SCAC MEETING AGENDA
Friday, February 17, 2023
In Person at TAB – Austin, TX

FRIDAY, FEBRUARY 17, 2023:

I. WELCOME FROM C. BABCOCK

II. 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 2nd, 2022 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. TEXAS RULE OF CIVIL PROCEDURE 7

1-14c Sub-Committee:
Hon. Harvey Brown – Chair
John Kim – Vice Chair
Connie Pfeiffer
Pamela Baron
Marcy Greer

1. February 15, 2023 Memo from Subcommittee

V. PERMISSIVE APPEALS

Appellate Sub-Committee:
Pamela Baron – Chair
Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Rich Phillips
Scott Stolley
Charles Watson

2. February 14, 2023 Memo from subcommittee

VI. TEXAS RULE OF APPELLATE PROCEDURE 52

Appellate Sub-Committee:
Pamela Baron – Chair
Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Rich Phillips
Scott Stolley
Charles Watson

3. February 2, 2023 Memo from subcommittee

VII. TEXAS RULES OF CIVIL PROCEDURE RULE 226A – REVIEW OF CRC PROPOSAL OF AMENDMENT TO RULE

216-299a Sub-Committee Members:

Prof. Elaine Carlson – Chair
Thomas Riney – Vice Chair
Alistair Dawson
Marcy Greer
Rusty Hardin
John Kim
Robert Meadows
Hon. David Peeples
Hon. Robert Schaffer
Kent Sullivan
Hon. Cathy Stryker
John Warren
Kennon Wooten

4. Feb. 6, 2023 email from SCOT
5. Feb. 12, 2023 email from Professor Carlson re rule 226a questions for consideration
6. Texas CRC Proposed Amendment to TRCP 226a

VIII. 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

7. February 13, 2023 Memo from subcommittee

Tab 1

Texas Supreme Court Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: Rules 1-14C Subcommittee

CC: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: February 15, 2023

Re: TRCP 7

Our committee was asked to draft amendments or a comment to Rule of Civil Procedure 7—which governs the appearance of counsel in a case—in light of SCAC 18-3 vote at its November 6, 2020 meeting that the rule should be amended to clarify that independent executors have the right to proceed pro se. This committee, which was then under the leadership of Bob Pemberton, provided the SCAC with its memo dated November 20, 2020 (Ex. B). It concluded, "the better view of Texas law is that executors have the right to proceed pro se, both in initiating the court proceedings necessary to effectuate their rights under a will and thereafter in performing that role."

Along with that memo, the subcommittee provided SCAC with , Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007) (Ex. C), a number of cases (Ex. D) and two Amicus briefs submitted to SCOTX in Cause No. 19-0803, *In re Maupin*, in which a pro se litigant attempted to challenge the written policy of the Travis County Probate Court No. 1 that requires independent executors to be represented by a lawyer (Ex. E and F).

Exhibit A contains our proposed revision to comply with SCOTX's request. It is straight-forward change in the rule that states that persons not appearing in a representative capacity may appear pro se. The comment states that an independent executor may appear pro se.

Should the comment also state that trustees may appear pro se?

The committee conferenced with Connie Pfeiffer's appellate colleague, Andrew Ingram, who recently taught law school classes on community property. He agreed with our proposed revisions to the rule but also recommended that the committee change the Rule regarding trustees. The discussion below contains his recommendation that the comment also make clear that trustees may appear pro se. The issue of trustees was not submitted to our committee, but we found his

analysis persuasive. Here is Andrew's analysis:

> The comment should be amended to list trustees along with independent executors as people who represent themselves when they appear in court. The fiduciary in *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), was a trustee, and the case is a key authority identified in the Report for treating independent executors as representing themselves in court.
>
> Going back to first principles, a trustee is someone who holds legal title to property for the benefit of someone else who holds the equitable title. When a trustee sues or is sued in relation to trust property, she is the named plaintiff because she holds the legal title.
>
> This is more like an independent executor than a guardian. An independent executor receives letters testamentary and thereafter has the power to stand in the shoes of the deceased and manage the property of the deceased. So, like a trustee, she is always appearing in her own right but in a special capacity through which she controls estate property as a fiduciary.
>
> On the other hand, guardians should be left as examples of people who do not represent themselves in court. When a guardian goes to court in her capacity as guardian, she is suing on behalf of the ward who is the real party in interest.

We note that the November 2020 Subcommittee report does not address this issue but does discuss *Huie v. DeShazo* (Ex. G) and states that an independent executor is "a type of trustee."

Should the comment also state that dependent administrators may appear pro se?

Andrew also noted that the draft comment does not address dependent administrators, but only independent executors. He believes there are "good arguments for and against treating dependent administrators the same as independent executors and allowing them to proceed pro se."

> There is a simple argument for parity: a personal representative/administrator in a dependent administration functions much like an independent executor. She is still someone with letters testamentary/letters of administration empowered to take possession of the property of the deceased. When she sues or has been sued and appears in court, she appears as herself, in her capacity as personal representative. Unlike an independent administrator though, she must seek the approval of the court that appointed her before carrying out most major decisions.
>
> On the other hand, there are two counterarguments for treating a dependent administration different from an independent one. The first is that a dependent administrator and the court must work together more closely, and this will be easier if the dependent administrator is represented by an attorney. The second is that a dependent administrator, like a guardian, is much more a creature of the court than an independent administrator.
>
> To understand how a guardian or dependent administrator is a "creature of the court," consider that trustees and independent administrators usually take their authority by private actions. A trust can be created without any judicial involvement. An independent executor takes her right to serve from the will, and the court, while it has the power to reject an independent executor, usually approves what the testator has done with deference. A dependent administration, on the contrary, usually happens when there is no will and an interested party needs to open an administration of the estate. In that case, the

> administrator is more like a guardian, someone appointed and trusted by the court in the first instance to help the court manage the deceased's property.
>
> Because a dependent administrator is a creature of the court, it makes more sense to let the court have a say in how the dependent administrator conducts business before the court. After all, if the court had known beforehand that a person it appointed to head a dependent administration was going to proceed pro se, it could have found her "unsuitable" and declined to appoint her. *See* Tex. Estates Code § 304.003(5).
>
> In the end, the question of how to treat dependent administrators is not a highly consequential one compared with the treatment of independent executors. Nearly every Texas will drafted by an attorney or authored using common consumer software specifies an independent executor. It is now even possible to obtain an independent administration by agreement of all the heirs when there is no will. Tex. Estates Code §§ 401.002–003. Dependent administrations usually occur where there is no will, heirs cannot be found or are contentious, and where one heir or creditor needs to force an administration. In that case, it's unlikely that the person seeking the dependent administration will not be represented by counsel and that the dependent administrator ultimately appointed will be pro se. Moreover, probate courts can use their power to disqualify those they find "unsuitable," *id.*, to steer selection to a collaborator in administering the estate who will use an attorney.

We recommend against including dependent administrators in the rule primarily because, as Andrew states, "the question of how to treat dependent administrators is not a highly consequential one compared with the treatment of independent executors" since Texas wills generally specify an independent executor.

Exhibit A

RULE 7. MAY APPEAR BY ATTORNEY

Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

RULE 7. MAY APPEAR BY ATTORNEY

Any party to a suit may appear and prosecute or defend his or her rights therein, either in person or by an attorney of the court. An individual who is acting in a representative capacity may not appear in court to prosecute or defend his or her rights, but an individual who is not appearing in a representative capacity may appear pro se.

Comment: An independent executor of an estate represents himself or herself and not others and may appear pro se. Guardians prosecuting or defending suits on behalf of their wards act in a representative capacity and may not appear pro se.

Alternative comment suggested by Andrew Ingram: A trustee or an independent executor of an estate represents himself or herself and not others and may appear pro se. Guardians prosecuting or defending suits on behalf of their wards act in a representative capacity and may not appear pro se.

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Exhibit B

1-14c Subcommittee of the Texas Supreme Court Rules Advisory Committee
Report Regarding Probate Court Policies Prohibiting Pro Se Executors
November 2, 2020

The Texas Supreme Court has requested that the Rules Advisory Committee study and make recommendations regarding the following issue:

> **Probate Court Policies Prohibiting Pro Se Executors.** Nearly all the statutory probate courts have policies prohibiting executors from proceeding pro se. The Court asks the Committee to consider whether an executor has a right to proceed pro se and whether these policies impermissibly restrict that right.

The Court provided a law review article that "may inform the Committee's work," Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007) ("Hatfield article"). The Chair has requested the 1-14c Subcommittee to report its views on the matter.

In response, the Subcommittee has reviewed the Hatfield article, pertinent caselaw,[1] and briefing filed in the Texas Supreme Court in Cause No. 19-0803, *In re Maupin*, in which a pro se litigant attempted to challenge the written policy of the Travis County Probate Court No. 1 that requires independent executors to be represented by a lawyer.[2] Although the Court ultimately denied the petition for review in that case, the briefing—and particularly the amicus briefs filed on behalf of the Texas Access to Justice Commission, on one hand, and the Texas College of Probate Judges and the State's Presiding Statutory Probate Judge[3] on the other[4]—provide helpful historical

[1] Principally, *Ex Parte Shaffer*, 649 S.W.2d 300 (Tex. 1983) (orig. proceeding); two court of appeals opinions that have been cited as authority for policies restricting independent executors from proceeding pro se, *Steele v. McDonald*, 202 S.W.3d 926 (Tex. App.—Waco, no pet.), and *In re Guetersloh*, 326 S.W.3d 737 (Tex. App.—Amarillo 2010, orig. proceeding); and the court of appeals opinion in *In re Maupin*, discussed below. The Subcommittee has provided copies of these cases with this report. The *Maupin* opinion is an attachment to the amicus brief filed by the Texas Access to Justice Commission.

[2] Travis Co. Probate Ct. No. 1, "Court Policy Regarding 'Pro Se' Applicants (Applicants Without a Lawyer"). The current version of this policy is provided with this report.

[3] Who also happened to be the presiding probate judge in the case.

[4] Copies of which are also provided with this report.

background regarding the question now presented, as well as illustrating (along with the Hatfield article) the issues of law and jurisprudential policy that may come to bear on the question.

To summarize our answer to the question posed, the Subcommittee is presently of the view that Texas law does permit an independent executor to proceed pro se, both in applying for court approval to act in that capacity and in subsequently so acting. This tentative conclusion follows from the legal principle that the executor is representing himself or herself, not others, and thus is not engaged in the unauthorized practice of law. However, as cautioned in the Hatfield article, the Subcommittee should add that there may be cases in which it would be extraordinarily unwise for an executor to act pro se, given the potential liability for breaching fiduciary duties. Such practical risks and disadvantages of proceeding pro se are, of course, present in any type of case where a person attempts to do so, and sometimes with stakes far higher than here. The Subcommittee has addressed only the question of a party's right to proceed pro se (the question posed by the Court) without regard to any policy concerns about the exercise of that right.

Background

At the outset, it may be helpful to begin with a brief, high-level summary of some pertinent features of Texas probate law and procedure that form the context of the question presented. Under Texas law, if a person dies leaving a lawful will, that person's "estate"—*i.e.*, his or her property[5]—vests immediately in the persons to whom it is devised under the will or otherwise to the person's heirs at law, subject to payment of and liability for the decedent's debts.[6] Since at least 1848, that Texas testator has also enjoyed the right to have the estate administered (basically paying off creditors and disposing of the property in accordance with the will) through "independent administration," in lieu of judicial supervision, including the right to pick his or her own

[5] *See* Tex. Estates Code § 22.012 ("'Estate' means a decedent's property, as that property: (1) exists originally and as the property changes in form by sale, reinvestment, or otherwise; (2) is augmented by any accretions and other additions to the property, including any property to be distributed to the decedent's representative by the trustee of a trust that terminates on the decedent's death, and substitutions for the property; and (3) is diminished by any decreases in or distributions from the property.").

[6] *See id.* §§ 101.001(a), .051.

independent executor to serve as the testator's personal representative in handling these matters.[7] To effectuate this appointment (and the named executor may decline to so serve), the will must be admitted to probate (basically a judicial declaration that it is a valid will) and the executor must obtain court authorization (letters testamentary), which are generally to be issued unless the named executor is statutorily "disqualified."[8] (The statutory grounds for disqualification include "a person whom the court finds unsuitable,"[9] potentially a broad and somewhat nebulous standard,[10] but the probate court policies in question do not appear to rest upon any determination that pro se litigants are categorically "unsuitable," within the meaning of the statute, to act as executors[11]).

Depending on the language of the will, the independent executor, once authorized, may have no further interaction with the court aside from filing an oath and an inventory, appraisement, and list of claims. Basically, the independent executor goes forth and settles the estate without further court supervision or involvement. However, in performing this role, the independent executor holds the estate in trust, owing fiduciary duties to beneficiaries that include taking the same care with estate property as a prudent person would with that person's own property.[12]

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[7] *See Kappus v. Kappus*, 284 S.W.3d 831, 834-35 (Tex. 2009); Tex. Estates Code § 22.017; *see generally id.* subch. I, governing independent administration.

[8] *See* Tex. Estates Code §§ 301.051, .151, .152, 304.001-.003, 306.001; *In re Maupin*, Cause No. 13-17-0555-CV (Tex. App.—Corpus Christi 2019, pet. denied), slip op. at 3.

[9] *Id.* § 304.003(5). The other statutory grounds for disqualification are that the person is incapacitated, a felon, a nonresident natural person or corporation who has not appointed a resident agent, or a corporation not authorized to act as a fiduciary in this state.

[10] *See Kappus*, 284 S.W.3d at 835 (noting the "expansive" nature of "unsuitability").

[11] The case law in this area seems to emphasize the existence of conflicts of interest or antagonism between the named executor versus the beneficiaries.

Additional statutory requirements come into play where a person seeks to act as an independent *administrator* of an estate, as opposed to an independent executor. *Compare* Tex. Estates Code § 301.152 *with id.* § 301.153. Although the terms are sometimes used interchangeably, an independent executor more precisely refers to a personal representative appointed under a will while an independent administrator is appointed in the absence of an independent executor named in the will who can and will serve. *See id.* § 301.051. Because the Court's question refers specifically to independent executors, the Subcommittee has not attempted to address any additional or distinct issues that might arise with independent administrators.

[12] *See* Tex. Estates Code §§ 101.003, .351.101; *see also Humane Soc'y of Austin & Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (when applying predecessor statute, observing that "the executor of an estate is held to the same fiduciary standards in his administration of the estate as a trustee . . . [and] is subject to the high fiduciary standards applicable to all trustees").

The arguments for prohibiting independent executors from proceeding pro se are founded on the view, articulated in *Steele* and *Guetersloh*, that an independent executor attempts to "represent" persons other than himself or herself se in seeking to probate wills and obtain letters testamentary.[13] It follows, in this view, that an executor engages in the unauthorized practice of law by proceeding pro se. In this regard, the Committee should also note some of the background law regulating the "practice of law" in this State.

The Texas Supreme Court has inherent power, derived in part from the Texas Constitution's separation-of-powers provision, to regulate judicial affairs and the administration of justice within the Judicial Department, including governing the practice of law.[14] This power is "assisted" by statute, principally the State Bar Act.[15] The Act defined the "practice of law" as:

> the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[16]

This definition, however, "is not exclusive and does not deprive the judicial branch of the power and authority under both [the Act] and the adjudicated cases to determine whether other services and acts may constitute the practice of law."[17]

Generally, only a member of the State Bar of Texas may "practice law" in this State, subject to exceptions both within and outside of the Act. One exception, which is also arguably implicit in the Act's "practicing law" definition, is that a person does not engage in the unauthorized practice of law by providing legal services for oneself. Texas Rule of Civil Procedure 7 makes this

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[13] *See* Probate Court Judges' amicus brief at 13-15; Travis Co. policy ("a pro se may not represent others. Under Texas law, only a licensed attorney may represent the interests of third-party individuals or entities, including . . . probate estates." (citing *Guetersloh* and *Steele*)).

[14] *See, e.g., In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 769-70 (Tex. 1999).

[15] *Id.* at 770.

[16] Tex. Gov't Code § 81.101(a).

[17] *Id.* § 81.101(b).

explicit in the context of proceedings before Texas justice, district, and county courts (and therefore in courts that exercise probate jurisdiction[18]): "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by attorney of the court."[19]

On the other hand, as the Probate Court Judges pointedly noted in their amicus brief, the Texas Supreme Court has previously approved some local rules of probate courts that require executors (with some exceptions) to be represented by counsel.[20] This Subcommittee is charged with assessing this issue, therefore, both under Rule 7 (right to appear on one's own behalf) and Rule 3a (adoption of local rules).

Analysis

Although the distinction seems to be overlooked frequently, the issue of whether an independent executor has the right to proceed pro se (or, conversely, engages in the "unauthorized practice of law") would more precisely concern two distinct sets of acts: (1) when a named executor brings the court proceedings required to effectuate his or her power to act in that capacity; and (2) when the executor acts in that capacity thereafter. As for the first stage, the Subcommittee agrees with the Hatfield article that the nominated executor would seem only to be prosecuting only his or her own rights under the will to obtain the status of executor.[21] It is the second phase—once the independent executor begins to act in that capacity (a role that can entail paying off creditors, selling property, dealing with taxing authorities, etc.) that would give rise to potentially closer questions as to whether the independent executor's actions in that capacity, at least some of which would arguably constitute the "practice of law," would be unauthorized because deemed to be performed for or on behalf of persons other than the executor.

[18] Tex. R. Civ. P. 2.

[19] *Id.* R. 7.

[20] Probate Court Judges' amicus brief at 16-17.

[21] Hatfield article at 126 ("The nominated executor prosecutes his or her *personal* rights when probating the will. To put an even finer point on it, when the nominated executor probates the will, he or she, by definition, has yet to assume the role of executor and thus has no duties or obligations to the beneficiaries. Thus, it is incoherent to claim the executor's right to probate the will is somehow derived from the beneficiaries' interests.").

In resolving this question, it seems clear that one cannot merely equate "the estate" to a distinct legal entity like a corporation, although this was a component of the divided *Steele* court's reasoning.[22] As the Hatfield article points out, it is established Texas law that the "estate" of a decedent is not itself a legal entity and cannot properly sue or be sued as such.[23] In fact, the amicus brief filed by the probate judges in *Maupin* conceded that the "narrow point—that estates are not separate juridical entities—is certainly correct."[24] They reasoned, rather, that (1) under Texas statutory and common law, an independent executor, acting in that capacity, is nonetheless a "juridical entity" distinct from that person individually; and (2) by virtue of the fiduciary relationship that exists in the independent-executor capacity, the person in that capacity is "representing" the persons to whom the fiduciary duties are owned, and not only "himself" or "herself," and thus cannot proceed pro se.[25]

While Texas law certainly recognizes a distinction between a person's individual capacity and his or her capacity as an independent executor, it is far less clear that a person acting the independent-executor capacity is thereby proscribed from proceeding in that capacity pro se. In *Ex parte Shaffer*,[26] the Texas Supreme Court held that an independent executor, acting in that capacity, had the right under Tex. R. Civ. P. 7 to proceed in court pro se in defending against claims that he breached his fiduciary duties in that capacity. The relator, "[w]hile serving as Independent Executor for the estate of Horace Yates," was sued in a Dallas County probate court by Mr. Yates's widow "for alleged breach of fiduciary duty in that capacity."[27] After multiple continuances and the withdrawal of Shaffer's attorney, Shaffer sought yet another continuance, prompting the trial court to order Shaffer to post a bond to indemnify the widow for the costs of

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[22] *See Steele*, 202 S.W.3d at 928 & n.2 (citing *Kunstoplast of. Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996) (per curiam), for the proposition that "Texas courts have consistently held that a non-attorney may not appear pro se in behalf of a corporation.").

[23] Hatfield article at 117-18 (citing, *e.g.*, *Henson v. Estate of Crow*, 734 S.W.2d 648 (Tex. 1987), and *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex. 1975)).

[24] Brief at 14.

[25] *Id.*; *see also* Travis Co. Probate Ct. No. 1 policy (providing that "the executor . . . must be represented by a lawyer" because "[a]s executor of a decedent's estate, you don't represent only yourself. An executor represents the interests of beneficiaries and creditors. This responsibility to act for the benefit of another is known as a fiduciary relationship. It gives rise to certain legal obligations and responsibilities that require legal expertise.").

[26] 649 S.W.2d 300 (Tex. 1983) (orig. proceeding).

[27] *Id.* at 301.

delaying trial, to retain an attorney to represent him in the suit, and to report on his status in procuring an attorney.[28] Subsequently, the trial court adjudged Shaffer in "direct" contempt for failing to comply with its order and ordered him jailed until he purged himself of the contempt by hiring an attorney and posting bond.[29] On Shaffer's application for habeas relief, the Court held that the underlying order was void and ordered Shaffer discharged.[30]

Regarding the requirement that Shaffer obtain an attorney, the Court could find "no authority" allowing a court "to require any party to retain an attorney," and to the contrary, it held that "ordering a party to be represented by an attorney abridges that person's right to be heard by himself" under Tex. R. Civ. P. 7.[31] "If Shaffer's lack of an attorney was being used to unnecessarily delay trial or was abusing the continuance privilege," the Court added, "the proper action would have been to order him to proceed to trial as set, with or without representation."[32]

Although there was no dispute before the Court as to whether Shaffer was engaging in the unauthorized practice of law by appearing pro se in his capacity as independent executor, the Court's analysis is inconsistent with that notion. Namely, the Court reasoned that Shaffer, even while appearing in his capacity as independent executor, was nonetheless representing "himself" for purposes of Rule 7, and therefore had the right to proceed pro se. And while it is true that Schaffer was defending against claims for allegedly breaching his fiduciary duties, the opinion does not suggest that Shaffer was representing "himself" only because of the nature of the claim. Rather, the Court makes clear that these claims were asserted against him in his capacity as independent executor.[33] In the very least, the reasoning of *Shaffer* is difficult to reconcile with the notion that an independent executor does not represent "himself" or "herself" when proceeding in that capacity pro se.

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 301-02.

[31] *Id.* at 302.

[32] *Id.*

[33] *Id.* at 301 ("While serving as Independent Executor for the estate of Horace Yates, Shaffer was sued . . . for alleged breach of fiduciary duty in that capacity").

Also instructive is *Huie v. DeShazo*,[34] in which the Texas Supreme Court held that an attorney hired by a trustee represents the trustee rather than the trust's beneficiaries under Texas law. As the Hatfield article suggests, *Huie* tends to refute the notion that an independent executor (a type of trustee), by virtue of the fiduciary duties owing to the beneficiaries, is deemed to be "representing" the beneficiaries' interests, as opposed to the executor/trustee's own unique rights and interests in administering the estate.[35]

These Texas Supreme Court decisions would, of course, control over any contrary holdings of lower courts. The Subcommittee would also note that Texas law does not hold generally that a person who owes some sort of fiduciary duty to another cannot, for that reason alone, proceed pro se. Were that the rule, any married person would arguably be unable to proceed pro se, at least to the extent the marital estate might be affected, as the marital relationship between spouses is a fiduciary relationship.[36]

In light of these considerations, the Subcommittee concludes that the better view of Texas law is that executors have the right to proceed pro se, both in initiating the court proceedings necessary to effectuate their rights under a will and thereafter in performing that role. That being said, the Subcommittee hastens to acknowledge that its members consist of three generalist appellate lawyers or judges and a county clerk, all of whom disclaim expertise in Texas probate practice. Because our analysis may have overlooked some nuance or wrinkle of that sometimes-complicated area of the law, the Committee or the Court may desire input from other persons having deeper subject-matter expertise and/or broader range of perspective, including those involved in preparing the materials appended to this report or others with genuine expertise. (The same would be true if the Court desires a broader discussion encompassing the policy and practical implications of executors exercising their right to proceed pro se, and/or possible responsive measures[37]). On the other hand, the Subcommittee has at least offered the best efforts of four

[34] 922 S.W.2d 920, 925 (Tex. 1996).

[35] Hatfield article at 131-34.

[36] *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). The Subcommittee should acknowledge that it borrowed this observation from Mr. Maupin's pro se reply in support of his petition for review (at 9-10).

[37] The Hatfield article suggests several such topics at 136-45.

objective observers with “fresh eyes” and no particular “history” or agendas regarding the legal question posed or how it is answered. We hope that these efforts are of benefit to the Committee and to the Court.

Respectfully submitted,

Bob Pemberton
Chair, 1-14c Subcommittee

Exhibit C

PRO SE EXECUTORS—UNAUTHORIZED PRACTICE OF LAW, OR NOT?

MICHAEL HATFIELD*

I. STATUTORY PROBATE COURTS, EXECUTORS AND ESTATE ADMINISTRATION IN TEXAS

There is a well known and continuing split among Texas' seventeen statutory probate courts.[1] The split is as to the rights of the person named executor to probate a will or otherwise appear in court without hiring a lawyer. Eight of the courts permit it, while nine insist an executor doing so would be engaging in the unauthorized practice of law and, thus, cannot be permitted.[2] Depending upon how the split is resolved, either nine of the statutory probate court judges are denying executors' their *pro se* appearance rights otherwise guaranteed under Texas law or eight of the judges are assisting the unauthorized practice of law.[3] A recent Waco Court of Appeals decision denying *pro se* rights to an executor is likely to widen

* Associate Professor of Law, Texas Tech University School of Law; Of Counsel, Schoenbaum, Curphy & Scanlan, P.C., San Antonio, Texas; Board Certified Estate Planning and Probate, Texas Board of Legal Specialization. I deeply appreciate the comments and guidance of my colleague Gerry W. Beyer, the Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law. All errors and omissions are mine.

[1] See *infra* p. 8.

[2] *See, e.g.*, Travis County Court Policy Regarding Pro Se Applicants available at http://www.co.travis.tx.us/probate/pdfs/pro_se.pdf. (last visited September 19, 2006). The eight courts permitting executors to appear *pro se* are Bexar County Probate Court Number 1; Bexar County Probate Court Number 2; Dallas County Probate Court Number 3; El Paso County Probate Court; Galveston Country Probate Court; Harris County Probate Court Number 1; Harris County Probate Court Number 4; and Tarrant County Probate Court Number 1. Dallas County Probate Court Number 1, Harris County Probate Court Number 3 and Hidalgo County Probate Court each allows the executor to appear pro se so long as the executor is the sole beneficiary. A special thanks to Nicholas Davis of Texas Tech University School of Law for discussing these court policies with the court clerks. His report (including the contact information of the individuals he spoke with) is in my files.

[3] The issue of pro se appearances is analyzed in detail *infra* pp. 16-32. As to assisting in the unauthorized practice of law, *see* TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. 10, §9)

the split.[4]

In practical terms, the court split also means that whether or not an executor is required by a court to hire a lawyer depends on a matter of geography. To exacerbate the role of chance, it is not simply a matter of geography but a matter of docket ordering for some executors because some of the probate judges in counties with more than one probate court have conflicting policies. Thus, for example, an executor appearing to probate a will in Harris County may or may not be forced to hire a lawyer depending upon which one of the four Harris County probate court's docket his or her case lands when the court clerk accepts the filing. One Houstonian in a clerk's office is told he or she has different legal rights than the Houstonian ahead or behind him or her in a bureaucratic queue.

This Article clarifies why under Texas law an individual named as executor in a will has the right to offer the will for probate and otherwise appear in a probate court without hiring a lawyer.[5] This Article first provides an overview of the independent administration provisions of the Texas probate code before reviewing the unauthorized practice of law prohibition and the *pro se* exception. After establishing that Texas executors qualify for the *pro se* exception in Texas because executors appearing in court are exercising their own management rights (rather than the rights of "the estate" or the beneficiaries), the Article explores suggestions of court reform to be considered in light of these *pro se* rights. The Article concludes with the suggestion that it is probably unwise for most executors to proceed *pro se* regardless of their right to do so.

A. Historical Model of Ease

The term "probate"[6] should not have the same connotations to Texans[7]

[4] Steele v. McDonald, 202 S.W.3d 926 (Tex.App. – Waco 2006).

[5] As it is the most common form of estate administration, the paradigm considered in the Article will be an independent administration in which there is no will contest or other litigation. Throughout this Article, the presumption is that there is no contest between which of more than one alleged wills is the valid one. All references to probate and estate administration are to those not involving legal contests or disputes of any kind. The term "probate court" is intended to mean those courts with original probate jurisdiction whichever court that may be in a particular county. *See infra* p. 8.

[6] The term "probate" refers to both the court procedure by which a will is proved to be valid or invalid (the technical meaning) and to the legal process wherein the estate of a testator is administered (the popular meaning). *See* BLACK'S LAW DICTIONARY 1202 (6th ed. 1990). Generally, in this Article, the latter meaning will be intended except when reference is specifically

as it does to those living or owning real property in many other states. Texas has provided a "plain" and "layman"-friendly probate system since the 19th century.[8] While the expenses and complications of probate systems elsewhere sustain substantial probate avoidance planning, Texans have never had the same generalized need to avoid probate.[9] Indeed, because the Texas probate system is "much different and typically much simpler" than other systems, the State Bar of Texas considers it unethical for Texas lawyers to make undue comparisons between the Texan system and others.[10] It is also unethical for Texas attorneys to claim that the Texas probate system is inherently lengthy, expensive, complicated, or always to be avoided.[11] Texas has long had the type of probate system other states are now moving towards.[12]

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made to probating the will.

[7] The term "Texan" is used to refer to individuals residing in Texas or owning real property located in Texas. *See* TEX. PROB. CODE ANN. §6 (Vernon 2003); 17 M.K. WOODWARD ET. AL., TEXAS PRACTICE, PROBATE & DECEDENTS' ESTATES §§44-45 (2006.); 2 JUDGE NIKKI DESHAZO ET. AL., TEXAS PRACTICE GUIDE PROBATE §14:36 (2006).

[8] *See* W.S. SIMKINS, THE ADMINISTRATION OF ESTATES IN TEXAS 9 (1934). ("[T]he Legislature, August 9, 1876, framed a complete system of procedure and laws for the administration of estates in Texas. It will be seen. . . that the law of 1876 is only a reproduction of the law of 1848. . . This Act of 1876 was intended by the Legislature *to be a plain and definitive system of rules* to govern executors and administrators, *and to make it possible for the layman to perform his duties without appealing for instruction from the court in the various steps to be taken*" (emphasis added).) Minter v. Burnet, 90 Tex. 245, 251, 38 S.W. 350 (1896) ("We think that the legislature intended, by the enactment of the law of 1876, to make plain and definite rules to govern administrators and executors in the discharge of their duties, because it is not infrequently the case that they must perform those duties without having the instruction of the court with reference thereto.")

[9] Of course, specific Texas clients may be well advised to avoid probate in certain situations but in other states avoiding probate is a near-universal estate planning objective. *See, e.g.*, Thomas M. Featherston, Jr. *Wills and Living Trusts – What's Best for the Client?,* p. 3 *in* WILLS TRUSTS AND ESTATE PLANNING 2000 (Texas Bar CLE 2000); Bernard E. Jones, *Revocable Trusts*, p. 28 *in* BUILDING BLOCKS OF WILLS, TRUSTS AND ESTATE PLANNING 2002 (Texas Bar CLE 2002).

[10] State Bar of Texas Advertising Review Committee *Interpretive Comment No. 22: Advertisement of Living Trusts* available at http://www.texasbar.com/Template.cfm?Section=Advertising_Review&template=/ContentManagement/ContentDisplay.cfm&ContentID=8559#ALT (last visited September 18, 2006).

[11] *Id.*

[12] For example, Texas has chosen to keep its own, comprehensive probate code rather than adopt the Uniform Probate Code being considered and adopted in other states because the improvements made in probate law by the Uniform Probate Code have long been part of Texas law, such as the streamlined, independent administrations of decedents' estate. C. Boone

B. Probating Wills in Texas

Probating a will in Texas requires only three separate documents, typically consisting of no more than four total pages. The will and a written application for its probate are delivered to the court clerk who posts public notice.[13] A court hearing is usually scheduled for the first Monday following ten days after the notice is posted.[14] The court hearing rarely takes more than five minutes and consists of no more than a recitation of the facts necessary to support the application (*e.g.*, that the decedent was domiciled in the county).[15] A simple order is presented for the judge's signature, and, when signed, the will is admitted to probate.[16] The efficiency of the Texas system routinely results in dozens of wills to be admitted to probate at each uncontested docket session.[17]

It is with the court's admission of a will to probate that the testator's directions become legally operative.[18] Ensuring a document to be a valid will is the responsibility of the probate courts.[19] With the court's order that a will is admitted to probate, the testator's intentions for his or her property are effected. These intentions may include deviating from the intestacy scheme, providing certain tax benefits for the beneficiaries, or providing certain specific benefits for minor or disabled beneficiaries or others needing management assistance or creditor protection.

Because the effects of a will are so important, whoever possesses the will when the testator dies is required to deliver the document to the probate court clerk.[20] The person in possession is not required to begin the process of probating the will, only to make it available for anyone qualified to probate it.[21] In order to be qualified to probate a will, a person must be

Schwartzel, *Is the Prudent Investor Rule Good for Texas?* 54 BAYLOR L. REV 71 n.472 (2002).

[13] TEX. PROB. CODE ANN. §§81(a), 128(a) (Vernon 2003); *see*, *generally*, 17 WOODWARD, *supra* note 7, §282.

[14] This is the earliest time at which a hearing can be scheduled. §§ 128(c), 33(ff), (g).

[15] § 88.

[16] § 89.

[17] This is based upon my personal experience of the well established routines of the Bexar County Probate Courts as well as my interviews with other attorneys who are Board Certified in Estate Planning and Probate.

[18] § 94; *more generally, see* WILLIAM J. BOWEN AND DOUGLAS H. PARKER PAGE ON WILLS § 26.8 (2004).

[19] §§ 84, 88.

[20] § 75.

[21] There is no requirement that a will ever be probated. *See, e.g.*, Stringfellow v. Early, 15

named as the executor in the will or have a beneficial interest in it (that is, be a beneficiary or a creditor of the estate).[22]

C. Administration Independent of Court Oversight

The vast majority of estates in Texas—over 80%—are administered under the independent administration provisions of the probate code.[23] These provisions are "one of the most significant developments in American probate law" because of their simplicity.[24] Independent administration means that the independent executor rather than the probate court judge bears sole responsibility for the administration.[25] The expectation of independent estate administration is so well-established as the norm in Texas, that suggestions of court-dependent administration are limited to problematic estates.[26]

The only court proceeding required under independent administration is

Tex. Civ. App. 597, 40 S.W. 871 (Tex. Civ. App. 1897, writ dism'd).

[22] § 3(rr), § 76.

[23] Young Lawyers Association Needs of Senior Citizens Committee, *Living Trust Scams*, 62 Tex. B.J. 745 (1999); Sara Patel Pacheco, *et al*. *The Texas Probate Process from Start to Finish*, p. 12 *in* 5TH ANNUAL BUILDING BLOCKS OF WILLS, ESTATES AND PROBATE 12 (Texas Bar CLE 2004). Estates may be administered independently of court involvement beyond the probate hearing in two situations. The most common situation is that the will requires independent administration. § 145(b). Otherwise, in the case of wills that do not require it or in the case of intestate estates, the sole condition for independent administration is consent of the beneficiaries or, as in the case of an intestate estate, the heirs. § 145(c) – (e).

[24] 17 WOODWARD, *supra* note 7, § 491. However, independent administration is not the only simple means of estate administration in Texas, even if it is the most common. The Texas probate code provides several alternatives for simple estate administration. Wills can be admitted as muniments of title rather than being offered for probate with title being passed to beneficiaries without the need for any estate administration. § 89A. Surviving spouses can administer community property without any court proceedings at all. §§ 156, 160, 177. And the use of affidavits in connection with certain estates and contractual settlement agreements for any estate can be substituted for court involvement in estate administration. §§52, 137; *see, e.g*., *Stringfellow*, 40 S.W. 871, Estate of Morris, 677 S.W.2d 748 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.). Thus, in Texas, the general expectation is that the probate system is one of flexibility, simplicity, and efficiency.

[25] §§36, 145 (h), (q); 17 WOODWARD, *supra* note 7, § 75; *Id.* § 497; 1 DESHAZO, *supra* note 7, § 1:24.

[26] For example, dependent administration might be favored when the estate is insolvent or where disputes between the executor and beneficiaries are expected. *For discussion see,e.g.,* Pacheco, *supra* note 23, at 18.

the hearing to probate the will.[27] Thereafter, the independent executor ("the executor") must submit three additional documents usually consisting of no more than five pages total: a single-paragraph oath,[28]a short affidavit regarding notice to creditors,[29] and an inventory of the estate's assets.[30] These documents are submitted to the court clerk. No additional contact between the executor and the court is required. For example, there is no requirement that the judge oversee the executor or review the fees or that the executor close the administration.

D. Attorneys' Involvement in Independent Administration

Executors offering a will for probate are entitled to hire a lawyer at the estate's expense.[31] While estate administration may become complex in terms of dealing with third parties (*e.g.*, those with custody of estate assets) or in terms of dealing with tax or asset management issues (*e.g.*, locating and valuing assets or managing active businesses), there is little complexity in the probate court work required by an independent administration. In a law firm, the requisite documents can be prepared by a legal assistant and then reviewed by the attorney who may expect to offer multiple wills for probate in one docket session. While lawyers in other states often charge high fees for probate court, Texas lawyers' fees are far more likely to be charged for the practical, non-court work involved in an estate administration rather than probate court appearances.[32]

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[27] §145(h); 17 WOODWARD, *supra* note 7, § 75; *Id.* §497; 1 DESHAZO, *supra* note 7, § 1:24.

[28] § 190; 18 M.K. WOODWARD ET AL., TEXAS PRACTICE, PROBATE & DECEDENTS' ESTATES §642 (2006); 1 DESHAZO, *supra* note 25, § 7:7.

[29] § 294; 17 WOODWARD, *supra* note 7, §500; 1 DESHAZO, *supra* note 25, § 1:30.

[30] §§45(h), 250, 251. Of the three court filings required, the inventory is the most legally complex. It requires not only valuation but a characterization of marital property as either separate or community. This characterization can be complex whenever a decedent was married and (a) either or both spouses at any time lived outside of Texas while married and acquired significant property during such time; (b) either or both spouses inherited or were given significant property; (c) either or both spouses owned significant property prior to marriage; or (d) there was a pre-marital or post-marital property agreement between the spouses. 18 WOODWARD,*supra* note 28, §791; *Id.* § 800; 1 DESHAZO, *supra* note 7, § 1:29; 2 DESHAZO, *supra* note 7, § 9:30.

[31] § 242; 18 WOODWARD, *supra* note 28, §729; 2 DESHAZO, *supra* note 7, § 10:21.

[32] While total lawyers fees for an estate administration may vary from about $1,200 to about $10,000 in Texas (depending upon the nature of the estate and the issues it raises), even in the state's largest city total legal fees *and court costs* for the probate hearing (independently of other estate administration legal fees) should not be expected to exceed $800. *See* David P. Hassler *et*

E. Probate Courts

A will may be offered for probate in the county in which the decedent resided, if any, otherwise in the county in which the decedent's property is located.[33] In counties without a statutory probate court, wills are offered for probate in the constitutional county court (or, in certain instances, the statutory county court).[34] However, in a county with a statutory probate court, the statutory probate court is the only court with probate jurisdiction.[35]

With original and exclusive jurisdiction over probate matters, the statutory probate courts of Texas are located in ten of the states most populated counties: Bexar (two courts), Collin, Dallas (three courts), Denton, El Paso, Galveston, Harris (four courts), Hidalgo, Tarrant (two courts), and Travis.[36] The exclusive nature of the jurisdiction means that in probate-related cases, parties do not have recourse to a district court.[37] About half of Texans live in the high population counties with specialized statutory probate courts.[38] As mentioned above, eight of the specialized courts currently permit executors to appear without a lawyer, while nine require it.[39]

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al., *Getting Down to Bidness: A Survey on Economics, Practice Management and Life Quality Issues for Texas Estate Planning and Probate Attorneys At The Turn of the Century* p. 16 *in* ESTATE PLANNING AND PROBATE 2000 (Texas Bar CLE 2000) and Jones, *supra* note 9, at 29.

[33] For a more complete overview of venue, *see, e.g*., § 6; 17 WOODWARD, *supra* note 7, §§ 44-45; 2 DESHAZO, *supra* note 7, § 14:36.

[34] §4; §5; s*ee* TEX. GOV'T CODE ANN. §25.0003(d) (Vernon 2003); 17 WOODWARD, *supra* note 7, § 1.

[35] TEX. GOV'T CODE ANN. §25.0003(e) (emphasis added).

[36] The Statutory Probate Courts contact and other information is available at http://www.courts.state.tx.us/trial/probate.asp (last visited June 26, 2006).

[37] For a review of the history of the statutory probate courts from the 1970s onward, *see* Joseph R. Marrs, *Playing the Probate Card: A Plaintiff's Guide to Transfer to Statutory Probate Courts*, 36 ST. MARY'S L.J. 99 (2004).

[38] The population of Texas is estimated to be about 23,000,000 with about 11,700,000 Texans living in the following counties each of which having one or more specialized statutory probate court: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Tarrant, and Travis. The population estimates may be found on the U.S. Census Bureau web site available at http://quickfacts.census.gov/qfd/states/48000.html (last visited April 28, 2006) while the current list of statutory probate courts (with their contact information) may be found on the Texas Judiciary Online web site available at http://www.courts.state.tx.us/trial/probate.asp (last visited June 26, 2006).

[39] *Supra* note 3.

On October 18, 2006 the Waco Appeals Court spread the confusion beyond the most populous counties by denying an executor the right to proceed *pro se* in a hearing unrelated to the probate of a will.[40] A vigorous dissent by the Chief Justice argued that the majority had adequately considered neither the law nor the consequences.[41] The Chief Justice lamented the ending of the independent administration system in Texas heralded by such pro se denials,[42] which is a concern echoed elsewhere — and now in this Article.

II. AN OVERVIEW OF THE UNAUTHORIZED PRACTICE OF LAW PROHIBITION

Though providing legal services for oneself has never been considered "unauthorized," no one is entitled to engage in the unauthorized practice of law.[43] This prohibition is the general norm in the United States (though not necessarily elsewhere),[44] and it prevents non-lawyers from representing others in court or advising others as to the law. Though well established in general terms, there are many exceptions to the rule, and the organized bar's interest in enforcing it has waxed and waned over the past century.

A. The 20th Century Ebb and Flow

The organized bar's campaign against the unauthorized practice of law[45] was born, matured, and all but retired into an un-enforced letter during the course of the 20th century.[46] The historical concern was so low that when

[40] Steele v. McDonald, 202 S.W.3d 926 (Tex.App. – Waco 2006).

[41] Steele, 930-931.

[42] Id.

[43] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §4, especially Comment C (2000) [hereinafter RESTATEMENT]

[44] Perhaps also surprising to Americans would be knowing that the prohibition against "the unauthorized practice of law" is unknown in most of the world, including Europe. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, LAWYER'S. DESKBOOK PROFESSIONAL RESPONSIBILITY §5.5-3 (2005-6 ed.).

[45] *Id.*

[46] From the American Revolution through the Civil War, there was no substantial effort by the bar to stop "unauthorized" practice. Deborah L. Rhode, *Policing The Professional Monopoly: A Constitutional And Empirical Analysis Of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 7-10 (1981); Derek A. Denckla, *Nonlawyers And The Unauthorized Practice of Law: An Overview of Legal and Ethical Parameters*, 67 FORDHAM L. REV 2581, 2583-2586 (1999); *see also* STANDING COMMITTEE ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION,

the American Bar Association adopted its first Canons of Ethics in 1908, the issue was not even addressed.[47] The campaign against unauthorized practice began in 1914 as an effort to curtail competition with lawyers from banks and title companies.[48] This campaign gained momentum during the Great Depression when the American Bar Association organized its first unauthorized practice committees, which eventually were successful at divvying-up legally-significant work through negotiations with the banks and title companies, as well as the insurance companies, realtors, accountants, and other competing industries and professions.[49] By the 1960s, federal anti-trust issues raised by these negotiated professional boundaries began to weaken the bar's campaign.[50] By the end of the 20th century, the campaign had weakened to the point that the American Bar Association and many states disbanded their committees on unauthorized practice; legal reformers began calling into question whether or not the rule actually provided any public benefit (or only provided an economic benefit to lawyers); and even members of the bar began calling for the minimization rather than the defense of the professional walls encircling the law.[51]

AMERICAN BAR ASSOCIATION 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE p. xii – xv (1996) (hereinafter [ABA Survey]). After the Civil War, bar associations did begin lobbying for passage of legislation that prohibited non-lawyers from making court appearances. Denckla, *supra*, at 2582-2583. Roscoe Pound's theory of the evolution of legal systems begins with the first step of a desire to administer justice without lawyers which manifests itself in a hostility to a formal bar. The appropriate role of lawyers in the American justice systems has been the subject of debate since the beginning, even though it is hard for contemporary lawyers to imagine how that could even be possible. Pound's orientation to the lawyers and the administration of justice sets the tone for the ABA Survey. *Id.* at xi.

[47] Denckla, *supra* note 43, at 2583.

[48] *Id.* at 2582-2584.

[49] Rhode, *supra* note 43; Denckla, *supra* note 43, at 2584-2585. Initially articulated by the bar in terms of economic self-interest, the public justification for the prohibition was eventually changed to protecting the public (though the public itself has not given much support to the bar's efforts and the empirical research indicates the public has suffered little, if any, as a result of non-lawyers practicing law). Rhode, *supra* note 43, at 3; RESTATEMENT, *supra* note 40, Note on Comment A, Comment b, and Comment C.

[50] Denckla, *supra* note 43, at 2584; ABA Survey, *supra* note 43, at p. xv-xvi.

[51] Denckla, *supra* note 43, at 2585. *See, e.g.,* Michael W. Price, *A New Millennium's Resolution: The ABA Continues Its Regrettable Ban On Multidisciplinary Practice*, 37 HOUS. L. REV. 1495 (2000); Stuart S. Prince, *The Bar Strikes Back; The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245 (2000); Bradley G. Johnson, *Ready or Not, Here They Come: Why The ABA Should Amend The Model Rules To Accommodate Multidisciplinary Practices*, 57 WASH. & LEE. L. REV. 951 (2000).

Coinciding with the national Great Depression-era campaign, Texas enacted its first statute against the unauthorized practice of law in 1933.[52] The statute was drafted by the first unauthorized practice of law committee to be appointed by the Texas Bar Association (the predecessor of the State Bar of Texas).[53] As did the national campaign, the Texas campaign began to falter in the latter part of the 20th century, which ended with the failure of a high profile unauthorized practice prosecution against a national accounting firm —- and many Texas lawyers advocating a fundamental re-thinking of the sharp divide between the practice of law and other professions.[54]

B. Defining the Unauthorized Practice of Law

An enduring problem in enforcing the unauthorized practice prohibition has been defining the practice of law.[55] Within a given a state, definitions and standards may be found in statutes, case law, and the disciplinary rules of the bar.[56] These are often not uniform within the state and are not consistent between the states.[57] As the problems of vagueness and

[52] *See In Re* Nolo Press/Folk Law, 991 S.W.2d 768, 769-70 (Tex. 1999); Rodney Gilstrap and Leland C. de la Garza, *UPL: Unlicensed, Unwanted and Unwelcome*, 68 TEX. B.J. 798 (October 2004).

[53] *See In Re* Nolo Press, 991 S.W.2d at 769-70; Gilstrap and Garza, *supra* note 49. In 1939, the State Bar of Texas created the Unauthorized Practice of Law Committee. The Texas Supreme Court initially adopted rules that authorized the UPLC to assist local grievance committees to investigate UPL but did not authorize the UPLC to prosecute lawsuits. The UPLC's role was largely advisory. The investigation and prosecution of UPL was left to the local grievance committees. In 1952, the Texas Supreme Court adopted rules establishing the UPLC as a permanent entity and giving the UPLC investigative and prosecutorial powers, as well as the duty to inform the State Bar and others about UPL. From 1952 to 1979, the UPLC's members were appointed by the State Bar. In 1979, the UPL statute was amended to require that members of the UPLC be appointed by the Supreme Court. *See In Re* Nolo Press, 991 S.W.2d at 769-70; Gilstrap and Garza, *supra* note 49.

[54] Jack Baker et al., *Professionals Clash on What Is The Practice of Law*, PRAC. TAX STRATEGIES (May 1999).

[55] ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-1.2.

[56] For example, for Texas law *see* TEX. PEN. CODE ANN. §38.122 – 38.123 (Vernon 2003); TEX. GOV'T CODE ANN., § 81.103, 81.104. (Vernon 2005); Crain v. UPLC, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); Davies v. Unauthorized Practice Committee, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ)*; see* Gilstrap and Garza, *supra* note 49.

[57] ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-1.2; Denckla, *supra* note 43.

circularity in definition appear insurmountable, the contemporary trend is to avoid any attempts at a precise or exhaustive definition, preferring instead an *ad hoc* approach somewhat similar to Justice Stewart's "I know it when I see it" approach to defining pornography. [58]

Some of the difficulties in defining unauthorized practice involve Constitutional concerns, but others involve accepting the practical needs of public access to law-related services.[59] Across jurisdictions, a variety of activities that seem likely to be the practice of law by conceptual standards are exempted from the definition of unauthorized practice, including allowing non-lawyers to prepare documents related to real estate transfers,[60] the sale of legal forms,[61] and even assistance in preparing forms.[62] More substantial practical deviations are to be found in exceptions for allowing non-lawyers to represent others in legal proceedings: many states permit non-lawyers to represent others in administrative proceedings (*e.g.*, workers' compensation proceedings), and some states permit non-lawyers to appear in court on behalf of others in specific situations – such as small claims courts, law clinic representations, and domestic violence situations.[63]

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[58] *See, e.g.*, Linda Galler, "*Practice of Law" in the New Millennium: New Roles, New Rules But No Definitions*, 72 TEMP. L. REV. 1001 (1999); REST Reporters Note C; see, e.g., Miller v. Vance, 463 N.E.2d 250, 251 (Ind. 1984); *In re* Campaign for Ratepayers' Rights, 634 A.2d 1345, 1351 (N.H. 1993); *In re* Unauthorized Practice of Law Rules, 422 S.E.2d 123, 124 (S.C. 1992).

[59] For a critical assessment in terms of Constitutional and public policy concerns, *see, e.g.*, Rhode, *supra* note 43.

[60] Denckla, *supra* note 43, at 2590; RESTATEMENT, *supra* note 40; Compare, *e.g.*, Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981) (real-estate brokers may complete standardized forms for simple real-estate transactions); *Miller*, 463 N.E.2d 250 (both banks and real-estate agencies may fill in blanks on approved mortgage forms, so long as no individual advice given or charge made for that service); *In re* First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992) (escrow closing companies, real-estate brokers, lenders, and title insurers may use standard forms for standardized real-estate transactions, so long as no advice given or separate fee charged for that service); *In re* Opinion No. 26 of the Comm. on Unauthorized Practice, 654 A.2d 1344 (N.J. 1995) (despite fact that many aspects of residential real-estate transaction involves practice of law, real-estate brokers and title-company officers may control and handle all aspects of such transactions, after fully informing parties of risks of proceeding without lawyers), with, *e.g.*, Arizona St. Bar Ass'n v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz.1961) (real-estate agents may not fill out standardized forms in land-sale transactions); Kentucky St. Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky. 1972) (bank officer's act of filling out mortgage forms constitutes unauthorized practice).

[61] Denckla, *supra* note 43, at 2591.

[62] *Id.*

[63] ABA Survey, *supra* note 43, at 34-43, see especially the study of California, Delaware, the District of Columbia, Iowa, Maryland, Massachusetts, New Hampshire, New York, Oregon,

The federal rules even permit non-lawyers to represent others in the United States Tax Court, which travels across the country holding trials in states with local laws that prohibit non-lawyer representation in court.[64]

C. The Texas Approach to the Unauthorized Practice Prohibition[65]

The Texas Supreme Court has the ultimate authority to regulate the practice of law in Texas, including the definition of the unauthorized practice of law.[66] However, the Texas legislature has enacted both criminal and civil statutes prohibiting the unauthorized practice of law. The criminal statute very narrowly addresses only the issue of individuals falsely holding themselves out as lawyers.[67] The civil statute is Chapter 81 of the State Bar Act and is intended to be the primary deterrent. It authorizes the Supreme Court to appoint a committee charged with eliminating the unauthorized practice of law,[68] which it defines as

> the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved

Pennsylvania, Virginia, and Washington.

[64] Attorneys, accountants, actuaries, and other agents are permitted to represent others before the Internal Revenue Service, though actuaries and other agents are subject to specific limitations on their practice. 5 U.S.C. §500 (2006); 31 C.F.R. § 1.03(a), (b), (d) (2005); *Id.* §10.4. Non-lawyers are also allowed to practice before the U.S. Tax Court as a result of Internal Revenue Code of 1986, as amended, §7452. The provision states that no person is to be denied admission to practice before the Tax Court because of failure to be a member of a particular profession (i.e., an attorney). The provision gives the Tax Court the right to make the rules regarding practice before the court. Tax Court Rule §200(a)(3) allows nonattorneys to practice before the court by passing a written examination. Baker, *supra* note 51. The federal law permitting the non-lawyer practice pre-empts the state law prohibiting it. *See* Sperry v. Florida, 373 U.S. 379 (1963).

[65] A good overview of these laws can be found in the October 2004 Texas Bar Journal article authored by the chair of the Texas Unauthorized Practice of Law Committee. *See* Gilstrap and Garza, *supra* note 49.

[66] TEX. CONST. art. II, § 1; *see In Re* Nolo Press/Folk Law, 991 S.W.2d 768, 769-70 (Tex. 1999).

[67] TEX. PEN. CODE ANN. §§38.122 – 38.123 (Vernon 2003).

[68] TEX. GOV'T CODE ANN., §§ 81.103. 81.104 (Vernon 2005).

must be carefully determined.[69]

Even though the statute defines the practice of law, it acknowledges that the issue is ultimately one for the Texas Supreme Court rather then the legislature.[70] In its rules for admission to the bar, the Texas Supreme Court has defined the practice of law as "drafting and interpreting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, departments of government or administrative agencies." [71] In case law, Texas courts have defined the practice of law to include "all advice to clients, express or implied, and all action taken for them in matters connected with the law."[72]

However, non-lawyers in Texas are now legally entitled to represent others in a variety of situations: the U.S. Tax Court; certain specialized Texas courts;[73] and before specific Texas and federal agencies. [74] Non-lawyers enrolled in law school have a limited license to practice law.[75] As for providing legal advice and document preparation, in certain situations non-lawyers are authorized to provide services to transfer mineral or mining interests in real property[76] and other real property interests, [77]as well as provide advice and document preparation assistance for medical powers of attorney and the designation of guardians (two legally powerful documents, it should be noted).[78]

D. Pro Se Representation and the Unauthorized Practice of Law

The prohibition against the unauthorized practice of law only prohibits

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[69] *Id.* § 81.101.

[70] *Id.* § 81.101(b).

[71] TEX. R. GOVERN. BAR ADM'N XIII(c)(1).

[72] Crain v. UPLC, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); Davies v. Unauthorized Practice Committee, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.): Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ).

[73] *See* TEX. GOV'T CODE ANN. § 28.003(d); Op. Tex. Att'y Gen. Nos. C-82 (1963), C-283 (1964) and II-538 (1975) (small claims court cases); TEX. R. CIV. P. 747a; TEX. PROP. CODE ANN, § 24.011 (Vernon 2000); Op. Tex. Att'y Gen. No. JM-451 (1988) (FED cases).

[74] *See, e.g.*, TEX. LAB. CODE ANN. § 401.011(37) (Vernon 2006) (Workers' Compensation Comm.); 28 TEX. ADMIN. CODE § 1.8 (West 2006) (Tex. Dep't of Ins.).

[75] TEX. GOV'T CODE ANN. § 81.102; TEX. R. GOVERN. BAR ADM'N XIX.

[76] TEX GOV'T CODE ANN. §83.001.

[77] *Id*.

[78] *Id.* §81.101.

the *unauthorized* practice of law by non-lawyers.[79] So even though it is the practice of law, providing legal services for oneself has never been considered *unauthorized*.[80] For example, one can draft one's own will or appear in court on one's own behalf, even when doing either of those for another would be the unauthorized practice of law.[81] The unauthorized practice prohibition only applies to a person seeking to advise or represent another person.[82]

A historical principle of British common law, the right to advise or represent oneself in legal matters – *pro se* representation –[83] was statutorily codified at the federal level with the Judiciary Act of 1789 and then adopted by states – including Texas—with either their adoption of the British common law or by statute.[84] American Courts have described the right as fundamental[85] and moral.[86] However, because it has always been given statutory protection, the issue of a Constitutional right to appear *pro se* has never arisen for review (except for in criminal cases, in which it has been recognized.)[87] The Texas statute recognizing the right follows both the

[79] RESTATEMENT, *supra* note 40, §4.

[80] *Id*. Comment C

[81] *Id*, Comments C and D.

[82] ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-4.2; RESTATEMENT, *supra* note 40.

[83] Tiffany Buxton, *Foreign Solutions To The U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 107 (2002).

[84] *Id. at* 109. Congress re-enacted a revised version of this Act in 1948, granting parties the right to "plead and conduct their own case personally" in any court of the United States. *Id.*at 110.

[85] U.S. v. Dougherty, 473 F.2d 1113, 1127, 154 U.S.App.D.C. 76, 90 (D.C.Cir. Jun 30, 1972).

[86] *Id.* at 1128, 91.

[87] The Supreme Court needed to specifically recognize a Constitutional right to proceed *pro se* in criminal cases because the pro se right can conflict with the Constitutional right to competent counsel in criminal cases. Since the Supreme Court has recognized the right as a more fundamental Constitutional right than the right to competent counsel, it would be hard to argue the Supreme Court would not recognize the right in a civil context in which there is no competing Constitutional right. Nevertheless, the court has never had the opportunity and given the statutory protection of the right, it seems an issue unlikely to ever arise for review. The seminal decision extending the federal constitutional right of *pro se* representation to an accused in a criminal case is Faretta v. California, 422 U.S. 806 (1975). In effectuating the right, the court is required to warn a defendant adequately of the dangers and disadvantages of self-representation in order that the waiver of the right to counsel be knowing and voluntary. *Id.* at 2541; *e.g.*, United States v. Sandles, 23 F.3d 1121 (7th Cir. 1994), and authority cited. On the power of the court to appoint "standby counsel" for an accused proceeding pro se, even over objection by the accused, see *Faretta*, 422 U.S. at 834 n.46; McKaskle v. Wiggins, 465 U.S. 168, 184 (1984). On the general desirability of doing so, see, *e.g.*, United States v. Moya-Gomez, 860 F.2d 706, 740 (7th Cir.

federal statute and other state statute formats, simply stating that [88] "any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."[89]

The right to proceed *pro se* is a personal right and can only be exercised by the person having the right. This means, for example, that a non-lawyer owner, officer, or other agent of a business entity does not have the right to appear in court in order to prosecute or defend the business entity's rights.[90] Texas courts have followed this general rule with respect to corporations finding that the corporation's non-lawyer agents are not appearing to defend

1988), *cert. denied*, 492 U.S. 908 (1989). There is, however, no constitutional right to the assistance of standby counsel. *E.g.*, United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir. 1991), *cert. denied*, 502 U.S. 959 (1991); United States v. La Chance, 817 F.2d 1491, 1498 (11th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987). An accused also has no right to a "hybrid" representation, part *pro se* and part standby counsel. *See McKaskle*, 465 U.S. at 178. On the rule that a mid-trial election by an accused to invoke the right to proceed *pro se* does not relieve long-standing counsel from responsibility to continue as standby counsel, see United States v. Cannistraro, 799 F.Supp. 410 (D.N.J. 1992). RESTATEMENT, *supra* note 40. *See also* Comment, *Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515 (1984); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659 (1988); Edward M. Holt, *How To Treat "Fools:" Exploring The Duties Owed To Pro Se Litigants In Civil Cases*, 25 LEGAL PROF.. 167 (2001); Buxton, *supra* note 80, at 103.

[88] The Texas Constitution specifically provides that Texas criminal defendants have the right to appear without counsel.

[89] Texas Rules of Civil Procedure 7 applies to probate proceedings. TEX. R. CIV. P. 2.

[90] Restatement, *supra* note 40, Comment E. *See* generally C. Wolfram, MODERN LEGAL ETHICS § 13.7 (1986). On the rule that a corporation or similar entity can appear in court only through an attorney, *see, e.g.*, Osborn v. Bank, 22 U.S. (9 Wheat.) 738, 830 (1824); Commercial & R.R. Bank v. Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 65 (1840); Capital Group, Inc. v. Gaston & Snow, 768 F.Supp. 264 (E.D. Wis. 1991) (president and sole shareholder of professional-services corporation could represent himself *pro se*, but could not represent corporation in either of those capacities or by assignment of its cause of action), citing authority; Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn. 1992) (corporation appearing in trial court must be represented by attorney despite fact that court proceeding originated in small-claims court where no such rule applied); Salman v. Newell, 885 P.2d 607 (Nev. 1994) (trust could not proceed *pro se*, and non-attorney trustee could not represent trust); E & A Assocs. v. First Nat'l Bank, 899 P.2d 243 (Colo. Ct. App. 1994) (nonattorney general partner could not represent partnership). Some courts have made narrow exceptions where the proceeding would not be unduly impaired, in view of the nature of the litigation, or where enforcing the rule would effectively exclude the entity from court. *E.g.*, *In re* Unauthorized Practice of Law Rules, 422 S.E.2d 123 (S.C. 1992) (business may be represented in civil-magistrate proceedings by nonattorney); Vermont Agency of Natural Res. v. Upper Valley Reg'l Landfill Corp., 621 A.2d 225 (Vt. 1992), and authority cited. RESTATEMENT, *supra* note 40, Comment D.

their personal rights but rather the corporation's and, thus, do not qualify under the *pro se* exception.[91]

The corporate variety of the *pro se* right allows the corporation's in house, employee-lawyer to represent it in court rather than requiring the corporation to hire outside legal counsel. Since the in house, employee-lawyer is an agent of the corporation, his or her appearance in court is considered to be the corporation's appearance. Even though corporations cannot practice law, they are allowed this type of *pro se* appearance so long as the subject of the legal proceedings is the corporation's own rights and not the rights of others. To allow the latter would be to allow the corporation to practice law for another's benefit.

III. TEXAS EXECUTORS AND THE UNAUTHORIZED PRACTICE OF LAW

A. Whose Rights Are At Stake

Texas courts that deny executors' *pro se* rights do so out of an unauthorized practice of law concern.[92] There is no law that explicitly mandates the retention of an attorney by an executor. The probate code authorizes executors to hire attorneys with estate funds, but it is otherwise silent as to the attorney-executor relationship.[93] There are innumerable cases involving this right to use estate funds to hire an attorney for the executor, but none of these cases premise the right on the legal necessity of the hire.[94] The allowance of the expense has never been construed to mean it is obligatory.

The unauthorized practice of law concern with respect to executors is whether or not they qualify for the *pro se* exception in Texas. The legal

[91] Kunstoplast of Am., Inc. v. Formosa Plastics Corp., 937 S.W.2d 455, 456 (Tex. 1996) (generally, a corporation may be represented only by a licensed attorney). *But see*, Custom-Crete, Inc. v. K-Bar Services, Inc., 82 S.W.3d 655 (App. 4 Dist. 2002) (letter of non-attorney corporate representative, which denied breach of contract claims against corporation, was sufficient to avoid no-answer default judgment).

[92] *See, e.g.*, Travis County Court Policy Regarding Pro Se Applicants available at http://www.co.travis.tx.us/probate/pdfs/pro_se.pdf (last visited September 19, 2006).

[93] TEX. PROB. CODE ANN. § 242 (Vernon 2003); 18 WOODWARD, *supra* note 28 § 729; 2 DESHAZO, *supra* note 7, § 10:21.

[94] *Id*.; *See, e.g*., Callaghan v. Grenet, 66 Tex. 236 (1886); Williams v. Robinson, 56 Tex. 347 (1882); Dallas Joint Stock Land Bank v. Maxey, 112 S.W.2d 305 (Civ.App.1937, n. w. h.); *see* W.S. Simkins, THE ADMINISTRATION OF ESTATES IN TEXAS 3D. § 270 (1934).

question is whether or not an executor as *the party appearing* in court would be *the person with rights* being prosecuted or defended.[95] The statute guarantees the right to appear in person without an attorney so long as the party appearing is the party with the rights at stake. When an executor appears in a Texas probate court, is the executor appearing in person to prosecute or defend *the executor's* rights? Or is the executor appearing in person to prosecute or defend another person's rights? If so, who is this other person? Is the estate this other person? Are the beneficiaries this other person?

Conceptually, there are three options for settling the rights of executors to appear *pro se*. One option – the entity approach—is to claim that the rights at stake in probate court proceedings belong to the estate. The second option – the "Minnesota rule"—is to claim that the rights belong to the beneficiaries. The third option is to claim that the rights belong to the executor. In chart form, the options are as follows:

Executors and Pro Se Representation: Whose Rights Are At Stake?

Party Appearing	**Party With Rights**	**Pro Se Representation?**
Executor	Estate	No
Executor	Beneficiaries	No
Executor	Executor	Yes

Thus, whether or not the executor qualifies for *pro se* representation depends upon whether the executor is representing his or her own rights in the proceeding. This Article argues that the third option is required under Texas law. It rejects both the entity approach (the first option) and the Minnesota rule (the second approach).

B. Rejecting The Entity Approach

As discussed above, the general rule in Texas and elsewhere is that a non-attorney owner, officer, or other agent of a business entity does not have the right to appear in court to prosecute or defend the business entity's rights.[96] There is no *pro se* right in the entity's non-attorney agents because those agents' rights are not at stake in any court appearance. In Alabama,[97]

[95] TEX. R. CIV. P. 7: "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."

[96] *See supra* pp. 15-16.

[97] The Alabama Supreme Court adopted the reasoning that an estate is a legal entity in Ex

Maine[98] and South Carolina,[99] the courts have extended the reasoning of this business entity rule to estates without addressing the fundamental question.

When solving the *pro se* rights equation for an executor, the fundamental question is whether or not a non-attorney executor relates to the estate in the way that a corporation's non-attorney officer or other agents relate to the corporationWhile we may casually speak of an executor representing "the estate," the question with respect to *pro se* representation is how legally similar are the two relationships.

An estate is very much unlike a corporation because it is not a legal entity. It can neither sue nor be sued. [100] The "estate" is no more than the property owned by the decedent at death and is legally defined as such.[101] Because estates are not entities with legal rights, the Texas cases in which corporate agents are prohibited from appearing on behalf of the corporation are not analogous.

Proponents of the entity approach could point to the exceptions to the general rule. It is true that there are limited exceptions to the general rule, such as giving estates entity-like rights to be a partner in a Texas partnership.[102] However, the Texas Supreme Court has consistently dismissed any claims that an estate should be treated as an entity as *a general rule* in Texas and has specifically denied that an estate is the party with rights in a law suit.[103]

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parte Ghafary, 738 So.2d 778, 780 (Ala. 1998) and affirmed it in Godwin v. McKnight, 784 So.2d 1014, 1014 (Ala. 2000) in which it asserted without further analysis that the executor's filings were "on behalf of" the estate.

[98] The Supreme Judicial Court of Maine adopted the reasoning that an estate is a legal entity in State v. Simanonok, 539 A.2d 211, 212 (Me. 1988).

[99] The Supreme Court of South Carolina adopted the reasoning that an estate is a legal entity in Brown v. Coe, 616 S.E.2d 705, 707-708 (S.C. 2005).

[100] Dueitt v. Dueitt, 802 S.W.2d 859 (Tex.App.—Houston [1st Dist.] 1991, no writ); Henson v. Estate of Crow, 734 S.W.2d 648 (Tex. 1987); Price v. Estate of Anderson, 522 S.W.2d 690 (Tex. 1975); *see also* JUDGE ADELE HEDGES & LYNNE LIBERATO, TEXAS PRACTICE GUIDE: CIVIL APPEALS §5:38 (2006); 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544 (2006).

[101] § 3(l).

[102] For discussion of estates as partners, *see, e.g.*, 19 ROBERT W. HAMILTON ET. AL., TEXAS PRACTICE, BUSINESS ORGANIZATIONS §6.5 (2005).

[103] *Dueitt*, 802 S.W.2d 859; *Henson*, 734 S.W.2d 648; *Price*, 522 S.W.2d 690; ; *see also* HEDGES & LIBERATO, *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544. For a discussion of the general rule that only the executor has the

C. The Minnesota Rule

At the height of the organized bar's twentieth century campaign against banks providing legal services,[104] the Minnesota Supreme Court held that a bank serving as executor does not have the right to proceed *pro se*.[105] This kept the bank's lawyers from appearing in probate court on behalf of the bank, which required the bank to hire outside legal counsel. This "Minnesota rule" has been followed in the Supreme Courts of Arkansas, Wisconsin, Kentucky and Florida but rejected by the Supreme Court of Ohio (even though it was considering the same issue in the same Great Depression-era anti-bank legal environment).[106]

1. Minnesota

The seminal Minnesota case was a 1930 professional discipline case, *In Re Otterness*.[107] An attorney who was a salaried employee of a bank turned

right to be the party to the suit and some of the exceptions to the general rule, *see* 17 WOODWARD, *supra* note 7, § 171; AUTHOR, TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §§ 46.01-0.2 (year); HEDGES & LIBERATO ,*supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544.

[104] *See supra* p. 9.

[105] *In Re* Otterness, 181 Minn. 254, 223 N.W. 318 (Minn. 1930).

[106] A too brief review of 19 A.L.R.3d 1104 regarding the "necessity that executor or administrator be represented by counsel in presenting matters in probate court" could leave the impression that the Minnesota rule is more settled law than it is. This secondary source cites all of the cases described but, for example, cites the Ohio case (described below) in support of the proposition even though the Ohio case rejected the Minnesota rule. As to the other cases the American Law Reporter cites, none are on point even though close: Wright, State *ex rel.* v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937) (this was a criminal case against a man who held himself out as a lawyer and given advices to executors and administrators; the *pro se* exception was not relevant); Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 707, 281 N.W. 432 (1938) (this was a case of a corporation using non-lawyers to appear in court on its behalf, which is not permitted since the non-lawyers are representing the corporation, not themselves; the issue was a corporation's general *pro se* rights rather than an executor's specific *pro se* rights); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939) (this is the case of a real estate broker providing legal services; although dicta recites the Minnesota rule, the broker had provided legal advice to executors and administrators but had not himself appeared as such; the *pro se* exception was not relevant). This *Denkema* case cites several older cases along with the *Otterness* case, but the older cases are all examples of someone who was not a lawyer holding himself out as a lawyer—and not cases in which an executor's right to appear *pro se* was relevant. Similarly, see, for example, Ferris v. Snively, 19 P.2d. 942 (Wash. 1933) and In re Brainard, 39 P.2d. 769 (Ia. 1934).

[107] *In Re Otterness*, 223 N.W. 318.

over to the bank his legal fees charged for the probate court work he did.[108] The Minnesota Supreme Court censured the attorney. [109] The bank was not permitted to practice law in Minnesota, and the attorney was facilitating its practice because the probate court work profited the bank.[110] The *pro se* exception was a potential defense since had it qualified, the bank would not have been engaged in the unauthorized practice of law, and the attorney would not have been guilty of assisting it.[111] That is, while the bank could not appear in probate court on behalf of the beneficiaries of the estates, if its court appearances were for its own benefit as executor of the estates, it would not be engaged in the *unauthorized* practice of law but rather covered by the *pro se* exception. Dismissing the potential *pro se* defense, the court cited, explained, and distinguished the *pro se* exception in a single short paragraph: as the bank had no beneficial interest in the estate, it had no right to appear *pro se*.[112] The only exception according to the Minnesota court would be if the bank were to defend personal rights as an executor, such as if it were to defend against a fiduciary misconduct charge.[113]

2. Arkansas

In the 1954 case *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, the Arkansas Supreme Court followed the Minnesota rule when it too considered a bank's use of salaried attorneys to engage in the practice of law in the probate courts. Again addressing the *pro se* exception in a situation in which it could be used defensively by a bank, the court opined that the bank executor was not acting on its own behalf but on behalf of the beneficiaries. Thus, the court concluded the bank-executor did not qualify for the *pro se* exception.[114] (Almost fifty years later, the Arkansas Supreme Court re-affirmed this as the rule in Arkansas.)[115]

[108] *Id.* at 256.

[109] *Id*. at 258.

[110] *Id.* at 257.

[111] *See supra* pp. 15-16.

[112] *In Re Otterness*, 223 N.W. 318 at 258.

[113] *Id.*

[114] Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock, 224 Ark. 48, 273 S.W.2d 408 (1954).

[115] Davenport v. Lee, 72 D.W.3d. 85 (Ark. 2002).

3. Kentucky

As in Minnesota and Arkansas, it was banks allegedly engaged in the practice of law in the probate courts that brought the issue of *pro se* executors to the Supreme Court of Kentucky in the 1965 case *Frazee v. Citizens Fidelty Bank & Trust Company*.[116] Specifically, the court was considering contempt proceedings against five banks for the unauthorized practice of law through their salaried employee-attorneys.[117] The banks claimed protection under a Kentucky statute explicitly confirming *pro se* rights to fiduciaries.[118] The court invoked its superiority over the legislature on these issues and disregarded the statute.[119] Citing its own cases against unauthorized practice but offering no further analysis, the court simply stated that "fiduciaries are in no different position" than other unlicensed persons without a "beneficial interest in the corpus of the estate."[120] Thus, the court denied the banks the right to appear *pro se*.

4. Wisconsin

The first state supreme court to consider the *pro se* executor issue outside the context of preventing banks from practicing law for profit was the Wisconsin court in the 1965 case *Baker v. County Court of Rock County*.[121] An individual executor fired his attorney and then made *pro se* filings.[122] The courts rejected the filings and ordered the executor to hire an attorney.[123] As was required in the Wisconsin probate process, the executor had requested the probate court to review and adjudicate the rights of the beneficiaries in certain distributions.[124] The probate court thought that it was rare for beneficiaries to hire their own attorneys to review these procedures, and, thus, the court reasoned it was incumbent upon the executor to hire an attorney; otherwise, the legal rights of the beneficiaries would go un-represented by an attorney, which would place an undue

[116] Frazee v. Citizens Fidelty Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965).

[117] *Id.* at 781.

[118] *Id*. at 781-782.

[119] *Id.* at 783.

[120] *Id*. at 782.

[121] Baker v. County Court of Rock County 29 Wis. 2d 1, 138 N.W.2d 162 (1965).

[122] *Id*. at 164.

[123] *Id*.

[124] *Id*. at 165.

burden of review on the court.[125]

The Wisconsin court deviated from the Minnesota rule in two significant ways, however. First, it opined that not all *pro se* court filings by an executor are prohibited but only those that raise complex legal questions.[126] Second, the court made clear that it rejected the notion that even a beneficially interested executor could appear *pro se*. [127] The court's reasoning was that executors are officers of the probate court, and as part of their management by the court, they must obey any orders to hire an attorney, which the court has good reason to do in order to manage its own burden of reviewing pleadings.[128]

5. Florida

The Florida Supreme Court followed the Minnesota rule in its 1974 case *Falkner v. Blanton*.[129] Like the Wisconsin court, the Florida Supreme Court considered the *pro se* appearance rights of an individual executor outside of the context of prohibiting banks from practicing law in the probate court.[130] However, in its single paragraph opinion, the court distinguished itself from the Wisconsin court by holding that an individual executor would have *pro se* rights so long as the executor was the sole beneficiary of the estate.[131] Unlike the Wisconsin court, it did not distinguish between simple and complex proceedings.

6. Ohio's Rejection of the Minnesota Rule[132]

Similarly to the situations considered in Minnesota, Kentucky, and Arkansas, in the 1937 case, *Judd v. City Trust Savings Bank* the Ohio Supreme Court considered banks that were engaged in estate planning and probate court work in Ohio.[133] It held that the bank could not provide estate

[125] *Id*. at 167.

[126] *Id.*

[127] *Id.* at 171-172.

[128] *Id.*

[129] State *ex rel*. Falkner v. Blanton, 297 So.2d 825 (Fla. 1974).

[130] *Id.* at 825.

[131] *Id.*

[132] The Supreme Court of Indiana also rejected the Minnesota approach to the *pro se* exception but with respect to trustees (*i.e.*, the case did not address executors' rights). Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942).

[133] Judd v. City Trust Sav. Bank, 133 Ohio. St. 81, 12 N.E.2d 288 (1937). In Ohio, once the

planning for clients, even if it were named as the fiduciary in the estate planning documents.[134] However, it held that banks were covered by the *pro se* exception (and thus not engaged in the unauthorized practice of law) if their salaried attorney-employees appeared in probate court on behalf of the banks as executors.[135] The court noted that executors are bound to fulfill various duties and that they are personally liable for mismanagement, misconduct, or neglect in connection with these duties.[136] The attorneys employed by the banks were thus employed so that the bank could discharge its duties without being subject to suit.[137] The court noted that any beneficiary dissatisfied with the way in which the executor discharges its duties can sue the executor.[138] Nevertheless, as a result of their *pro se* rights, the bank-executors could represent themselves in court (through their salaried-employee attorneys) without being engaged in the unauthorized practice of law.[139] Thus, the Ohio Supreme Court rejected the notion that the executors were only representatives of the beneficiaries' interests and focused instead on the executor's personal liability in discharging its duties.

D. Rejecting the Minnesota Rule in Texas

Texas courts should reject the Minnesota rule for multiple reasons, especially because it is inconsistent with contemporary Texas Supreme Court jurisprudence.

1. The Historical Battle Between Banks and the Bar

The Minnesota rule emerged during the turf battle between attorneys and bank trust officers over who had what capacities in estate administration.[140] This turf battle was the 20th century genesis of the campaign against the unauthorized practice of law, and the initial

bank is appointed "it can handle all probate and other legal work necessary to execute the trust." 2 ANGELA G. CARLIN, BALDWIN'S OHIO PRACTICE MERRICK-RIPPNER PROBATE LAW §53:6 (2006).

[134] *Id.* at 85, 291.

[135] *Id.* at 94, 294.

[136] *Id.* at 90-92, 292-294.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See supra* p. 9.

Minnesota case, the Kentucky case, the Ohio case, and the Arkansas case all have to be seen in this greater historical context. The Kentucky court was not only siding with the bar over the banks in the contempt proceeding against the banks, but also was defending its own turf against the legislature; the court was asserting its rights over the legislature's when it rejected both the substance and the form of the legislature's permission for fiduciaries to appear *pro se* (permission one surmises that may have been granted after the banks' lobbying). [141]

As the *pro se* exception was a potential defense for the banks, it was removed with cursory reasoning by those courts following the Minnesota rule. As discussed above, corporations cannot appear *pro se* through their non-lawyer employees.[142] Thus, the right for a corporation to appear *pro se* is simply the right not to spend their funds on *outside* legal counsel. The banks that were providing probate services did so with their in house legal counsel in order to make a profit. Had the courts concluded that it was the bank's rights at stake in the probate proceedings, the banks could have continued to make a profit with their in house legal counsel. But by concluding the banks were not acting for their own benefit but for the beneficiaries, the banks were not permitted to proceed with their in house legal staff in competing with lawyers for probate services.

The Minnesota rule courts were explicitly interested in stopping bank competition for probate services. There is nothing said about protecting the public from ill-prepared non-lawyers since, after all, those who were representing the banks were, indeed, lawyers. Historically, this type of economic defensiveness by the bar eventually led to anti-trust concerns, which eventually led to the decline in the zealousness of unauthorized practice prosecutions.[143] In the early days, it was not shameful for the bar to assert that economic interests were behind its unauthorized practice prosecutions.[144] Eventually, of course, this did become shameful, and the

[141] Frazee v. Citizens Fidelty Bank & Trust Co., 393 S.W.2d 778, 783 (Ky. 1965).

[142] *See supra* pp. 15-16.

[143] *See supra* pp. 9-12.

[144] Rhode, *supra* note 43; Denckla, *supra* note 43, at 2584-2585. Initially articulated by the bar in terms of economic self-interest, the public justification for the prohibition was eventually changed to protecting the public (though the public itself has not given much support to the bar's efforts and the empirical research indicates the public has suffered little, if any, as a result of non-lawyers practicing law). Rhode, *supra* note 43, at 3; RESTATEMENT, *supra* note 40, Note on Comment A, Comment B, and Comment C.

justification gave way to expressing concerns about protecting the public.[145] In an age in which access to justice is a greater concern than economic protectionism, and in an age in which there are so many exceptions to the unauthorized practice prohibition, the zealousness of the Minnesota rule courts to restrict judicial access is anachronistic.

2. Failure to Respect the Executor-Beneficiary Fiduciary Relationship

Focusing on denying banks their profit-center of employed probate court attorneys, most of the Minnesota rule courts did not focus on the uniqueness of the executor-beneficiary relationship.[146] However, the uniqueness of the executor-beneficiary relationship is essential to understanding the *pro se* rights of executors. What the Minnesota rule courts have done is to treat executors as legally transparent–as agents of the beneficiaries—just as the employee-attorneys were agents of the banks. This made their reasoning syllogistic but at odds with the intentional division of management rights from beneficial interests. None of the courts discussed this division. These courts' conclusion that the executors have no right to appear in court followed directly from their observation that the beneficiaries have the beneficial interests.[147]

However, by definition, executors have special, specific, and statutory rights and duties that are not derived from beneficial interests. The unique rights of the executor are reflected in the specific statutory entitlement of the person nominated to be executor to probate the will (even though the only other persons entitled to probate the will are those who have a beneficial interest in the estate.)[148] When a nominated executor appears in court to probate the will, he or she is acting pursuant to a specific statutory definition distinct from any beneficial interest.[149] While the beneficiaries of the will may receive a benefit by its probate, the executor's choice to

[145] *Id.*

[146] The exception was the Wisconsin court which focused on the executor's relationship to the court during estate administration. Baker v. County Court of Rock County 29 Wis. 2d 1, 8 138 N.W.2d 162, 166 (1965).

[147] *In Re* Otterness, 181 Minn. 254, 258 223 N.W. 318, 320 (1930); Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock, 224 Ark. 48, 52, 273 S.W.2d 408, 411 (1954); Frazee v. Citizens Fidelty Bank & Trust Company, 393 S.W.2d 778, 782 (Ky. 1965); Falker v. Blanton, 297 So.2d 825, 825 (Fla. 1974).

[148] TEX. PROB. CODE ANN. §76 (Vernon 2003); 17 WOODWARD, *supra* note 7, § 243.

[149] *Id.*

probate the will is personal.[150] There is no duty to probate the will.[151] Thus, the nominated executor cannot be forced to do so by the beneficiaries. Failing to probate the will does not reduce his or her qualification to be appointed executor.[152] Furthermore, the beneficiaries' rights are not affected either way. The nominated executor prosecutes his or her *personal* rights when probating the will. To put an even finer point on it, when the nominated executor probates the will, he or she, by definition, has yet to assume the role of executor and thus has no duties or obligations to the beneficiaries. Thus, it is incoherent to claim the executor's right to probate the will is somehow derived from the beneficiaries' interests. And in the Texas independent administration system, this is the only court appearance required.

Additionally, under the Texas probate code, even though not a beneficiary of the estate, the executor has the sole right to collect, possess, and manage the assets of the estate in his or her personal prudent discretion.[153] This is true even though title to the assets of the estate vests immediately in the beneficiaries upon the testator's death (which is necessary to avoid a lapse in legal title at death.)[154] The executor's management right includes the exclusive right to bring estate-related law suits.[155] Those law suits must be brought by the executor *in the name of the executor* rather than in the name of the estate or the beneficiaries.[156] Since the beneficiaries do not have the right, the executor certainly does not

[150] *Id*.

[151] The custodian of the will upon the testator's death should deliver it to the proper court clerk, but there is no duty to probate a will in Texas. §75. 74 TEX. JUR. 3D WILLS §361.

[152] § 78 provides the only grounds on which an executor can be disqualified from serving. 17 WOODWARD, *supra* note 7, § 252; 1 DESHAZO, *supra* note 25, § 5:14.

[153] §37, §230, §232. Blinn v. McDonald, 92 Tex. 604, 612, 46 S.W. 787 (1898); Morris v. Ratliff, 291 S.W.2d 418 (Civ. App. 1956, writ ref'd n. r. e.); Freeman v. Banks, 91 S.W.2d 1078 (Civ. App. 1936, writ ref'd.) *See* 18 WOODWARD, *supra* note 28, § 693; 18 TEXAS PRACTICE, PROB. & DECEDENTS' ESTATES §697; 17 WOODWARD, *supra* note 7, § 171; TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §47.01[2].

[154] *Id*.

[155] For a discussion of the general rule and the rare exceptions, *see* §233A; Gannaway v. Barrera, 74 S.W.2d 717 (Civ. App. 1934), *aff'd on other grounds*, 130 Tex. 142, 105 S.W.2d 876 (1937). Gaston v. Bruton, 358 S.W.2d 207 (Civ. App. 1962, writ ref'd n. r. e.). *See* 17 WOODWARD, *supra* note 7, § 171; TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §§46.01-0.2; HEDGES & LIBERATO , *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544.

[156] *Id.*

derive the right from them. The beneficiaries have no right to manage the executor, and even by pooling all of their rights, the beneficiaries cannot remove the executor for the exercise of his or her discretion one way rather than another so long as he or she discharges the legal duties and abides by fiduciary principles.[157] For example, the executor can decide whether or not to pursue a malpractice claim against the testator's estate planning attorney.[158] Not any one of the beneficiaries and not all of the beneficiaries acting jointly could bring such a claim, nor could they force the executor to bring such a claim. It is the statutory authorities given exclusively to the executor that are at stake when the executor appears in court.Conceptually, the executor might be said to be an agent of the testator but cannot be said to be the agent of the beneficiaries. Though the beneficiaries are destined to be the ultimate recipient of the property, it does not follow the executor is their mere representative: the executor's rights to manage the estate are distinct from the beneficiaries' interests and are not derived from them.

As the Ohio court noted, the executor is given these management rights subject to high fiduciary duties, and the beneficiaries are given no rights at all other than to sue if the duties are unfulfilled.[159] This is the essence of the fiduciary relationship between the executor and the beneficiaries. Under Texas law executors are given the exclusive management rights but owe the beneficiaries the highest duties of good faith, fidelity, loyalty, fairness, and prudence.[160] The Minnesota rule reduces the executor's court appearance rights in an apparent attempt to ensure the beneficiaries' interests are protected, but this ignores the role of fiduciary duties for that purpose. These duties are imposed by the law precisely because the law gives the executor the exclusive rights to manage the estate. Because of these duties,

[157] § 222; 17 WOODWARD, *supra* note 7, § 508.

[158] Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006) (malpractice claim in the estate-planning context may be maintained in Texas only by the estate planner's client or the client's personal representative)

[159] *Id*. at 90-92, 292-294. The Minnesota rule courts could have protected both the historical understanding and their objective of denying *pro se* rights to bank executors simply by finding it a violation of the executor's fiduciary duties to proceed *pro se*. However, the courts did not give this type of fiduciary analysis. Instead, the courts derived the right to appear in court from beneficial interests– deciding who had the right to appear with reference to who had the rights to benefit.

[160] Humane Soc. of Austin & Travis County v Austin Nat'l Bank, 531 S.W.2d 574 (Tex. 1975), *cert. denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, 862 SW2d 662 (Tex. App.—Dallas 1993, writ denied); Ertel v O'Brien 852 SW2d 17 (Tex. App.—Waco, writ denied).

the executor's bond or personal assets protect the beneficiaries. It is this liability that ensures the executor's prudent exercise of the management rights. Because of this liability exposure, the Ohio court described the executor's interest in avoiding a fiduciary suit as "very real, vital, and substantial."[161] In contrast, the Minnesota rule cases do not mention these duties or analyze the fiduciary relationship. Instead, they simply reject the executor's management rights by reciting the un-disputed fact that it is the beneficiaries who receive the property.

3. Inapplicability of Wisconsin Rationale

The unique reasoning of the Wisconsin court deserves special mention as to why Texas courts should reject it specifically along with the Minnesota rule generally.

Unlike the other Minnesota rule cases, the Wisconsin court did not attempt to settle who had the right to appear in court merely by reciting who had the beneficial interest. Instead, the Wisconsin court's reasoning invoked the complexity of the Wisconsin probate system and the need of the executor to have the court make determinations. But the Texas probate system has been designed without undue complications, and executors do not seek the type of determinations that the Wisconsin system requires.[162] Indeed, the premise of complexity is essential to the Wisconsin holding because the court reasoned that not all court appearances required a lawyer, only the ones involving complex issues.[163]

The Wisconsin court also based parts of its reasoning on the fact that most beneficiaries do not hire an attorney to review their rights.[164] The court then concluded that the executor must hire one so that the beneficiaries' rights are protected.[165] This, too, is specifically unpersuasive in Texas because under Texas law an executor's attorney has no duty to the beneficiaries but only to the executor. [166]

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[161] Judd v. City Trust Sav. Bank, 133 Ohio. St. 81, 91, 12 N.E.2d 288, 293 (1937).

[162] Baker v. County Court of Rock County 29 Wis. 2d 1, 8 138 N.W.2d 162, 166 (1965). Texas probate court judges are not responsible for the acts of independent executors. §§ 145(q), 36, 145(h); 17 WOODWARD, *supra* note 7, § 75; *Id.* § 497; 1 DESHAZO, *supra* note 25, § 1:24. Young Lawyers Association Needs of Senior Citizens Committee, *supra* note 23; Pacheco, *supra* note 23.

[163] *Baker*, 9 138 N.W.2d at 167.

[164] *Id.*

[165] *Id.*

[166] Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

4. "Practice of Law" Outside the Courtroom

Under the Minnesota rule, executors are engaged in the unauthorized practice of law whenever an attorney fails to represent them *in court*. A consequence of this rule is that executors are engaged in the unauthorized practice with respect to a variety of *non-courtroom tasks* as well. As discussed above, the Texas standards for unauthorized practice include, not only court appearances, but providing services that have a "legal effect" that must be "carefully determined"[167] or taking any action in a matter that is "connected with the law."[168] Delineating which of the executor's management tasks did not require the executor to obtain a legal opinion would be considerably impractical if every legally significant decision the executor made might be considered the practice of law. Defending the executors' right to appear *pro se* in probate court also defends the executors' right to manage the estate without the obligation of anxiously securing legal opinions to avoid the unauthorized practice of law *outside of the courtroom*. Individuals managing their own affairs have the right to make legally significant decisions for themselves, and so do executors (who can be sued by the beneficiaries for failing to act as a prudent individual would in managing those affairs).

In some of those states adopting the Minnesota rule, the courts have been forced to consider which of an executor's out-of-court tasks do require an executor to hire an attorney.[169] Historically, as explained above, the goal of the Texas probate system has been to allow non-lawyers to administer the estate without seeking permission at every turn.[170] Prohibiting the executor's performance of non-courtroom tasks would defeat the purpose of the simplified independent administration system by replacing the judge's management of the estates in Texas with attorneys'. Legal fees and complications would certainly increase beyond the current level if there were a legal obligation of an attorney to review all of an executor's legally significant letters, agreements, and decisions to ensure that the executor is

[167] TEX. GOV'T CODE ANN. § 81.101 (Vernon 2004).

[168] Crain v. UPLC, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); Davies v. Unauthorized Practice Committee, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ).

[169] *See.,e g*., Frazee v. Citizens Fidelty Bank & Trust Co., 393 S.W.2d 778, 784-785 (Ky. 1965).

[170] TEX. PROB. CODE ANN. §6 (Vernon 2003); 17 WOODWARD, *supra* note 7, §§ 44-45; 2 DESHAZO, *supra* note 7, § 14:36.

not engaged in the unauthorized practice of law.

5. Professional Responsibility and Liability Issues Under the Minnesota Rule

The Minnesota rule has disturbing, unintended ethical consequences for Texas lawyers, which is another set of reasons to reject it.

a. Executors Practicing Law Outside the Courtroom

A Texas attorney cannot ethically assist anyone engaged in the unauthorized practice of law.[171] If the executor is at risk for engaging in the practice of law by making legally significant out-of-court decisions during the estate administration, the attorney has an obligation in order to ensure that his or her client has not crossed the line into the practice of law in order to ensure he or she is not assisting in unauthorized practice. As a practical matter, the attorney's job would be transformed from advising the executor when requested to supervising the executor at all times. This would be necessary to make sure the attorney has not unwittingly helped the executor engage in the practice of law. Thus, it is not only a matter of increased legal fees for the attorney reviewing all of the executor's legally significant decisions but also a question of what level of supervision and detailed instruction is ethically required of the Texas lawyer in order to keep the client from engaging in the practice of law.

b. Unbundled Probate Services

If an executor has the right to proceed *pro se*, then a Texas attorney is able to provide unbundled legal assistance in probate court without breaching any ethical duties. For example, if an executor has the right to proceed *pro se*, an attorney might draft the application for the probate of the will and send the executor to court with it. However, if the executor does not have the right to proceed *pro se*, drafting the documents for the proceeding would be ethically prohibited.[172] This type of unbundled assistance might provide a significant cost savings for some clients and may even be provided *pro bono*, especially to the attorney's friends and family.

[171] TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05.

[172] *Id.* 5.05.

c. Knowing the Client's Identity

The fundamental issue in the executor's right to proceed *pro se* is whether the executor is prosecuting the executor's rights or the beneficiaries' rights. Under the Minnesota rule cases, the claim is the executor is prosecuting the beneficiaries' rights when he or she appears in court. This, those cases conclude, is why the executor cannot appear *pro se*. This would mean that when the executor's attorney appears in court, it is to represent the estate's beneficiaries. Thus, if the executor does not have *pro se* rights, then the executor does not have the right to an exclusive attorney-client relationship with his or her attorney. As discussed below, the right of the attorney and the executor to an exclusive attorney-client relationship is well established in Texas law.[173] The attorney's certainty that he or she is advising the executor as to the executor's rights is a corollary to knowing the attorney is not obligated to advise all of those with beneficial interests in the estate (including creditors) as to their rights. It is this certainty that allows the attorney to behave both ethically and competently, knowing who the client is—and, just as importantly, who the client is not.

6. Texas Supreme Court Jurisprudence and the Minnesota Rule

The Minnesota rule cases are also inconsistent with contemporary Texas Supreme Court jurisprudence. One Texas Supreme Court case explicitly affirms the right of an executor to appear *pro se* while another makes clear that the attorney-client relationship is between the executor and the attorney (not the estate or the beneficiaries).

a. Pro Se Rights of an Executor

In the 1983 case *Ex parte Shaffer* the Texas Supreme Court considered whether a Texas executor had *pro se* rights in probate court. [174] In the case, the executor was sued for an alleged breach of his fiduciary duty.[175] Before the trial, the executor's attorney withdrew. The Dallas County Probate Court Number 3 ordered the executor to retain a new attorney, which the executor failed to do.[176] The judge ordered the executor to be held in the

[173] *See infra* pp. 31-32.

[174] *Ex parte* Shaffer, 649 S.W.2d 300 (Tex. 1983).

[175] *Id*. at 301.

[176] *Id*.

county jail in contempt of court until he hired an attorney.[177] The Texas Supreme Court held the probate judge's order void.[178] The Texas Supreme Court's reasoning was short and blunt:

> counsel cites no authority, and indeed we can find none, which allows a court to . . . require any party to retain an attorney. . . [O]rdering a party to be represented by an attorney abridges that person's right to be heard by himself.[179]

Presumably because the Texas Supreme Court believed the facts were directly covered by the *pro se* rule, it did not detail its application of the rule. The court's brevity provides an ambiguity for those who favor the Minnesota rule. Those proponents can argue the case simply affirms that an executor is permitted to proceed *pro se* when he or she is "personally liable"—allegations of fiduciary duty breaches—and not when it involves "estate claims." The initial Minnesota case indeed cites this as a *pro se* right. [180]

While superficially plausible, this Minnesota rule distinction is inherently problematic. It makes a distinction between an attorney "for the estate" (when no one is claiming the executor has mismanaged it) and an attorney "for the executor" (whenever there is a claim of mismanagement). It envisions two attorneys for each executor: one to advise the executor on how to prudently handle estate business and one to defend the executor from any suits claiming the executor failed to prudently handle estate business. It is impossible to segregate the executor's need for legal advice in this way. The executor is always exposed to personal claims of wrongdoing when making decisions in administering the estate, and Texas law does not require the hiring of a second attorney to advise the executor when a fiduciary claim is made. Texas law permits the executor's use of estate funds in defense against claims of his or her personal wrongdoing; even if the executor fails in his or her defense, so long as the executor defended the actions in good faith, the executor is entitled to use estate funds for the attorney.[181] There is no such person as the "attorney for the estate." The estate funds legal representation for the executor for routine

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *In Re* Otterness, 181 Minn. 254, 358 223 N.W. 318 (1930).

[181] TEX. PROB. CODE ANN. §149C(c) (Vernon 2003); 1 DESHAZO, *supra* note 25, § 5:75.

advice and for defense against fiduciary claims. It is the executor's rights at stake in both situations.

b. Whose Rights Are At Stake?

In the question of the 1996 case *Huie v. DeShazo*, the Texas Supreme Court answered whose rights are the subject of legal representation when a trustee hires an attorney.[182] The Texas court rejected the trends in other states to make the beneficiaries' rights or the trust estate's rights the subject of the legal representation and continued instead with the historical view that it is the fiduciary's rights.[183] The court held that trustees have a right to confidential legal advice in how to manage their trust estates and how best to discharge their duties to the beneficiaries.[184] The trustee is the personal client of the attorney, not a legally transparent representative of the beneficiaries. This is true even when trust estate funds are used to compensate the attorney and even when the beneficiaries are bringing legal claims against the trustee personally.[185]

The right of trustees to pay the attorney with trust estate funds while expecting the attorney to represent the trustee to the exclusion of the beneficiaries is indistinguishable from the right of executors to do so. Executors' standards of performance are the same as those of trustees, and nothing in the Texas Supreme Court's reasoning would mark a difference between executors and trustees. [186] As the executor's—rather than the beneficiaries'—rights are the subject of any legal representation of the executor, it follows that these are the relevant rights at stake when an attorney appears in probate court. Since an attorney would appear in court to prosecute or defend the executor's exclusive right to manage the estate, the executor has the right to appear *pro se* in court with respect to his or her same rights.

The Texas Supreme Court did not hesitate to reject the view that the

[182] Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

[183] *Id*. at 924-927.

[184] *Id*.

[185] *Id*.

[186] *See, e.g*., Geeslin v. McElhenney, 788 S.W.2d. 683, 684 (Tex. App—Austin 1990, no writ); Humane Soc. of Austin & Travis County v Austin Nat'l Bank, 531 SW2d 574 (Tex. 1975), *cert denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, 862 S.W.2d 662 (Tex. App.—Dallas, writ denied); Ertel v O'Brien, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

beneficiaries are the "real" clients with the "real" interests at stake, which is the principle of the Minnesota rule cases.[187] Instead, the Texas Supreme Court reasoned along the lines of the Ohio Supreme Court focusing on the legal rights to manage rather than the rights to benefit. As the Ohio court made explicit, it is the executor's personal liability for mismanagement that ensures proper management—and not a requirement that the executor hire an attorney to represent the beneficiaries' interests.

E. Waco Court of Appeals

On October 18, 2006, the Waco Court of Appeals considered a ruling in the 77th District Court (Limestone County) in which an independent executor had discharged his attorney after the appeal was perfected.[188] Having no attorney appearing before them prompted the court to consider whether or not an independent executor had the right to appear *pro se*.[189] Without the benefit of a briefing, the court answered itself.[190]

Claiming in one sentence that it was "not all clear" whether or not an independent executor could appear *pro se* under Texas Rule of Civil Procedure 7, the court began the next sentence by concluding that "a plain reading" of the rule suggests the independent executor cannot appear *pro se*.[191] There was not any reasoning between the sentences, which introduced and attempted to resolve the issue without asking the fundamental question as to *whose* rights are at stake when an independent executor appears *pro se*. Begging the question it did not even ask, the court wrote and concluded that the independent executor "is litigating rights in a representative capacity rather than on his own behalf."[192] In dissent, the Chief Justice clarified that the independent executor has all the rights of the decedent, including the right to appear *pro se*.[193] The majority did not consider this claim, nor otherwise investigate whose rights were involved in managing the estate.

[187] "We concluded that, under Texas law at least, the trustee who retains the attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries." *Huie*, 922 S.W.2d at 925.

[188] Steele, 927.

[189] Steele, 928.

[190] Steele, 931.

[191] Steele, 928.

[192] Id.

[193] Steele, 930.

Except for a case denying *pro se* rights to non-attorney representatives of corporations, no Texas cases were cited in the opinion. No mention was made of *Ex parte Shaffer* nor *Huie v. DeShazo*. Further, much to the dismay of the dissenting Chief Justice, no mention was made of the Texas independent estate administration system or the rights of independent executors.[194]

Instead of considering Texas law, the opinion cites a jumble of out-of-state cases, including lower state appellate cases and federal circuit cases rather than authoritative statements from the respective state supreme courts.[195] The Waco court did cite the supreme courts of Alabama, Maine and South Carolina, which each had concluded the estate is a legal entity.[196] Being persuaded by this reasoning, the Waco court failed to cite the Texas law to the contrary.[197] It did cite the Wisconsin supreme court case that adopted the Minnesota rule and the recent Arkansas case that re-affirmed the Minnesota rule in Texas – but it failed to consider the distinction between the two (*i.e.*, that the Wisconsin rationale presumed legal complexities).[198] It also failed to cite any opposing authorities (such as the Ohio supreme court) or Texas-specific considerations (such as the peculiarities of the Texas independent administration system).

The Chief Justice addressed many of these shortcomings. He reminded the majority that the independent executor has the management rights that belonged to the decedent.[199] He criticized the majority for deciding an issue without any briefing, and for its misplaced discussion of and reliance on out-of-state authority, which, he pointed out, the court failed to acknowledge is divided. [200] The Chief Justice's primary concern was the

[194] Steele, 930-931.

[195] For example, rather than considering the case law issued by the Minnesota, Kentucky, Florida, and Ohio supreme courts discussed above, the court cited lower court rulings from Illinois and Nebraska, as well as cases from the 6th, 8th, and 11th federal circuits without acknowledging that only the supreme court of a state speaks authoritatively as to its law. With no shortage of state supreme court cases, this is a curious string of citations. Steele, 928.

[196] Steele, 928.

[197] Dueitt v. Dueitt, 802 S.W.2d 859 (Tex.App.—Houston [1st Dist.] 1991, no writ); Henson v. Estate of Crow, 734 S.W.2d 648 (Tex. 1987); Price v. Estate of Anderson, 522 S.W.2d 690 (Tex. 1975); *see also* JUDGE ADELE HEDGES & LYNNE LIBERATO, TEXAS PRACTICE GUIDE: CIVIL APPEALS §5:38 (2006); 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544 (2006).

[198] Steele, 928.

[199] Steele, 930-931.

[200] Steele, 930-931.

majority's failure to consider the peculiarities and value of the independent administration system and how their expansive holding would mean nothing could be done in any probate judicial proceeding without an attorney. [201] With considerable justification, as explained above, the Chief Justice concluded his dissent:

This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel.[202]

F. Conclusion

Under Texas law, the executor is representing his or her own rights when he or she (or his or her attorney) appears in probate court. Because under *Huie v. DeShazo*, an attorney could appear in court on behalf of the executor's exclusive right to manage the estate, the executor has the right to appear *pro se* in court with respect to those same rights. *Ex parte Shaffer* must be interpreted as the Texas Supreme Court specifically guaranteeing this right. The Minnesota rule has never been adopted in Texas and is inconsistent with both *Huie v. DeShazo* and *Ex parte Shaffer*. Independently of these Texas Supreme Court cases, the Minnesota rule should be rejected because it obliterates the distinction between vesting management rights in executors and beneficial interests in beneficiaries. It also disregards the role of fiduciary duties in regulating the executor-beneficiary relationship. Adopting the Minnesota rule in Texas would raise professional responsibility issues for Texas attorneys involved in estate administration, such as forcing them into hyper-vigilant supervision of their executor-clients to ensure their clients were not inadvertently practicing law outside of the courtroom. More importantly, the adoption of the Minnesota rule's reasoning that it is the beneficiaries' interests that are the subject of legal representation would contradict the reasoning in *Huie v. DeShazo* that the executor's attorney owes no duties to the beneficiaries.

IV. IMPLICATIONS OF *PRO SE* RIGHTS

Having demonstrated that executors have *pro se* rights in Texas, it is

[201] Steele, 930-931.

[202] Steele, 931.

timely to consider the implications. The chief implication for the probate court system is how best to accommodate *pro se* executors. Attorneys need to be aware of the professional responsibility implications that denying *pro se* rights to executors would have, as discussed above, but should also discuss with their clients their desires regarding permitting, prohibiting, or regulating their chosen executors' *pro se* activities. For executors, the question becomes not whether or not they can proceed *pro se* but under what, if any, circumstances they ought to.

A. Probate Court System Reforms

With some limited exceptions, the general rule is that a *pro se* litigant is held to the same courtroom procedures and standards as an attorney.[203] Thus, there is no legal mandate of special accommodations. However, the judicial trend is towards providing special accommodations in a way calculated to balance both access to justice and judicial efficiency.[204]

Any accommodation of *pro se* executors must reflect the obvious fact: non-lawyers are unlikely to know as much about the law as lawyers. With respect to executors appearing *pro se*, one concern is that the interests of the beneficiaries will not be well served because the executor does not know what to do when. The other concern is that executors not knowing what to do when increases the work load of judges and court staff and decreases the efficiency of the probate system.

Considering how best to respond to the concerns for beneficiaries' interests and judicial efficiency when executors proceed *pro se* requires an understanding of how other jurisdictions accommodate *pro se* petitioners and the uniqueness of the Texas probate court systems.

1. National Experience

The problems of *pro se* representation are well studied, and many different courts are experimenting with solutions. *Pro se* representation is on the rise both at the federal and state levels, with more than 1/3 of the cases filed in federal district court being *pro se*.[205] There is abundant

[203] In a civil proceeding in which plaintiff determined to proceed pro se, no allowance would be made for the fact that plaintiff was not a lawyer. *See, e.g.*, Bailey v. Rogers, 631 S.W.2d 784 (Tex. App.—Austin 1982). (litigants who represent themselves must comply with applicable procedural rules). But *see, e.g.*, Bradlow, *supra* note 84; Holt, *supra* note 84.

[204] *Id.*

[205] Buxton, *supra* note 80, at 112.

scholarly and professional literature on *pro se* representation, including correlating the increase in *pro se* cases with a financial inability to hire counsel.[206] Almost every state participated in a recent national conference on making the judicial system more accessible to *pro se* litigants,[207] and 45% of all jurisdictions have established some sort of *pro se* assistance program or service to increase the ability of *pro se* litigants to participate effectively in the judicial system and, thereby, increase both the effectiveness and the efficiency of the judicial system as a whole.[208] These programs range from providing basic information and forms to providing on-site, *pro bono* legal counsel.

2. Unique Texas Probate Court Considerations

Accommodating *pro se* executors requires acknowledging the uniqueness of the simplified executor-centered independent administration provisions Texas probate.[209] It is relatively informal and easy to use. The purpose of the probate proceedings is simply to publicize basic information about the decedent, the decedent's will, and the property the decedent owned.[210] As mentioned above, the court proceeding to probate a will in Texas requires only about four pages of simple documents and five minutes of time with the judge.[211] These provide basic information and do not require articulating legal doctrines or theories.

Additionally, we have to remember that the probate court's work is not optional. Because of death's universality, the probate court's jurisdiction is also universal. It affects Texans of the lowest and highest economic situations. In this context, given that the national rise in *pro se* appearances has been correlated with the financial inability to retain an attorney,[212] the dominant concern should be to ensure that estates of insufficient value to secure legal services are able to secure legal access.

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[206] *See, e.g.*, Lois Bloom & Helen Hershkoff *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 17 NOTRE DAME. J.L. ETHICS & PUB. POL'Y 475 (2002); Bradlow, *supra* note 84; Holt, *supra* note 84; Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Cetiorari*, 63 ALB. L. REV. 381 (1999); Buxton, *supra* note 80, at 103.

[207] Buxton, *supra* note 80, at 118.

[208] *Id.*

[209] *See supra* pp. 4-8.

[210] *Id.*

[211] *Id.*

[212] Buxton, *supra* note 80, at 106.

3. Potential Court Responses

Bearing in mind the uniqueness of the Texas probate system, several reforms and experiments in other jurisdictions might be useful to increasing the effectiveness of *pro se* executors and judicial efficiency without decreasing the financial efficiency of the courts.

a. Education and Orientation

The most basic accommodation for *pro se* executors would be for the court to provide generic information through a web site or otherwise, including explanations of laws and court procedures, as well as form pleadings.[213] Another simple accommodation that is used in some courts is to provide video recorded programs providing the basic information, while other courts sponsor courses for *pro se* litigants in which lawyers, paralegals, or court staff provide orientation to the court system and basic instructions.[214]

b. Assistance

A more involved level of accommodation for *pro se* executors would be to provide assistance in completing specific forms or addressing specific issues. This level of accommodation might range from the use of a document examiner to review documents to ensure they comply with basic requirements to the use of a staff attorney to serve as a "facilitator" to provide more specific information on procedure and assistance in preparation of court documents.[215] In some states, lawyers providing pro bono representation or law students enrolled in law clinics are also used to provide this level of assistance in some courts.[216]

c. Covering Expenses

A fee charged to *pro se* executors should cover the courts' costs for such programs and, perhaps, even offset other court expenses.

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[213] *Id.* at 112.

[214] *Id.* at 123.

[215] *Id.* at 121.

[216] *Id.* at 123.

4. Coordinated Legislative Response

While the probate courts could undertake these reforms on their own, the legislature could play a substantial role in ensuring the willingness of judges, court staff, and lawyers to be involved in these reforms. The legislature should statutorily limit causes of actions against lawyers or others that might arise from providing assistance to *pro se* representatives.

B Advising the Testator and Drafting the Will

Because the testator's intention is the guide in estate administration, the will should reflect the testator's intention with respect to *pro se* estate administration. The risks of *pro se* administration—that is, the executor's exposure to fiduciary litigation and the beneficiaries' exposure to losing property due to the executor's mistakes—as well as the potential cost savings of it should be discussed with the testator. The testator should be left with the final word.

1. Prohibiting Proceeding *Pro Se*

The will could prohibit *pro se* representation by conditioning the executor's appointment on his waiving any right to proceed *pro se*. Since the "practice of law" is not limited to courtroom appearances (which can be easily prohibited), the complication in drafting would be to define the prohibition in a way that would not impair the out-of-court activities an executor might be qualified to do without legal assistance but that might arguably fall within the definition of the "practice of law." For example, would preparing forms to make an insurance claim on estate property be the practice of law when the benefit of the insurance would be for the beneficiaries? While conceptually identical to prohibiting *pro se* representation, requiring the executor to hire an attorney for representing the executor in court would avoid the hard task of defining what exactly the executor could and could not do.

2. Providing Flexibility

The testator may prefer to provide flexibility to the executor. For example, if the testator's child is sophisticated and the testator's estate is relatively simple, the testator might wish to appoint the child as executor and allow her to make the decision at the time. If the testator is not adverse to the executor proceeding *pro se*, he might consider explicit provisions

addressing the situation. For example, perhaps he would like to prohibit the beneficiaries from suing unless the executor was grossly negligent in deciding to proceed *pro se*, or perhaps he would permit the executor to proceed *pro se* only if she posted a bond. Perhaps the most practical provision would be to allow the executor to proceed *pro se* only with the beneficiaries' consent.

C. Should Executors Appear Pro Se?

While it is clear that executors have the legal right in Texas to proceed *pro se*, it is unclear when, if ever, they should. Executors choosing to go without legal counsel run the risk of being sued for breaching duties to the beneficiaries. An inherent disadvantage to defendants of such suits is that the plaintiffs have the benefit of hindsight, which is denied at the time the balancing of risks and benefits must be made. Complicating any sort of risk-benefit calculus by the executor is that the executor never knows what he or she does not know. The executor lacks the information, strategies, and experience of a good lawyer, which means the executor is quite unlikely to discern the real dangers of proceeding *pro se*. The real danger is not that an application for probate will have to be amended to include some overlooked information, but that the executor might, for example, misinterpret a clause in the will in a way that benefits one beneficiary at the expense of another. The most serious estate administration risks for executors are not mistakes in the probate courtroom but mistakes with beneficiaries, creditors, and third parties.

1. Fiduciary Duties and Infallible Hindsight

An executor is charged with duties of good faith, fidelity, loyalty, fairness, and prudence.[217] Presumably a *pro se* executor can act in good faith and with fidelity, loyalty, and fairness towards the beneficiaries.[218] The key question is whether or not an executor would ever be acting prudently by proceeding *pro se*.[219] If the executor cannot establish that his

[217] Humane Soc. of Austin & Travis County v Austin Nat'l Bank, (1975, Tex) 531 S.W.2d 574 (Tex. 1975), *cert denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, (1993, Tex App Dallas) 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied); Ertel v O'Brien,852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

[218] Herschbach v. City of Corpus Christi, 883 S.W.2d 720 (Tex. App.—Corpus Christi 1994, writ denied).

[219] TEX. PROB. CODE ANN.. § 230(a) (Vernon 2003); 18 WOODWARD, *supra* note 28, § 693;

or her decision to proceed *pro se* evidenced the prudence an ordinarily capable and careful person would have used in making the decision, he or she can be sued for breaching a duty to the beneficiaries. Such a suit would only be brought if there had been damage to the beneficiaries' interest, so it follows that the executor would only be called to prove the prudence of proceeding *pro se* in the event of some significant problem with the estate's property or beneficiaries. Inevitably, as fiduciaries often discover only after such a claim is brought, the plaintiffs have the benefit of hindsight in second-guessing the executor's decisions. If the executor proceeds *pro se* without a hitch, no one will care. But if any problems arise during the estate administration, the executor has taken the risk that the beneficiaries will sue claiming he or she is responsible on the theory that the problem would have been avoided had the executor been sufficiently prudent to hire legal counsel. Hiring counsel insures against this claim.

2. The Real Work of Estate Lawyers and the Real Risk of *Pro Se* Executors

Appearing in court to probate a will is a necessary but obviously insufficient part of estate administration. The most substantial work of estate administration and the most substantial role of estate lawyers occur outside of the brief probate hearing. Estate lawyers use their practical experience in helping the executor locate and value assets, which may involve choosing between competing appraisals or determining if the executor has an ownership interest in assets the testator may not even realized were owned, such as legal claims.[220] Estate lawyers guide executors through income tax, estate tax, gift tax, generation-skipping transfer tax, and property tax issues. Estate lawyers prepare deeds or other assignments to the beneficiaries, as well as settlement agreements that memorialize the distributions from the estate and the beneficiaries' acquiescence in their propriety. Estate lawyers advise the executor in dealing with creditors' claims. Perhaps most importantly, estate lawyers provide both legal and practical guidance when one or more beneficiaries appear likely to become cross-wise with one another or the executor. The

Int'l First Bank Dallas, N.A. v. Risser, 739 S.W.2d 882 (Tex. App.—Texarkana 1987) (disapproved of on other grounds by, Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002)).

[220] For example, the testator may have a malpractice claim against his or her estate planning attorney. *See, e.g.*, Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006).

five or so minutes of the routine probate hearing very quickly becomes a distant memory in the estate's administration.

There is a continuum of technical and practical difficulty between the uncontested probate of a will destined for independent administration and a multi-year contested estate litigation. Whether or not a prudent person would proceed *pro se* in estate administration depends upon the person's estimation of where on that continuum the estate's administration will be. While even the most experienced lawyers may misjudge the complications of a particular estate's administration, the *pro se* executor's judgment is presumably going to be made without the benefit of much experience. This lack of experience is likely to miss any number of potential complications a competent lawyer would spot.

a. Complications with Uncontested Probate

The application for the uncontested probate of a will is a simple and relatively informal court proceeding only so long as the original will is offered and was duly executed. A *pro se* executor might not make much of the fact that there is only a photocopy of the will[221] or that one of the witnesses signed the self-proving affidavit attached to the will but not the will itself.[222] The executor may also miss that there is no self-providing affidavit attached to the will.[223] Any of these deviations might require significant additional work to have the will probated; though, to the untrained eye, none of them are likely to seem significant at all. And these are all complications that can arise in uncontested hearings with all of the beneficiaries' supporting both the executor and the will. Yet, their consent and support is legally insufficient to overcome the deficiencies.

b. The Unavoidable Risk of Contest

The contest of a will is very unlike the simple uncontested proceeding requiring knowledge of procedure and strategy in addition to substantive legal information. The risk of the *pro se* executor being defeated on procedural rather than substantive grounds is substantial.[224] However,

[221] *See* WOODWARD, *supra* note 7, § 284.

[222] *See* §59; Boren v. Boren, 402 S.W.2d 728 (Tex. 1996).

[223] *See* §59.

[224] *See, e.g.*, Bloom & Hershkoff, *supra* note 184; Bradlow, *supra* note 84; Holt, *supra* note 84; Smith, *supra* note 184.

unlike most *pro se* litigants whose defeat is consequential only to them, the estate's beneficiaries stand to lose. This is a loss the beneficiaries may seek to recover from the executor. Unfortunately for the *pro se* executor, there is never certainty that a probate hearing initially scheduled for the uncontested docket will remain so.

c. Interpreting the Will

One of the most common legal services lawyers provide during an estate administration is explaining the will's meaning to the executor so that the executor can follow its terms. Although a *pro se* executor might mistake clear wording for clear meaning in a will, an estate lawyer knows better. Is a distribution to be *per stirpes* or *per capita*?[225] Is an individual adopted as an adult a "child?"[226] Is a step-child?[227] What if the testator was divorced from his wife but never changed his will—does she still benefit?[228] How are taxes and expenses to be charged among the beneficiaries' shares?[229] Do non-probate assets bear any of these?[230] The answer to each of these questions will shift benefits and burdens among the beneficiaries, and the answer may not be as clear to the executor as the words of the will. The duty to be fair to the beneficiaries is one the *pro se* executor can risk transgressing when he interprets the will without a lawyer even if the interpretation is in good faith and reasonable.

d. Estate Assets

The job of the executor is to collect the testator's assets and to distribute the assets to the beneficiaries. Like most jobs, it is easier said than done. The ease of this task depends in part on how well organized the testator was, but even the most organized testator's assets might not be so easily collected and distributed. The testator may have legal claims he never considered pursuing, such as claims against beneficiaries for unpaid debts owed. May, must or should the executor pursue such a claim? [231] The

[225] *See* §43.

[226] *See* Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687 (Tex. 1984).

[227] *See* Guilliams v. Koonsman, 279 S.W.2d 579, 583 (Tex. 1955).

[228] *See* §69.

[229] *See* §§ 322A, 322B.

[230] *Id.*

[231] *See, e.g.*, Russell v. Adams, 299 S.W. 889, 894 (Tex. Comm'n App. 1927); Oxsheer v. Nave 40 S.W. 7 (Tex. 1897).

testator's assets are likely to have changed between the date of the will and the date of death. What if assets specifically bequeathed to a beneficiary cannot be found or were sold and replaced with other assets?[232] None of these issues are likely to become evident until after the probating of the will, yet these types of issues are common complications to an executor's attempt to locate and distribute the testator's assets.

e. Summary

It is impossible to catalog the potential complications of an estate administration, even one that seems simple on first review. Even an experienced estate lawyer never knows what all he or she does not know when considering whether or not to take on advising an executor with respect to an estate administration. As a practical matter, a *pro se* executor bears the risk personally when he or she estimates where upon the continuum of ease and trouble the estate's administration will be; disgruntled beneficiaries will be armed with both the rights of those owed the highest duties and the certainty of hindsight as to how problematic the administration became.

D. Conclusion

Executors have the right to proceed *pro se* to probate a will and otherwise administer the estate. However, given the inherent uncertainties of estate administration and the executor's fiduciary duties to the beneficiaries, it is likely unwise for most executors to do so. Nevertheless, the probate courts should consider how best to accommodate *pro se* executors in a way that maximizes judicial access without decreasing judicial efficiency. Since, by definition, Texas attorneys will not be advising *pro se* executors, we should consider advising our testator clients as to the risks and potential benefits of *pro se* probate and ensuring that the testator's balancing of those risks and benefits is reflected in the will governing the executor.

[232] *See, e.g.*, Shriner's Hospital etc. v. Stahl, 610 S.W.2d 147, 150 (Tex. 1980).

Exhibit D

649 S.W.2d 300
Supreme Court of Texas.

Ex parte Craig SHAFFER.

No. C–2019.
|
April 20, 1983.

Synopsis
Relator, who was named defendant in a breach of fiduciary duty suit, brought habeas corpus proceeding seeking to be discharged from an order of Probate Court, No. 3, Dallas County, committing him to jail for contempt. The Supreme Court, Robertson, J., held that trial court's order which directed defendant to file a cost bond to indemnify plaintiff for costs of delaying trial and to retain an attorney to represent him in suit, and which provided that a failure to comply would result in an order of contempt was void, since one who involuntarily comes into court and does not seek affirmative relief cannot be required to post a cost bond, and ordering a party to be represented by attorney abridges that person's right to be heard by himself.

Relator discharged.

West Headnotes (3)

[1] **Costs** Nature and grounds of right in general

One who involuntarily comes into court and does not seek any affirmative relief cannot be required to post a cost bond. Vernon's Ann.Texas Rules Civ.Proc., Rules 143, 147.

2 Cases that cite this headnote

[2] **Attorneys and Legal Services** Pro Se Litigants; Self-Representation

Ordering a party to be represented by an attorney abridges that person's right to be heard by himself. Vernon's Ann.Texas Rules Civ.Proc., Rule 7.

12 Cases that cite this headnote

[3] **Attorneys and Legal Services** Pro Se Litigants; Self-Representation

Costs Nature and grounds of right in general

Trial court's order which directed defendant to file a cost bond to indemnify plaintiff for costs of delaying trial and to retain an attorney to represent him in suit, and which provided that a failure to comply would result in an order of contempt was void, since one who involuntarily comes into court and does not seek affirmative relief cannot be required to post a cost bond, and ordering a party to be represented by attorney abridges that person's right to be heard by himself. Vernon's Ann.Texas Rules Civ.Proc., Rules 7, 143, 147.

67 Cases that cite this headnote

Attorneys and Law Firms

***301** Dwaine Boydstun, Dallas, for relator.

John Exline, Dallas, for respondent.

Opinion

ROBERTSON, Justice.

In this original habeas corpus proceeding, the relator, Craig Shaffer, seeks to be discharged from an order of Probate Court No. 3, Dallas County, committing him to jail for contempt for failure to comply with an order of that court requiring him to post a cost bond and hire an attorney. We order relator released.

While serving as Independent Executor for the estate of Horace Yates, Shaffer was sued by the widow, Cleta Yates, for alleged breach of his fiduciary duty in that capacity. The case was set for trial and continued four times at Shaffer's request. On March 16, 1983, Shaffer appeared and once again moved for a continuance on the grounds that his attorney had been allowed to withdraw three days before trial and he had not yet been able to retain a new attorney. Two days later, Judge Ashmore ordered Shaffer (1) to file with the court a $10,000 cost bond to indemnify Cleta Yates for the costs of delaying trial; (2) to report to the court his status in retaining an attorney; and (3) to retain an attorney to represent him in

the suit. If these orders were not complied with by March 23, Shaffer would be in contempt and subject to imprisonment.

On March 25, without a formal motion for contempt, notice to Shaffer or a show cause hearing, the court adjudged him in contempt and ordered Shaffer placed in the county jail "until he purges himself of this contempt...." The court later issued findings of fact and conclusions of law in support of the contempt order including statements that: (1) a hearing was held without Shaffer being present; (2) that Shaffer had wholly failed to comply with the court's order and that such violation was intentionally designed to delay the trial; and (3) that no motion for contempt, notice, show cause order or other citation or process was required because this was a case of direct contempt.

[1] **[2]** **[3]** The issue here is whether the trial court's March 18 order exceeds its statutory authority and is therefore void, inasmuch as one may not be held guilty of contempt for ***302** refusing to obey a void order. *Ex parte Lillard,* 159 Tex. 18, 314 S.W.2d 800 (Tex.1958); *Ex parte Henry,* 147 Tex. 315, 215 S.W.2d 588 (Tex.1949). Counsel cites no authority, and indeed we can find none, which allows a court to require a bond of a defendant or to require any party to retain an attorney. Rather, in Texas the law is clear that one who involuntarily comes into court and does not seek any affirmative relief cannot be required to post a cost bond. Tex.R.Civ.P. 143, 147. Additionally, ordering a party to be represented by an attorney abridges that person's right to be heard by himself. Tex.R.Civ.P. 7. If Shaffer's lack of an attorney was being used to unnecessarily delay trial or was abusing the continuance privilege, the proper action would have been to order him to proceed to trial as set, with or without representation. Accordingly, we hold that the March 18 order is void.

The relator is discharged.

All Citations

649 S.W.2d 300

202 S.W.3d 926 (Tex.App.—Waco 2006)

Gene C. STEELE, et al., Appellants,

v.

John B. McDONALD, et al., Appellees.

No. 10-05-00266-CV.

Court of Appeals of Texas, Tenth District, Waco.

October 18, 2006

From the 77th District Court Limestone County, Texas Trial Court No. 22179-A

Brice B. Beale, The Beale Law Firm, Houston, for appellants.

James V. Fulcher, Attorney At Law, Teague, Jon Miller, Rodgers, Miller & McLain, Bryan, Clay R. Vilt, Attorney At Law, Gus G. Tamborello, Attorney At Law, W. Robert Brown, Attorney At Law, Houston, Richard L. Tate, Attorney At Law, Richmond, James C. Boone, Attorney At Law, Palestine, for appellees.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.

ORDER

PER CURIAM.

There are four appellants in this case: Gene C. Steele as an individual, Gene C. Steele as Independent Executor of the Estate of William B. Duke, Sally Steele (Gene's wife), and Tom F. Simmons. When the appeal was perfected, all four were represented by Brice B. Beale. However, Gene has now discharged Beale, but it is unclear whether Sally or Tom has and whether Gene has in his capacity as Independent Executor of the Duke Estate. Because of the current uncertainty regarding Beale's status, we will order Beale to either (1) file a written response indicating tat he continues to represent some or all of the appellants, a notice of non-representation, or a motion to withdraw; or (2) appear in this Court and show cause why his representation of any of the appellants should continue.

The Clerk of this Court advised Beale by letter dated July 11, 2006 that the appellants' brief he filed on June 12, 2006 is deficient. The letter notified Beale that an amended brief correcting the deficiencies identified must be filed within twenty-one days or the brief would be struck. To date, Beale has not filed an amended brief or otherwise responded to the Clerk's notice. Accordingly, the brief Beale filed on June 12, 2006 is struck. *See* Tex.R.App. P. 9.4(i).

Representation of Individuals

Gene notified the Clerk of this Court by letter dated August 16 that "Brice B. Beale, attorney of record for the appellants, has been released as counsel."

"A client can discharge an attorney at any time, with or without cause." *In re Users Sys. Servs., Inc.,* 22 S.W.3d 331, 335 (Tex.1999) (orig.proceeding); *accord* Tex.

Disciplinary R. Prof'l Conduct 1.15(a)(3) & cmt. 4, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9). A formal motion to withdraw is not required

to effectuate the client's intentions in this regard. *See Users Sys. Servs.,* 22 S.W.3d at 335-36.

According to Gene at least, the appealing parties have terminated Beale's representation. Gene states that he will be representing himself. He provides his name and address as "Appellants Pro-SE contact information." However, because Gene is not licensed to practice law, he is prohibited from representing his co-appellants. *See* Tex. Gov't Code Ann. § 81.102 (Vernon 2005); *Jimison v. Mann,* 957 S.W.2d 860, 861-62 (Tex.App.-Amarillo 1997, order) (per curiam). Therefore, Sally and Tom either continue to be represented by Beale, which appears unlikely in light of Gene's letter, or they are not currently represented in this matter.[1]

Representation of the Independent Executor

It is not at all clear whether Gene may appear *pro se* as an independent executor. Rule of Civil Procedure 7 states, "Any party to a suit may appear and prosecute or defend *his rights* therein, either in person or by an attorney of the court." Tex.R. Civ. P. 7 (emphasis added). A plain reading of Rule 7 suggests that Gene may not appear *pro se* as Independent Executor of the Duke Estate because in this role he is litigating rights in a representative capacity rather than on his own behalf.

Our research has not disclosed a Texas case involving the representative of a decedent's estate prosecuting a suit in behalf of the estate *pro se.* [2]

Courts in other jurisdictions which have addressed this issue have virtually all concluded that the representative of an estate may not appear *pro se* in behalf of the estate. *See Godwin v. State ex rel. McKnight,* 784 So.2d 1014, 1015 (Ala.2000); *Davenport v. Lee,* 348 Ark. 148, 72 S.W.3d 85, 90-91 (2002); *Ratcliffe v. Apantaku,* 318 Ill.App.3d 621, 252 Ill.Dec. 305, 742 N.E.2d 843, 847 (2000); *State v. Simanonok,* 539 A.2d 211, 212-13 (Me.1988) (per curiam); *Waite v. Carpenter,* 1 Neb.App. 321, 496 N.W.2d 1, 3-4 (1992); *Kasharian v. Wilentz,* 93 N.J.Super. 479, 226 A.2d 437, 438-39 (1967) (per curiam); *Brown v. Coe,* 365 S.C. 137, 616 S.E.2d 705, 708 (2005); *State ex rel. Baker v. County Ct. of Rock County,* 29 Wis.2d 1, 138 N.W.2d 162, 166 (1965); *see also Jones v. Correctional Med. Servs., Inc.,* 401 F.3d 950, 951-52 (8th Cir.2005) (representative of estate may not proceed *pro se* if estate has other beneficiaries or creditors); *Shepherd v. Wellman,* 313 F.3d 963, 970-71 (6th Cir. 2002) (same); *Iannaccone v. Law,* 142 F.3d 553, 559 (2d Cir.1998) (same); *contra Reshard v. Britt,* 819 F.2d 1573, 1582-83 (11th Cir.1987), *vacated en banc by an equally divided court,* 839 F.2d 1499 (11th Cir. 1988) (per curiam).

Consistent with these authorities, we hold that Gene may not prosecute this appeal *pro se* in his capacity as Independent Executor of the Duke Estate. Thus, Gene as Independent Executor is either

represented by Beale or not currently represented in this matter.

Determination of Representation

Beale is the person best situated to resolve the ambiguity regarding the current representation of Sally and Tom as individuals and of Gene as Independent Executor.

Accordingly, we ORDER Brice B. Beale to file, within fifteen (15) days after the date of this Order, either (i) a written response indicating that he continues to represent some or all of the appellants, (ii) a non-representation notice under Rule of Appellate Procedure Rule 6.4, or (iii) a

motion to withdraw under Rule of Appellate Procedure 6.5. If none of these documents is timely filed, Brice B. Beale must appear on November 15, 2006, at 9:00 a.m., when this Court is in session at the Tenth Court of Appeals, McLennan County Courthouse, 501 Washington, Room 404, Waco, Texas, to show cause why his representation of some or all of the appellants should continue.

FAILURE OF BRICE B. BEALE TO COMPLY WITH THIS ORDER MAY RESULT IN THE ISSUANCE OF A JUDGMENT OF CONTEMPT.

The Court orders that this Order be personally served on Brice B. Beale by overnight delivery via a commercial delivery service within the meaning of Rule of Appellate Procedure 9.5(b).

Appellant's Brief

Gene filed a *pro se* brief on July 27 which purports to have been filed on behalf of Sally and Tom as individuals and on behalf of himself as Independent Executor. However, Gene is prohibited by law from filing a brief on behalf of the other appealing parties.[3] *See* Tex. Gov' t Code Ann. § 81.102; *Jimison,* 957 S.W.2d at 861-62. Thus, no appellant's brief is currently on file for Sally, Tom, or Gene as Independent Executor.

Gene's brief also suffers from one of the same deficiencies as the brief filed by Beale—the omission of an appendix with the "necessary contents" prescribed by Rule of Appellate Procedure 38.1(j)(1).[4]*See* Tex.R.App. P. 38.1(j)(1). Therefore, Gene is hereby notified that, if he fails to file the original and five copies of an appendix containing the "necessary contents" within twenty-one (21) days after the date of this Order, his *pro se* brief will be struck, and the appeal will proceed as if no appellant's brief had been filed on Gene's

behalf. *Id.* 9.3(a)(1)(C), 9.4(i), 38.8(a), 38.9(a).

With regard to an appellant's brief to be filed on behalf of Sally and/or Tom as individuals and Gene as Independent Executor, no brief will be required until it is determined which of them is represented by counsel and which are appearing *pro se.* [5]

Appellees' Brief

Appellees filed a brief in response to Gene's brief on August 30. They have also filed a motion to dismiss the appeal, in which they request damages under Rule of Appellate Procedure 45 based on their contention that this is a frivolous appeal. However, this motion will not be considered until the issues surrounding Appellants' representation are resolved. Appellees will be permitted to file a supplemental or amended brief as necessary.

IT IS SO ORDERED.

Chief Justice GRAY dissenting.

TOM GRAY, Chief Justice, Memorandum dissenting opinion to Order.

An independent executor can do anything the decedent could do if he was still alive, unless there is some limitation upon the independent executor's powers at the time of the appointment.[1] *See generally cases cited in Kanz v. Hood,* 17 S.W.3d 311, 316-317 (Tex.App.-Waco 2000, pet. denied) (Gray, C.J., dissenting). I would include in that expansive statement of authorized acts the ability to appear on behalf of the estate and act as the decedent could with regard to being the

litigant in a judicial proceeding. Today's holding to the contrary by the majority causes me grave concern for truly cost effective independent administration of estates in Texas. For this reason and as explained below, I dissent.

Texas has long been recognized for the truly effective independent administration of a decedent's estate. Probate planning in other states frequently involves setting up trusts during the life of the decedent to own and control assets and, more importantly, keep them from becoming part of the decedent's estate subject to the administration of the probate court at the time of the decedent's death. That type planning, and its attendant costs, is avoided in Texas by our very effective and efficient administration of estates using truly independent administrators, though it may be used in Texas for other purposes. All over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved. I do not see how that can continue under the holding of the majority that although Gene had appeared as his own attorney, representing himself individually and as independent executor of Duke's Estate, "Gene, as independent executor, is either represented by Beale [an attorney] or not currently represented in this matter." Maj. Op. pgs. 928-929.

I find no help or support for this holding in the citation of out of state authorities on this issue. And I note that even that authority is divided. But unless those states provide for Texas style independent administration, and the person attempting to represent the estate in those cases was appointed as the independent executor of

the estate, and also unless the powers of the independent administrator in those states are as broad as the powers of an independent administrator in Texas, the discussion of out of state authority is suspect and the reliance on that authority is misplaced.

As I previously stated, I would already have stricken the brief filed by attorney Beale for failure to comply with the rules. *See Steele v. McDonald,* 195 S.W.3d 349, 350 (Tex.App.-Waco 2006, order) (Gray, C.J., concurring to letter order).[2] Likewise, I would now strike the brief tendered by Gene Steele for the same reason, noncompliance with the rules. I would then notify all four appellants that they have one final opportunity to file a compliant brief or their appeal will be dismissed for want of prosecution due to the failure to file a brief that complies with the rules.

Finally, to placate the concern of the majority, we could specifically notify Gene Steele in his capacity as independent executor that there may be an issue of whether, as independent executor, he can appear as the personal representative of an estate in litigation involving the estate. For certain, I would not decide this issue without briefing as the majority has done. The expansive holding of the majority means that nothing can be done by a personal representative in any judicial proceeding other than via an attorney. This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel.

I join no part of the majority's order.

Notes:

[1] Tom has co-signed with Gene the "Appellants' Rebuttal to Brief of Appellee Floyd Duke, Jr." and another pleading. His actions in this regard provide further indication that he has terminated Beale's representation and is representing himself. Tom identifies himself as "Thomas E. Simmons" in these pleadings. However, he was identified in the notice of appeal as "Tom F. Simmons." We will continue to use the name used in the notice of appeal, unless Tom establishes that it is a misnomer.

[2] Texas courts have consistently held that a non-attorney may not appear *pro se* in behalf of a corporation. *See, e.g., Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA,* 937 S.W.2d 455, 456 (Tex. 1996) (per curiam).

[3] Although Gene cannot engage in the unauthorized practice of law by filing a brief on behalf of his co-appellants, the appellate rules do permit parties to adopt by reference a brief filed by another party. *See* Tex. R. App. P. 9.7. However, neither Sally nor Tom has done so. Because Gene as Independent Executor cannot prosecute this appeal *pro se,* he likewise cannot, as Independent Executor, adopt by reference the *pro se* brief he filed in his own behalf. Tom's co-signature on the "rebuttal" brief does not adopt by reference Gene's *pro se* brief.

[4] Rule 38.1(j)(1) provides:

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

(A) the trial court's judgment or other appealable order from which relief is sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and

(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

Tex. R. App. P. 38.1(j)(1). Local Rule 13 further provides, "Every 'necessary' and 'optional' appendix must have an index and each appended document must be preceded by a numbered or lettered tab." 10th Tex. App. (Waco) Loc. R. 13.

[5] Because of the uncertainty regarding who currently represents Sally, Tom, and Gene as Independent Executor, they will each be served with a copy of this Order, as will counsel for Appellees.

[1] None of the parties have briefed this issue so we have not been provided with the documentation or discussion of case authorities that would help us resolve the scope of Gene Steele's appointment.

[2] Though, based on subsequent events, I now question the majority's resolve to apply the rules consistently to all litigants, I would at least be consistent for this proceeding.

Analysis
As of: May 14, 2012

IN RE: JAMES CRAIG GUETERSLOH, INDIVIDUALLY AND JAMES CRAIG GUETERSLOH, TRUSTEE OF THE 1984 GUETERSLOH TRUST

NO. 07-10-0375-CV

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO

326 S.W.3d 737*; *2010 Tex. App. LEXIS 8730

November 1, 2010, Decided

SUBSEQUENT HISTORY: Rehearing overruled by *In re Guetersloh, 2010 Tex. App. LEXIS 9731 (Tex. App. Amarillo, Nov. 23, 2010)*

CASE SUMMARY:

PROCEDURAL POSTURE: Relator trustee filed a petition for writ of mandamus seeking to require respondent, the judge of the 121st District Court, Terry County (Texas), to set an oral hearing on his pending motion to transfer venue and to allow him to appear pro se to defend a suit filed by real party in interest beneficiaries seeking termination of the trust, distribution of trust property, and an accounting of all income and distributions from the trust.

OVERVIEW: The beneficiaries' petition named the trustee as a party to the suit both in his capacity as an individual beneficiary and in his capacity as a trustee. The trial court concluded that a trustee could not appear in court pro se because to do so would amount to the unauthorized practice of law. Accordingly, the trial court notified the trustee that no action would be taken on the motion to transfer venue until such time as the trustee obtained legal representation. The court held that *Tex. R. Civ. P. 7* did not authorize a non-lawyer trustee to appear pro se, in the capacity of trustee of a trust, because in that role the trustee was appearing in a representative capacity on behalf of the trust's beneficiaries rather than in propria persona. An appearance of a non-attorney trustee in court on behalf of the trust to represent the interests of others amounted to the unauthorized practice of law. The trustee was likewise prohibited from appearing before the court of appeals in his capacity as a trustee. The absence of legal counsel representing the trustee in his capacity as a trustee did not, however, impair his right as an individual beneficiary to have his venue motion heard.

OUTCOME: The court struck the trustee's petition for writ of mandamus as it pertained to claims asserted in his capacity as a trustee, conditionally granted the writ of mandamus as it pertained to claims asserted in his individual capacity, and directed the trial court to schedule a hearing on his individual motion to transfer venue.

LexisNexis(R) Headnotes

Estate, Gift & Trust Law* > *Trusts* > *Trustees* > *Duties & Powers* > *Claims By & Against

[HN1] The term "trust" refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property. Accordingly, suits against a trust must be brought against the trustee.

Civil Procedure* > *Parties* > *Self-Representation* > *Right to Self-Representation
Estate, Gift & Trust Law* > *Trusts* > *Trustees* > *Duties & Powers* > *Claims By & Against

[HN2] The right of a party to self-representation is not absolute. A plain reading of *Tex. R. Civ. P. 7* does not suggest that a non-lawyer can appear pro se, in the capacity of trustee of a trust, because in that role he is appearing in a representative capacity rather than in propria persona. Because of the nature of trusts, the actions of the trustee affect the trust estate and therefore affect the interests of the beneficiaries. It follows that because a trustee acts in a representative capacity on behalf of the trust's beneficiaries, he is not afforded the personal right of self-representation.

Civil Procedure > Parties > Self-Representation > Right to Self-Representation
Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > Claims By & Against
Legal Ethics > Unauthorized Practice of Law
[HN3] The Texas Legislature has defined the practice of law to include, among other things, the preparation of pleadings or other documents incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court. Consistent with that legislative mandate, a trustee's appearance in a trial court in his capacity as trustee falls within this definition of the practice of law. Accordingly, if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN4] Mandamus is an extraordinary remedy available only in limited circumstances involving manifest and urgent necessity and not for grievances that may be addressed by other remedies. To be entitled to relief, the relator must demonstrate a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. Additionally, the relator must satisfy three requirements, to-wit: (1) a legal duty to perform; (2) a demand for performance; and (3) a refusal to act.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN5] When a motion is properly pending before a trial court, the act of considering and ruling upon it is ministerial, for purposes of determining entitlement to mandamus relief. However, the trial court has a reasonable time within which to perform that ministerial duty. Whether a reasonable period of time has lapsed is dependent on the circumstances of each case.

COUNSEL: James Craig Guetersloh, Houston, TX.

Denise Foster, Lavaca, AR.

Michael Guetersloh III, Corpus Christi, TX.

Honorable Kelly G. Moore, Judge, 121st District Court, Brownfield, TX.

M. F. Guetersloh Jr., Sandia, TX.

W. C. Bratcher, CRENSHAW DUPREE & MILAM L.L.P., Lubbock, TX.

JUDGES: [**1] PANEL A. Before CAMPBELL and HANCOCK and PIRTLE, JJ.

OPINION

[*738] ORIGINAL PROCEEDING

ON APPLICATION FOR WRIT OF MANDAMUS

OPINION

The novel issue presented by this mandamus proceeding is whether a trustee of a trust has the same right to represent himself in his representative capacity as he does in his individual capacity. We hold that he does not, strike his petition for writ of mandamus as it pertains to claims being asserted in his capacity as trustee, but conditionally grant his petition as it pertains to claims being asserted in his individual capacity.

Background

This mandamus proceeding relates to an underlying proceeding pending in the 121st District Court, Terry County, wherein the Real Parties in Interest, Michael Guetersloh, Jr., Denise Foster (formerly Denise Guetersloh Spicer), and Michael Guetersloh, III, each acting *pro se*, filed suit seeking (1) termination of the 1984 Guetersloh Trust, (2) distribution of trust property, and (3) an accounting of all income and distributions from the trust. The 1984 Guetersloh Trust is an express family trust created for the benefit of four named individuals, the three Real Parties in Interest and one of the Relators, James Craig Guetersloh. In addition [**2] to naming the Relator in his individual capacity as a [*739] party, [1] the petition named the other Relator, James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, as a party. [2]

1 A beneficiary designated by name in the instrument creating the trust is a necessary party in a suit under *Section 115.001 of the Texas Prop-*

erty Code. *Tex. Prop. Code Ann. § 115.011(b)(2)* (Vernon 2007).

2 Although the Texas Trust Code does not expressly require the joinder of the trustee as a necessary party in every suit pertaining to a trust, the trustee's presence is required in any suit requiring an accounting by the trustee. *See Tex. R. Civ. P. 39*; *Tex. Prop. Code Ann. § 115.001(a)(9)* (Vernon 2007).

On August 26, 2010, Relators, each acting *pro se*, filed an original answer, comprised of a general denial and affirmative defenses, coupled with a Motion to Transfer Venue based on provisions of the Texas Property Code. *See Tex. Prop. Code Ann. § 115.002(b)(1)* (Vernon 2007). That same day, acting *sua sponte*, the trial court found that the trustee of a trust cannot appear in court *pro se* because to do so would amount to the unauthorized practice of law. Accordingly, the trial court notified Relators that no action [**3] would be taken on their motion to transfer venue until such time as the trustee obtained legal representation. Notwithstanding the ruling of the trial court, on September 1, 2010, both Relators (with James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, still acting *pro se*) filed a motion for oral hearing concerning the motion to transfer venue. Despite being requested by Relators to do so, to date, the trial court has failed to issue a ruling on either motion. Relators now seek from this Court the issuance of a writ of mandamus ordering the trial court to set an oral hearing on Relators' pending motion to transfer venue and to allow the Relator, James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, to appear in the underlying proceeding on a *pro se* basis.

I. Trustee's Right to Self-Representation

The general rule in Texas (and elsewhere) has long been that [HN1] "the term 'trust' refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee with respect to the trust property." *Huie v. DeShazo, 922 S.W.2d 920, 926 (Tex. 1996)* (emphasis in original). Accordingly, suits against a trust must be brought against the trustee. *See Werner v. Colwell, 909 S.W.2d 866, 870 (Tex. 1995)*; [**4] *Smith v. Wayman, 148 Tex. 318, 224 S.W.2d 211, 218 (Tex. 1949)*; *Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377, 382 (Tex. 1945)*.

Relators argue that because James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, is the actual party to the suit being prosecuted by the Real Parties in Interest, under *Rule 7 of the Texas Rules of Civil Procedure* he is authorized to "defend his rights therein, either in person or by an attorney of the court." [HN2] The right of a party to self-representation is not, however, absolute. *See, e.g., Kunstoplast of Am. v. Formosa Plastics Corp., USA, 937 S.W.2d 455, 456 (Tex. 1996)* (holding that a non-attorney may not appear *pro se* on behalf of a corporation); *Steele v. McDonald, 202 S.W.3d 926, 928-29 (Tex.App.--Waco 2006, no pet.)* (holding that a non-attorney may not appear *pro se* in his capacity as independent executor of an estate). Although we have not been cited to, nor have we found, any Texas case directly dealing with the issue of whether a non-lawyer can appear *pro se* in court, in his capacity as a trustee of a trust, we believe the same logic expressed in those opinions should apply to this situation.

[*740] First, contrary to Relators' argument, the [**5] plain reading of *Rule 7* does not suggest that a non-lawyer can appear *pro se*, in the capacity of trustee of a trust, because in that role he is appearing in a representative capacity rather than *in propria persona*. Because of the nature of trusts, the actions of the trustee affect the trust estate and therefore affect the interests of the beneficiaries. It follows that because a trustee acts in a representative capacity on behalf of the trust's beneficiaries, he is not afforded the personal right of self-representation.

Secondly, [HN3] the Texas Legislature has defined the practice of law to include, among other things, "the preparation of pleadings or other documents incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court . . . ." Consistent with that legislative mandate, Relator's appearance in the trial court in his capacity as trustee falls within this definition of the "practice of law." Accordingly, if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law. *See Ziegler v. Nickel (1998) 64 Cal.App.4th 545, 549, 75 Cal. Rptr. 2d 312* [**6] (holding that "[a] nonattorney trustee who represents the trust in court is representing and affecting the interest of the beneficiary and is thus engaged in the unauthorized practice of law"). Therefore, we conclude the trial court did not err in prohibiting the Relator, James Craig Guetersloh, in his capacity as trustee of the 1984 Guetersloh Trust, from appearing without legal representation.

II. Trustee's Right to Mandamus Relief

The Real Parties in Interest contend that, because James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, does not have the authority to appear before the trial court *pro se*, that prohibition should likewise bar this Court from considering his pleadings in this proceeding. For the same reasons that he cannot appear *pro se* before the trial court in his representative capacity, Mr. Guetersloh is likewise prohibited from appearing before this Court in his capacity as trustee. Accordingly,

we hereby strike Relator's petition to the extent that it asserts claims in that capacity. That does not, however, preclude us from considering claims being asserted in his individual capacity.

III. Individual Right to Mandamus Relief

[HN4] Mandamus is an extraordinary remedy [**7] available only in limited circumstances involving manifest and urgent necessity and not for grievances that may be addressed by other remedies. *Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992)*. To be entitled to relief, the relator must demonstrate a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *See Republican Party of Texas v. Dietz, 940 S.W.2d 86, 88 (Tex. 1997)*. Additionally, relator must satisfy three requirements, to-wit: (1) a legal duty to perform; (2) a demand for performance; and (3) a refusal to act. *Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979)*.

[HN5] When a motion is properly pending before a trial court, the act of considering and ruling upon it is ministerial. *Eli Lilly and Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992)*. However, the trial court has a reasonable time within which to perform that ministerial duty. *Safety-Kleen Corp. v. Garcia, 945 S.W.2d 268, 269 (Tex.App.-San Antonio 1997, orig. proceeding)*. Whether a reasonable period of time has lapsed is dependent on the circumstances [*741] of each case. *Barnes v. State, 832 S.W.2d 424, 426 (Tex.App.--Houston [1st Dist.] 1992, orig. proceeding)*.

Here, we [**8] are not faced with a situation where the trial court has merely failed to schedule a hearing on Relator's motion to transfer venue. Instead, the trial court has affirmatively informed Relator that it would not schedule a hearing on *his* motion until the trustee (a separate and distinct party) was represented by legal counsel. The absence of legal counsel representing the trustee should not serve as an impediment to Relator's right, in his individual capacity, to have his motion heard. Accordingly, we find that Relator, James Craig Guetersloh, Individually, is entitled to mandamus relief.

Conclusion

Having determined that James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, cannot appear in court *pro se*, we strike his petition for writ of mandamus as it pertains to claims being asserted in that capacity. As it pertains to claims being asserted by James Craig Guetersloh in his individual capacity, we conditionally grant the writ of mandamus. We are confident the trial court will schedule a hearing on James Craig Guetersloh's individual motion to transfer venue and we direct the Clerk of this Court to issue the writ only in the event the trial court fails to schedule a hearing within [**9] sixty days.

Per Curiam

the requirements for a small estate affidavit. An attorney's assistance in drafting a small estate affidavit may prevent the denial of an Affidavit where it would have been an appropriate probate procedure if the Affidavit had been prepared correctly.

Q: What procedures should I follow if I decide to probate a Will as a muniment of title as a pro se applicant?

A: As stated above, whether a muniment of title is the best probate procedure for a particular situation is a legal decision best made by a lawyer; Court staff cannot guide you or advise what you should do in your case. If you decide to proceed with your case without a lawyer, the County Law Library has reference materials that may be helpful. **If you proceed with an application to probate a Will as a muniment of title, note the following:**

All beneficiaries. In a pro se application to probate a Will as a muniment of title, **all** beneficiaries under the Will **must** be applicants, and **all** beneficiaries **must** testify at the hearing.

Must swear no debts. To probate a Will as a muniment of title, each applicant must be able to swear on personal knowledge that there are no debts against the estate other than those secured by liens against real estate – that includes credit card balances, doctor's bills, utility bills, Medicaid estate recovery claims, etc. – *anything* owed by decedent and not paid off. Anyone falsely swearing that the estate has no creditors is subject to a perjury charge.

Needed documents. The Court reviews all documents for Will prove-ups before the hearing. By reviewing the documents before the hearing, the Court can ensure that hearings go more smoothly for participants. Please see the Court's document titled "Submitting Paperwork for Will Prove-Ups and Heirships: When & How" for more information about when and how to submit documents.

Note there are additional procedural requirements with additional necessary documents in the following cases:

(1) the Will is not the original Will,
(2) the Will is not self-proved, or
(3) you are probating the Will more than four years after the decedent's death.

Court staff can give you a handout with information about what the additional procedural requirements are, but you will need to obtain all additional documents.

- ***At the time you file the application in the Clerk's Office***, also file (1) the Will and (2) the death certificate (cross out the social security number). Rule 57 of the Texas Rules of Civil Procedure requires that you include the following information for each applicant in the application: name, address, phone number, email address, and fax number (if available).

- ***Within 24 hours after you set the hearing:***
  - ✓ Email megan.inouye@traviscountytx.gov the proposed order and the proposed (unsigned) proof of death and other facts.
  - ✓ If you have additional proposed *testimony* that is required because the Will is a copy, is not self-proved, or is being probated more than four years after decedent's death, also email that proposed (unsigned) testimony.
  - ✓ Put the date of the hearing and decedent's name in the subject line of the email.
  - ✓ If you do not have access to email, deliver these documents to the Court, with the date and time of the hearing on a cover sheet or Post-It note.

- ***At least one week before the scheduled hearing,*** file with the **Clerk's Office** any additional *signed pleadings* required because the Will is a copy, the Will is not self-proved, or the Will is being probated more than four years after decedent's death.

Exhibit E

FILED
19-0803
9/24/2019 2:06 PM
tex-37077900
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-0803

In the Supreme Court of Texas

IN RE ESTATE OF JANET AMANDA MAUPIN,
Deceased

BRIEF OF AMICUS CURIAE
TEXAS ACCESS TO JUSTICE COMMISSION
IN SUPPORT OF PETITION FOR REVIEW

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi-Edinburg, Texas
No. 13-17-00555-CV

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September 24, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Access to Justice Commission (the "Commission") respectfully submits this amicus brief in support of Petitioner Patrick Maupin. In accordance with Texas Rule of Appellate Procedure 11(c), the Commission states that no fee was charged or paid for the preparation of this amicus brief.

The Texas Supreme Court created the Commission by unanimous order in 2001. Misc. Dkt. No. 01-9065, Order Establishing the Commission. In that Order, the Texas Supreme Court recognized the following deficiencies, among others, in the then-existing framework for the provision of legal services for low-income Texans:

- Many gaps exist in developing a comprehensive, integrated statewide civil legal-services delivery system in Texas;
- Inadequate funding and well-intentioned but uncoordinated efforts stand in the way of a fully integrated civil legal-services delivery system;
- While many organizations throughout the state share a commitment to improving access to justice, no single group is widely accepted as having ultimate responsibility for progress on the issues; and
- Texas needs leadership that is accepted by the various stakeholder organizations committed to achieving full access, and empowered to take action.

Id. at 1. The Court's solution was the Commission. *Id.* at 2.

To call attention to important access-to-justice issues, the Commission has regularly filed amicus briefs, including in (1) *Highland Homes Ltd. v. State*, 448

S.W.3d 403 (Tex. 2014) (propriety of cy pres disposition of unclaimed class funds); (2) *McDonald v. Sorrels*, No. 19-cv-219 (W.D. Tex., filed Mar. 6, 2019) (constitutional challenge to funding for access to justice); and (3) *Abrigo v. Ginez*, No. 14-18-00280-CV, 2019 WL 2589877 (Tex. App.—Houston [14th Dist.] June 25, 2019, no pet.) (construction of Texas Rule of Civil Procedure 145 relating to indigent litigants).

Maupin's petition for review concerns judicial policies that prevent independent executors—including those who are the sole beneficiaries of a will—from proceeding pro se to administer estates. Those restrictive policies harm low-income Texans by (1) undermining Texas's long-standing probate framework that promotes the independent administration of wills, (2) restricting access to the courts, and (3) unnecessarily increasing the costs of administering estates.

For these reasons and those outlined below, the Commission files this amicus brief in support of Petitioner Maupin.

INTRODUCTION

The Travis County probate court denied Maupin the opportunity to obtain letters testamentary to administer his deceased wife's will simply because an attorney did not sign his court filings. It did so under a local policy that bars individuals from probating wills pro se, even where the independent executor is the estate's sole beneficiary. On appeal, the court of appeals upheld this policy without analysis and simply noted that a handful of other appellate courts had upheld similar restrictions. The court of appeals' opinion and the restrictive policy it sanctioned are wrong and require reversal.

The court of appeals' opinion is the latest in an unfortunate trend over the past decade that has prohibited independent executors—most of them administering small and uncontested estates—from proceeding pro se except in the rarest of circumstances. Virtually all statutory probate courts now have issued policies prohibiting executors from proceeding pro se. *See* App., Ex. A.[1] Texas probate courts have applied these policies such that—even where an independent executor

[1] A few statutory probate courts have incorporated these policies into their local rules, *see, e.g.*, Dallas County Probate Court Local Rule 4.05; Denton County Probate Court Local Rule 1.3, but most (including the Travis County probate court) simply have "policies" preventing executors from proceeding pro se. These policies, unlike local rules, do not require this Court's approval. The chart attached as Exhibit A does not include reference to the many county courts, which impose similar restrictive policies. *See* Pet. at 9.

is the sole beneficiary of an estate—he or she must retain counsel to obtain letters testamentary to administer the estate.

These restrictive policies affect thousands of Texans each year and unnecessarily increase the costs associated with independently administering estates. Last year, over 4,000 Texans filed a probate or guardianship proceeding pro se, and that number would undoubtedly be higher but for these policies that prohibit individuals from continuing pro se after filing. *See* Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Statistical Rep. at 32-33 (2018) (noting that 3.8% of the 105,697 probate and guardianship cases were filed pro se).

Especially where executors either lack the funds to hire an attorney or recognize that the costs of fighting these restrictive policies will be prohibitive, most Texans encountering these restrictive policies capitulate. But these policies are not correct just because they are not often (or ever) challenged. They restrict an individual's Rule 7 right to proceed pro se, are in tension with this Court's precedents, and are based on an inapt attempt by courts to analogize estates to corporations. The prevalence and perniciousness of these policies—which are important to the state's jurisprudence—warrant granting review here.

ARGUMENT

A. This Court should grant the petition for review because the restrictive probate court policies undermine Texas's independent administration system, unnecessarily siphon funds from estates, and, until now, have evaded review.

The Texas probate system has long been designed to allow non-lawyers to administer an estate. *See* Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329, 333 (2007) (hereinafter "*Pro Se Executors*"). In the 1800s, the Texas legislature implemented a probate system that was intended to allow executors to administer an estate without entangling a court. *See Minter v. Burnett*, 38 S.W. 350, 354 (Tex. 1896) ("We think that the legislature intended, by the enactment of the law of 1876, to make plain and definite rules to govern administrators and executors in the discharge of their duties, because it is not unfrequently the case that they must perform those duties without having the instruction of the court with reference thereto."). Because of Texas's system of independent administration, lawyers are warned not to compare Texas's probate system to those systems in other states "because the Texas probate system is much different and typically much simpler." Comm. on Advert., State Bar of Tex., Interpretive Cmt. 22: Advertisement of Living Trusts, https://www.texasbar.com/AM/Template.cfm?Section=Rules_Comments_and_Opinions&Template=/CM/ContentDisplay.cfm&ContentID=13435.

Despite Texas's unique and fiercely independent administration system, its statutory probate courts have implemented policies that do not allow individuals to probate a will pro se except in the most limited of circumstances, such as presenting a will as muniment of title. *See* App., Ex. A. None of these policies allows a pro se executor to receive letters testamentary,[2] even when the named executor is the sole beneficiary of the will. *Id.*

It has not always been this way. Before 2006, Texas's statutory probate courts generally did not restrict executors from proceeding pro se. But, in late 2006, the Waco Court of Appeals held, in a split decision, that an independent executor could not probate a will pro se because it concluded that "he [wa]s litigating rights in a representative capacity rather than on his own behalf." *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App.—Waco 2006, no pet.).

By 2007, *Steele* had created a split among the then-seventeen statutory probate courts, with only eight courts permitting executors to proceed pro se. *See Pro Se Executors* at 331 & n.3. Then, when other appellate court decisions, such as *In re Guetersloh*, 326 S.W.3d 737, 739-40 (Tex. App.—Amarillo 2010, orig. proceeding), adopted *Steele* without much analysis, additional statutory probate courts have

[2] Under Texas law, a muniment of title allows the transfer of estate property to the beneficiaries without the need for estate administration. *See* Tex. Estates Code, ch. 257. Letters testamentary, on the other hand, are issued by a probate court and permit an estate's executor to administer the will and act on behalf of a deceased person's estate. *See id.*, ch. 351.

restricted pro se representation. In just over a decade, executors have seen the right to proceed pro se vanish.

Despite this series of events, these restrictive policies have not been challenged in Texas courts. But that has little to do with the correctness of these restrictions and everything to do with the costs associated with such a challenge. Consider the options for executors who wish to proceed pro se. When they are told they cannot proceed pro se, they could spend hours doing legal research and argue the issue before a probate court. Then, when they lose, they could spend more time and money to file an appeal. Or, if they can afford it, they could just pay the attorneys' fees and move on.

In reality, most pro se litigants probably do not consider the notion that a court would have an illegal policy. So, for pro se executors who can afford to hire a lawyer, they just hire a lawyer and move on. For pro se executors who cannot afford to hire a lawyer, their only option is to comply with these policies and proceed in a manner that limits their rights as an executor, such as having the court probate the will as a muniment of title. *See supra* note 2. Maupin's petition for review presents the Court with a rare opportunity to consider and correct these restrictive policies.[3]

[3] The court of appeals mistakenly framed the policy at issue as a local rule promulgated under Texas Rule of Civil Procedure 3a. *See Estate of Maupin*, No. 13-17-00555-CV, 2019 WL 3331463, at *2 (Tex. App.—Corpus Christi-Edinburg July 25, 2019, pet. filed). But, unlike a handful of statutory probate courts that have adopted these

The Court's review is desperately needed because these misguided policies unnecessarily burden Texas estates, harming low-income Texans most of all. One national survey found that 11% of probate estates were valued at less than $10,000. *See* Estate Settlement Statistics, EstateExec, https://www.estateexec.com/Docs/General_Statistics (last visited Sept. 17, 2019). Despite those estates' small value, they faced average legal and accounting fees that exceeded $15,000—more than the entire value of the estate. *Id.* Costly probate court policies put thousands of Texans' inheritance at risk.

Maupin's petition for review provides this Court with an excellent vehicle to address this issue. This Court should not let this opportunity pass it by.

B. Both the court of appeals' opinion and the restrictive probate court policies rely on an erroneous comparison between corporations and estates.

The court of appeals' opinion and the restrictive probate court policy it protects wrongly analogize estates to corporations. The central tenet of this analysis is that the executor "is litigating rights in a representative capacity rather than on his own behalf." *Steele*, 202 S.W.3d at 928; *see also Maupin*, 2019 WL 3331463, at *2. That view, initially espoused in *Steele*, has caused pro se executors to lose rights and has led a handful of courts to conclude (wrongly) that an executor's administration

restrictive policies as local rules, *see supra* note 1, the Travis County policy restricting executors from proceeding pro se is only an off-the-rulebook notice on its website.

of an estate pro se would constitute the unauthorized practice of law. 202 S.W.3d at 928; *Maupin*, 2019 WL 3331463, at *2; *cf. In re Guetersloh*, 326 S.W.3d at 739-40 (addressing issue in trust context).

The practice of law is limited to legal work done "on behalf of a client." Tex. Gov't Code § 81.101. That is why Texas Rule of Civil Procedure 7 grants individuals the right to proceed pro se so long as they are prosecuting or defending their own rights. *See, e.g.*, Tex. R. Civ. P. 7 ("Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.") (App., Ex. B); *Ayres v. Canales*, 790 S.W.2d 554, 557 (Tex. 1990) (noting that Rule 7 precludes a court from "[o]rdering a party to be represented by an attorney"). Therefore, the central question raised in Maupin's petition for review is whose rights are executors representing when they attempt to probate a will.[4]

In *Pro Se Executors*, Professor Hatfield suggests three potential answers to this question: (1) the executor represents the estate, (2) the executor represents the beneficiaries, or (3) the executor represents himself or herself. *Pro Se Executors* at 348. He then reviews each of these possible answers and concludes that, under Texas law, an executor represents himself or herself. *Id.* at 370.

[4] To be clear—because the statutory probate courts have not been—the question is not whether probating the will may ***affect*** others' rights. Anytime individuals sue, they attempt to affect others' rights by imposing legal liability. If the practice of law were measured by whether others' legal rights are affected, then individuals could never represent themselves pro se.

That conclusion is correct, as explained below. But even if an executor were held to represent an estate's beneficiaries, the court of appeals' opinion cannot stand because Maupin is the sole beneficiary of his deceased wife's estate, Pet. at 17, and was attempting to represent only his own interests.

1. An executor does not "represent" the estate.

An executor does not represent an estate like an individual lawyer represents a corporation. In fact, an estate is not a legal entity, and cannot be represented like a corporation. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) (quoting *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975)). Moreover, estates, unlike their executors, cannot be sued, and—under Texas law—estates are nothing more than the property owned by decedents at their death. *See Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987). Instead of creating a separate legal entity (like corporations), Texas law permits executors to bring the estate's claims themselves. *See Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786 (Tex. 2006). There is simply no legal entity (called an "estate") for an executor to represent for the purposes of "practicing law."

Because estates are not entities and have no legal rights, they cannot be analogized to corporations, making the analysis conducted in *Steele* and adopted by other courts incorrect. A review of *Steele* confirms this error. The *Steele* court only cited to out-of-state cases, 202 S.W.3d at 928, but those states (unlike Texas) have

concluded an estate is a legal entity. 202 S.W.3d at 928 (citing cases). Texas law is to the contrary, and the *Steele* majority failed to consider this Court's binding precedent confirming that principle. *See infra* Sections B.2 & B.3.

2. An executor does not "represent" the beneficiaries of the estate, and even if he did, Maupin should still prevail here.

As Maupin notes in his petition for review, some states—most notably, Minnesota—have held that executors represent the interests of beneficiaries of estates. *See* Pet. for Rev. at 16; *see also In re Otterness*, 232 N.W. 318, 319-20 (Minn. 1930). In essence, the "Minnesota Rule" treats executors as legally transparent agents of the beneficiaries. But that conclusion cannot be right under Texas law, which gives executors special, specific, and statutory rights and duties above and beyond those of the beneficiaries. *See* Tex. Estates Code §§ 351.051, .052, .054. For example, the executor can decide whether to bring a malpractice claim against the testator's estate-planning attorney, but a beneficiary has no such right. *See Belt*, 192 S.W.3d at 789.

The "Minnesota Rule" also cannot apply in Texas because this Court's precedents are to the contrary. This Court has already concluded that an executor may appear pro se. *See Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983). This Court also has expressly held that the attorney-client relationship is between the executor and his or her attorney—not between the attorney and the estate or the beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 924, 925 (Tex. 1996). In light of

these precedents, there is no basis for the Court to conclude that executors are simply transparent legal actors that do nothing other than represent the interests of beneficiaries.

Even if the Court altered its precedents and reached that conclusion, the court of appeals' opinion cannot stand here because Maupin is the sole beneficiary. *See* Pet. at 17. Accordingly, if an executor represents the interests of beneficiaries, there is no reason why Maupin cannot proceed pro se because he would, as executor, simply be representing his interests as the sole beneficiary. That is why states that have adopted the Minnesota Rule have permitted executors to proceed pro se when they are the sole beneficiaries. *See, e.g.*, *State ex rel. Falkner v. Blanton*, 297 So.2d 825, 825 (Fla. 1974) (concluding that an individual executor would have pro se rights so long as the executor was the sole beneficiary of the estate); *cf. Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 610 (11th Cir. 1984) (concluding a sole proprietorship could proceed through pro se representation). And even some of Texas's statutory probate courts used to employ a similar rule. *See Pro Se Executors* at 331 n.3.

3. Because an executor "represents" his or her own interests, Maupin must be permitted to proceed pro se.

In light of the rights and duties that Texas law places on executors, executors represent their own interests in administering an estate. That is the only answer consistent with this Court's decisions in *Ex Parte Shaffer* and *Huie*.

In *Ex Parte Shaffer*, an executor was sued by a beneficiary for breach of a fiduciary duty, and the probate court held the executor in contempt for failing to retain an attorney. 649 S.W.2d at 301. On appeal, however, this Court held that the probate judge's contempt order was void because "[c]ounsel cites no authority, and indeed we can find none, which allows a court to . . . require any party to retain an attorney. . . . [O]rdering a party to be represented by an attorney abridges that person's right to be heard by himself." *Id.* at 302. Thus, far from taking the position that an executor represents the estate or its beneficiaries, this Court has made clear that, in Texas, executors represent their own interests.

More recently, this Court confirmed that view when it decided *Huie*. In that case, which involved a trust,[5] this Court rejected the view that the attorney-client privilege belongs to the trust or its beneficiaries, and instead, held that the privilege belongs to the trustee. 922 S.W.2d at 925 ("We conclude that, under Texas law at least, the trustee who retains the attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries.").

These precedents are consistent with Texas's statutory framework for the independent administration of estates. Nothing in the Estates Code forces an executor to retain an attorney and, instead, the Estates Code places duties of good

[5] *See Humane Soc'y of Austin & Travis Cty. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (noting the fiduciary duty of an executor in the administration of an estate is the same as that of a trustee).

faith, fidelity, loyalty, fairness, and prudence on executors in administering the estate. *See* Tex. Estates Code §§ 101.003, 351.101; *see also Humane Soc'y of Austin & Travis Cty.*, 531 S.W.2d at 577, 580. These duties protect the beneficiaries of estates and expose executors—to the extent they act contrary to these duties—to the risk of liability because (unlike estates) executors can be sued. Although the Texas Estates Code is designed to protect beneficiaries and the assets of estates, Texas law does not provide that an executor is representing the rights of the estate or its beneficiaries. To the contrary, the executor—in performing his or her duties—has all of the rights that belonged to the decedent, *Steele*, 202 S.W.3d at 930 (Gray, C.J., dissenting), and thus can only be representing himself or herself in administering the estate. Executors, as the living agent of the decedent, should be able to proceed pro se under Rule 7 in the same way that the decedent would have been entitled. *See McKibban v. Scott*, 114 S.W.2d 213, 216 (Tex. 1938) ("We have shown enough [statutory provisions] to demonstrate that our probate laws recognize the right of a person to name in his will his own executor, and, further, to show that the person so named, barring any disqualification, has the right, by virtue of the will itself to act as executor as named."). This Court should clarify these issues and provide guidance to statutory probate and other lower courts so Rule 7 rights are not unnecessarily restricted and estates are not saddled with unnecessary expenses.

* * *

In sum, the court of appeals' opinion must be reversed:

- *First*, under *Ex Parte Shaffer* and *Huie*, Texas law provides that an executor is the living agent of the decedent, has all of the rights the decedent had, and thus is representing himself or herself in administering the estate. Rule 7 therefore permits an executor to proceed pro se. Permitting executors to proceed pro se will keep estates' assets from being depleted by unnecessary legal fees and expenses.

- *Second*, even if this Court were to adopt the "Minnesota Rule" and hold that executors represent the estate's beneficiaries, reversal is still required because Maupin is the sole beneficiary of his deceased wife's estate, and therefore was attempting to represent his own interests in administering the estate.

PRAYER

For these reasons and those in Maupin's petition for review, amicus curiae Texas Access to Justice Commission respectfully requests that the Court grant the petition for review, reverse the judgment of the court of appeals, and remand this case so that Maupin can proceed before the Travis County probate court pro se.

September 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 3,233 words, except the portions excluded by Texas Rule of Appellate Procedure 9.4(i)(1). It was prepared in Microsoft Word using 14-point typeface for body text and 13-point typeface for footnotes. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Stephen S. Gilstrap
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CERTIFICATE OF SERVICE

I certify that, on September 24, 2019, the foregoing document was filed with the Texas Supreme Court and served on Petitioner Patrick Maupin, as indicated below. There are no other parties to be served in this case.

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APPENDIX

Exhibit A: List of Pro Se Policies by Statutory Probate Court

Exhibit B: Texas Rule of Civil Procedure

Exhibit C Court of Appeals' Opinion

EXHIBIT A

List of Pro Se Policies by Statutory Probate Court

Court	Status	Link
Bexar County Probate Court No. 1	Pro se under limited circumstances	https://www.bexar.org/3074/Probate-a-Will
Bexar County Probate Court No. 2	Pro se under limited circumstances	https://www.bexar.org/DocumentCenter/View/22499/Court-Policy-Regarding-Pro-Se-Applicants
Collin County Probate Court	Pro se under limited circumstances	https://www.collincountytx.gov/probate/Pages/general.aspx
Dallas County Probate Court No. 1	Pro se under limited circumstances	https://www.dallascounty.org/government/courts/probate/prose-policy.php
Dallas County Probate Court No. 2	Pro se under limited circumstances	https://www.dallascounty.org/government/courts/probate/prose-policy.php
Dallas County Probate Court No. 3	Pro se under limited circumstances	https://www.dallascounty.org/government/courts/probate/prose-policy.php
Denton County Probate Court	Pro se under limited circumstances	https://dentoncounty.gov/-/media/Departments/County-Courts/Probate-Court/Forms/PDFs/General/Pro-Se-Memo.pdf
El Paso County Court No. 1	Pro se under limited circumstances	https://www.epcounty.com/courts/probatefaq.htm
El Paso County Court No. 2	Pro se under limited circumstances	https://www.epcounty.com/courts/probatefaq.htm
Galveston County Probate Court	Pro se under limited circumstances	http://www.galvestoncountytx.gov/ja/pb/Documents/Rules%20of%20the%20Court/adminorder02-2007.pdf
Harris County Probate Court No. 1	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf
Harris County Probate Court No. 2	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf
Harris County Probate Court No. 3	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf
Harris County Probate Court No. 4	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf

Court	Status	Link
Hidalgo County Probate Court	Does not address the issue explicitly	https://www.hidalgocounty.us/1345/Probate
Tarrant County Probate Court No. 1	Pro se under limited circumstances	http://www.tarrantcounty.com/content/dam/main/probate-courts/probate-court-2/ProSePolicy.pdf
Tarrant County Probate Court No. 2	Pro se under limited circumstances	http://www.tarrantcounty.com/content/dam/main/probate-courts/probate-court-2/ProSePolicy.pdf
Travis County Probate Court	Pro se under limited circumstances	https://www.traviscountytx.gov/images/probate/Docs/pro_se.pdf

EXHIBIT B

Texas Rule of Civil Procedure 7

RULE 7. MAY APPEAR BY ATTORNEY

Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

EXHIBIT C

NUMBER 13-17-00555-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

ESTATE OF JANET AMANDA MAUPIN, DECEASED

On appeal from Probate Court No. 1
of Travis County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

Patrick Evan Maupin (Patrick) appeals the trial court's order admitting his wife's will to probate as a muniment of title. *See* TEX. EST. CODE ANN. § 31.001. Patrick argues that the trial court erred when it enforced a local rule prohibiting individuals acting pro se from administering estates and denied his pro se application for letters testamentary, instead issuing sua sponte a muniment of title. We affirm.[1]

[1] Pursuant to a docket-equalization order issued by the Supreme Court of Texas, the appeal has been transferred to this Court from the Third Court of Appeals in Austin, Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

I. BACKGROUND

Janet Amanda Maupin (Janet) died on June 22, 2017, at her home in Travis County, Texas. Janet left a self-proved will dated November 28, 1988. The will named Patrick as independent executor and sole beneficiary. On July 11, Patrick filed an application pro se to probate Janet's will and issue letters testamentary.

On August 7, the trial court held a hearing. Patrick appeared unrepresented and provided proof of Janet's death and residency in Travis County. When asked by the trial court why an administration was necessary, Patrick stated there were "a few assets" located out of state, "some balances on some accounts and credit cards and things," and "also a possible cause of action."

Pursuant to the Travis County Probate Court's pro se policy,[2] the court informed Patrick that he would need an attorney in order to apply for letters testamentary. In the interim, the trial court signed an order admitting the will to probate as a muniment of title sua sponte. The court decreed, in relevant part, as follows:

> that all of the necessary proof required for the probate of such will has been made; that such Will is entitled to probate; that there are no unpaid debts owing by this Estate, exclusive of any debt secured by liens on real estate; that there is no necessity for administration of this estate . . . .

Patrick appealed.

---

[2] The Travis County Probate Court No. 1 observes a pro se policy whereby individuals representing the interests of third parties must be represented by a licensed attorney. This includes executors applying for letters testamentary and prohibits individuals acting pro se from administering estates. Specifically, the policy provides:

> [A] pro se may not represent others. Under Texas law, only a licensed attorney may represent the interests of third-party individuals or entities, including guardianship wards and probate estates. *See In re Guetersloh*, 326 S.W.3d 737 (Tex. App.—Amarillo 2010, no pet.) and *Steele v. McDonald*, 202 S.W.3d 926 (Tex. App.—Waco 2006, no pet.), and the authorities cited. Therefore, individuals applying for letters testamentary, letters of administration, determinations of heirship, and guardianships of the person or estate must be represented by a licensed attorney.

II. APPLICABLE LAW AND ANALYSIS

A trial court's ruling on a probate application is reviewed under an abuse of discretion standard. *In re Estate of Gaines*, 262 S.W.3d 50, 55 (Tex. App.—Houston [14th Dist.] 2008, no pet.). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without regard to guiding legal principles. *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.). A trial court, however, does not abuse its discretion in complying with a local rule that has not been previously challenged or found to contradict the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 3a(1); *see also Kenley v. Quintana Petroleum Corp.*, 931 S.W.2d 318, 320–21 (Tex. App.—San Antonio 1996, writ denied).

Generally, if an independent executor named in a will comes forward within the statutory period for probating a will, offers it for probate, and applies for letters testamentary, the court has no discretionary power to refuse to issue letters to the named executor unless he is otherwise disqualified under the provisions set out in the Texas Estates Code. *See* TEX. EST. CODE ANN. § 304.003; *see also Alford v. Alford,* 601 S.W.2d 408, 410 (Tex. App.—Houston [14th Dist.] 1980, no writ).

Appellant's primary contention on appeal is that the trial court abused its discretion when the court, in accordance with its local rules, denied his application for letters testamentary based on his pro se status. *See* TEX. EST. CODE ANN. § 257.001. Specifically, Patrick argues that the court's policy is invalid under Rule 3a(1)[3] of the Texas Rules of Civil Procedure because it violates his right to self-representation under Rule 7. *See* TEX. R. CIV. P. 7; *see also Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983)

[3] "[A]ny proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located." TEX. R. CIV. P. 3a(1).

("Ordering a party to be represented by an attorney abridges that person's right to be heard by himself.").

However, our sister courts have established that Rule 7 only applies when a person is litigating his rights on his own behalf, as opposed to litigating certain rights in a representative capacity. *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App.—Waco 2006, no pet.) (holding that a non-lawyer cannot appear pro se on behalf of an estate as an independent executor); *see also Kaminetzky v. Newman*, No. 01-10-01113-CV, 2011 WL 6938536, at *6 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, no pet.) (mem. op.). The law distinguishes between a person in his individual capacity and the same person in his representative or fiduciary capacity. *See McMahan v. Greenwood*, 108 S.W.3d 467, 487 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (providing that an executor is synonymous with administrator and legal representative); *see generally Elizondo v. Tex. Nat. Res. Conservation Comm'n*, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.) (addressing individual versus representative capacity in the context of standing). An executor of an estate serves in a representative capacity of the estate, thereby requiring an attorney to represent the interests of the third-party at the outset. *See Steele*, 202 S.W.3d at 928; *McMahan*, 108 S.W.3d at 487.

In compliance with the local rule and supported by precedence, the trial court was unable to determine Patrick's suitability as an executor for his wife's estate absent attorney representation. *See Elliott*, 396 S.W.3d at 228; *Steele*, 202 S.W.3d at 928; *Kenley*, 931 S.W.2d at 320–21. Therefore, we hold that the trial court did not abuse its discretion in denying Patrick's pro se application. *See Elliott*, 396 S.W.3d at 228.

III. CONCLUSION

We affirm the trial court's order.

GREGORY T. PERKES
Justice

Delivered and filed the
25th day of July, 2019.

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No. 19-0803

IN THE
SUPREME COURT OF TEXAS

IN RE ESTATE OF JANET AMANDA MAUPIN,
Deceased,

ON PETITION FOR REVIEW FROM THE
THIRTEENTH COURT OF APPEALS AT CORPUS CHRISTI-EDINBURG, TEXAS
NO. 13-17-00555-CV

BRIEF OF *AMICI CURIAE* TEXAS COLLEGE OF PROBATE JUDGES AND PRESIDING STATUTORY PROBATE COURT JUDGE FOR THE STATE OF TEXAS IN OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

Mr. Maupin, the *pro se* petitioner, has asked the Court to answer the question of whether Rule 7 of the Texas Rules of Civil Procedure requires a probate court to allow an independent administrator to appear in court *pro se* in contravention of local rules and policies of statutory county probate courts prohibiting such representation.[1]

Under Rule 11 of the Texas Rules of Appellate Procedure, and as friends of the Court, the Texas College of Probate Judges ("College" or "Probate Judges College") and the Presiding Statutory Probate Court Judge for the State of Texas ("State Presiding Probate Judge") suggest that the Court deny the review requested by Mr. Maupin. At bottom, the case presents an issue of judicial policy, not law.

Even were the policy issue raised here potentially appropriate for adjudication in a case-specific context, *this* case is not the appropriate vehicle for addressing it. At a more fundamental level,

[1] The specific policy challenged is: "individuals applying for letters testamentary [and] letters of administration . . . must be represented by a licensed attorney. The only time a pro se applicant may proceed in court is when truly representing **only** himself or herself."

the appropriateness of *pro se* representation of independent executors in probate court proceedings implicates important and nuanced matters of judicial administration better suited for the more broadly deliberative public process of judicial rulemaking. There—and, of course, at the Texas Legislature—is where debate should be joined, if the Court is inclined to give more extended deliberation to whether allowing independent executors to appear *pro se* in probate court is to be mandated.

The Probate Judges College is paying the fee for preparation of this brief.

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

A. Overview of *Amici*

The Probate Judges College is a private non-profit educational organization that provides training and education to the probate courts and county clerks of Texas. After informal efforts began in 1977, the College was formally organized in 1980. Since then, it has provided continuing education in all aspects of probate law in furtherance of its mission to provide an open forum for discussions about, and explorations of, probate law, as well as other legal are-

as within the purview of probate courts. The College has a five-member board of directors. Four of them are current or former statutory probate court judges, with a combined 79 years of judicial experience

The position of State Presiding Probate Judge is a statewide, legislatively-created, judicial peer-elected office. *See* Tex. Gov't Code § 25.0022. Improving the management of statutory probate courts and the administration of justice is a core function. Tex. Gov't Code § 25.0022(d). One of the office's specifically assigned duties is to:

> ensure the promulgation of local rules of administration in accordance with policies and guidelines set by the supreme court.

Tex. Gov't Code § 25.0022(d)(1). According to the Attorney General, this provision authorizes the State Presiding Probate Judge to "adopt statewide local rules of administration for the statutory probate courts." Tex. Atty. Gen. Op. GA-0105 (2003) at 2.[2]

[2] The position is currently held by the Honorable Guy Herman, who in his other capacity as Judge of the Statutory Probate Court Number One for Travis County has been designated by the Court in this case as the respondent. In his capacity as the trial judge, Judge Herman has already filed his Response to Petition for Review on December 12, 2019. The Court has long recognized that a person may be involved in judicial proceedings as two dif-

B. Requiring That Independent Administrators Be Allowed To Act *Pro Se* In Court Would Harm, Not Help, The State System Of Independent Administration.

Both the Probate Judges College and the State Presiding Probate Judge have an abiding commitment to maintaining and enhancing Texas's longstanding system of independent administration of estates. It has proven itself over time as a way to make the State's probate system more affordable and easier to navigate, which in turn is an incentive for Texans to use it as a way to bring order and closure to the estates of their deceased loved ones.

The *Amici* are concerned, however, that the proposed resolution of the issue urged upon the Court by Mr. Maupin and his supporter, *Amicus Curiae* Texas Access to Justice Commission ("TAJC"), is not the way to improve this aspect of the Texas probate system. Rather, it would be a step backwards, pushing probate courts into a burdensome, time-consuming, and complicated

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ferent legal entities. *Heckman v. Williamson County*, 369 S.W.3d 137, 158 (Tex. 2012) (distinguishing suit against judges in their official capacities from suit against them in their personal capacities); *see also Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 689 (Tex. 2018) ("person may possess various capacities in which they can be sued, and not all those capacities are relevant to every suit"); *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 876 (Tex. 1968) (noting a person was "party to the suit in two different capacities," royalty owner and partial owner of working interest). To lessen the potential for confusion, this brief will use the official title of the *amicus* presiding judge.

tight-rope walk. Texas probate courts and their staff are prohibited from giving legal advice. *See* Tex. Gov't Code Ann. tit. 2, subtit. G, app. B (Tex. Code Jud. Conduct, Canons 2(B), 3(B)(8), 4(G). But invalidating a requirement that independent administrators have lawyers for court proceedings would inevitably—and frequently—confront probate courts with a quandary: try move the courtroom process along by assisting *pro se* independent administrators unfamiliar with legal procedures and niceties, while simultaneously avoiding the provision of legal advice forbidden by the canons of judicial conduct. This will be a routine dilemma for probate courts if the Court adopts Mr. Maupin's proposed rule.[3]

And it would be an especially perilous course, given the heightened obligations imposed on probate courts in particular. They are legislatively required to use "reasonable diligence" to ensure that independent administrators perform their legal duties.

[3] Mr. Maupin appears to seek a broad rule, extending beyond the situation of an independent executor who is the sole beneficiary under a will. *See* Maupin Pet. at 21 (requesting ruling that "executors administering wills explicitly stating that executors may act without approval of any court should be permitted to proceed pro se, *especially* where those executors are the sole beneficiaries of the estate"); *and* TAJC Br. at 8 (characterizing the challenge as being to "judicial policies that prevent independent executors—*including* those who are the sole beneficiaries of a will— from proceeding pro se to administer estates") (emphases added).

Tex. Estates Code § 351.352. They are in the unique position of facing personal liability for judicial acts if they fall short—through "gross neglect"—of meeting, for example, the "reasonable diligence" standard of seeing that independent administrators meet their legal duties. Tex. Estates Code § 351.354.

Requiring that an independent administrator be represented by a lawyer when administration of an estate requires turning to a probate court for judicial action is one way for probate courts to satisfy this standard. At the same time, such a requirement does not undermine the system of independent administration. Lawyers serve as lubricants to the probate system, as the interface between lay people serving as independent administrators and the courts. As discussed further below, *see* Part III.B, *Amici* here do not endorse the legal analysis in the law review article touted by *Amicus* TAJC,[4] but they strongly subscribe to the article's warning that proceeding *pro se* as an independent executor is a dubious proposition. Hatfield article at 375 ("it is unclear when, *if ever*,

[4] *See* M. Hatfield, Pro Se Executors—*Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007) ("Hatfield article").

they should" try proceeding *pro se*) (emphasis added). As the article forthrightly, and accurately, acknowledges:

> The executor lacks the information, strategies, and experience of a good lawyer, which means the executor is quite unlikely to discern the real dangers of proceeding pro se.

Id.

Against the backdrop of their long and deep experience in Texas probate law and administration of the State's statutory probate courts, *Amici* are deeply concerned about the potential adverse impact on Texas probate courts of the rule urged by Mr. Maupin and *Amicus* TAJC. There is good reason that "[v]irtually all statutory probate courts," TAJC Br. 9, have adopted the policy challenged here. The Probate Judges College and the State Presiding Probate Judge urge the Court to deny the petition for review. *If* the policy issue needs addressing, there are far better ways to do it than through this particular case.

III. ARGUMENT

Mr. Maupin, joined by TAJC, presses the Court to decide the question of whether an independent executor *must* be allowed to proceed *pro se* in statutory probate court proceedings. The only *le-*

gal, as opposed to policy-based, argument offered in support of an affirmative answer is Rule 7 of the Texas Rules of Civil Procedure.

The Rule 7 argument is not legally viable. *See* Part III.B, below. But the Court need not, and should not, even reach the substantive legal issue. The probate court admitted Mr. Maupin's deceased wife's will to probate as a muniment of title because it found "no need for administration of Decedent's estate." CR 15-16 (Order Admitting Will to Probate as Muniment of Title); Conclusions of Law 3-4. It is only if the court erred in admitting the will to probate as a muniment of title that the way in which an independent administrator may proceed in court—represented by an attorney or acting *pro se*—becomes an issue. Mr. Maupin, though, has waived any challenge to the muniment of title issue by not bringing the issue forward in his petition for review.[5] *See* Part III.A, below.

A. The *Pro Se* Issue Is Not Properly Before the Court.

Mr. Maupin and TAJC's stated objective directly clashes with the relief Mr. Maupin already has been afforded in this case: a

[5] *Amicus* TAJC does not address this problem.

cost-effective way to probate a will. The policy premise of Mr. Maupin and TAJC's challenge is that the probate court's policy can impose an unnecessary financial burden on estates. Maupin Pet. 19 ("financially harm[s] . . . estates"); TAJC Br. 10 ("unnecessarily increase[s] . . . costs"). The probate court, though, admitted the will to probate as a muniment of title, adopting an even less financially burdensome alternative for Mr. Maupin than if he had been issued the letters testamentary he wanted, along with the ability to appear *pro se* in court as independent administrator. The muniment of title route to probating a will is a way to "quickly and cost-efficiently" handle the matter when administration of the estate is not needed (as was the case here). *In re Kurtz*, 54 S.W.3d 353, 355 (Tex.App.—Waco 2001, no pet.); *see also Chabot v. Estate of Sullivan*, 583 S.W.3d 757, 759 n.2 (Tex.App.—Austin 2019, pet. denied) (same).

It is not clear why Mr. Maupin would want to challenge admission of the will to probate as a muniment of title rather than through issuance of letters testamentary and designation of an independent administrator. Mr. Maupin had the burden of estab-

lishing the necessity of an administration of the estate. Tex. Estates Code § 301.153(a). Yet, he has identified nothing in the trial record showing he met his burden. Nor does his petition present a challenge to the probate court's finding that there was no need for administration of the estate.

He does appear to have presented in some fashion such a challenge in the appeals court below. It was his first issue, arguing that "[t]he trial court abused its discretion and harmfully erred by not granting letters testamentary to Appellant." Brief of Appellant at 11 (filed May 7, 2018, in No. 13-17-00555-CV).[6]

By not raising this issue in his petition for review, Mr. Maupin has abandoned it. *Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (legal challenge waived if not raised in petition for review). The fact that Mr. Maupin is appearing in this Court *pro se* does not relieve him of his waiver. *Pro se* litigants are no less required to follow judicial rules of procedure than are licensed attorneys. *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (*per curiam*).

[6] Available online at http://www.search.txcourts.gov/Case.aspx?cn=13-17-00555-CV&coa=coa13.

If admitting the will to probate as a muniment of title was appropriate, then legal questions about an independent administrator cannot be reached. Because a challenge to the order on muniment of title has been waived, the issue raised here by Mr. Maupin and TAJC cannot be reached.[7]

B. Rule 7 Does Not Require Probate Courts To Allow *Pro Se* Independent Administrators.

It is not sufficient to argue that some legal policy *should* be adopted. Rather, an argument that a policy *must* be followed must has to arise from an underlying legal right. The only identified source of a legal right to appear in probate court as a *pro se* independent administrator is Rule 7 of the Texas Rules of Civil Procedure, which provides:

> Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

Mr. Maupin's argument is that this court-made rule means that he must be allowed to appear "in person" and prosecute "his rights" as an independent executor of his deceased wife's estate.

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[7] Even setting aside the waiver issue, the Response to Petition for Review extensively addresses why probating the will as a muniment of title in this case was legally proper. Resp. 9-16.

This is a misreading of Rule 7 as applied to independent administrators in probate courts. The several flaws in Mr. Maupin's Rule 7 argument are detailed below.

1. Governing This Case Is The Common Law Rule That Independent Administrators Are Fiduciaries Functioning In A Different Capacity Than Individual Persons Serving In That Capacity.

First, momentarily setting aside the import of its text, Rule 7 does not displace the common law governing the "rights" and "powers" of administrators. The Legislature has provided that the rights and powers of administrators are "governed by the common law" to the extent common law principles do not conflict with a statute. Tex. Estates Code § 351.001. A judicial rule is not a statute, and Rule 7 as interpreted by Maupin and TAJC would be inconsistent with Section 351.

In the probate context, for over a century Texas common law has distinguished between a person's capacity as an independent executor and that same person's personal capacity. *See Tison v. Glass*, 94 S.W. 376, 377 (Tex.Civ.App. 1906) (explaining that a judgment in a probate dispute was against an individual personally not "in his capacity of independent administrator). This is not a

relic. In *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983), the Court distinguished between holding a person liable as independent administrator and as individual. *See also Beck v. Beck*, 841 S.W.2d 745, 746 (Tex. 1991) (juxtaposing individual capacity of person with his capacity as independent executor of estate).

This well-established common law principle has not been altered by the Legislature (which, of course, has the power to do so). Consequently, Rule 7 cannot be the source of a right of independent administrators to appear *pro se* in judicial proceedings in probate court.

Mr. Maupin as an individual and Mr. Maupin as independent administrator are two different legal entities because they appear in court in two different capacities. Their legal duties are different, too. As independent administrator Mr. Maupin serves in a fiduciary role, but Mr. Maupin as himself does not. An independent administrator is "subject to the high fiduciary standards applicable to all trustees." *Humane Society of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1976). In that ca-

pacity with those legal duties, he is not (to use Rule 7's language) in probate court to "defend *his* rights."

This principle is not deflected at all in the arguments of Mr. Maupin, TAJC, and the law review article that in Texas an estate is not a legal entity. *See* Maupin Pet. 14; TAJC Br. 16; Hatfield article at 118. Their narrow point—that estates are not separate juridical entities—is certainly correct. But describing what the relationship of the independent executor to the estate is *not* does not answer the question of what it *is*. It is a fiduciary relationship with the duties exercised by a different juridical entity than the person in and of himself. This is a core principle of probate law, and the policy or rule that such fiduciaries may only appear in court through a licensed attorney is one of the key ways that principle is regularly driven home and kept at the forefront of the considerations of probate courts and independent administrators alike.

The Waco court of appeals correctly understood this important point in *Steele v. McDonald*, 202 S.W.3d 926 (Tex.App.—Waco 2006, pet. denied):

> A plain reading of Rule 7 suggests that Gene may not appear *pro se* as Independent Executor of the Duke Estate because in this role he is litigating rights in a representative capacity rather than in his own behalf.

Id. at 928; *cf. In re Gutersloh*, 326 S.W.3d 737, 739 (Tex.App.—Amarillo 2010, no pet.) (same, but as to trustees).

2. *Shaffer* Is Not On Point.

Mr. Maupin and TAJC tout *Ex parte Shaffer*, 649 S.W.2d 300 (Tex. 1983), as already establishing that independent executors must be allowed to proceed *pro se* in probate courts. Maupin Pet. 12-13; TAJC Br. at 17. *Shaffer*, though, is not sufficient authority for the proposition they urge.

Yes, there is clearly language in the opinion reciting that Rule 7 gives a party a right to represent himself in court. 649 S.W.2d at 302. But that language was at best a mere observation stating a truism from Rule 7. It does not grapple with, or address itself specifically to, independent executors and whether they can bring themselves within Rule 7's language. It was not even important to disposition of the case. The question in *Shaffer* was whether a court could hold someone in contempt without advance formal no-

tice to them. 649 S.W.2d at 301. *Shaffer* does not establish the legal principle Mr. Maupin urges.

3. Under Rule 3a(1), The Court's Formal Approval Of Local Rules Containing Policies Identical To The One Challenged Here Means That Rule 7 Does Not Prohibit The Policy.

Finally, administrative actions by this Court implicitly refute Maupin's argument. Under Rule 3a(1) of the Texas Rules of Civil Procedure, "[e]ach . . . probate court may make and amend local rules governing practice before such courts, provided . . . that any proposed rule or amendment *shall not be inconsistent with these rules*." (emphasis added).

At least twice in recent years, this Court has approved local probate court rules containing the very policy of Travis County Probate Court Number One. *See* Misc. Docket No. 19-9079 (Aug. 23, 2019) (approving local rules of Dallas County probate courts); Misc. Docket No. 12-9173 (Oct. 22, 1012) (approving local rules of Denton County probate courts). Rule 4.05(a)(1) of the Dallas County probate rules that this Court approved provides: "An individual shall be represented by an attorney if the individual is . . . applying to serve as an . . . administrator of an estate[.]" Rule

1.3(a)(1) of the Denton County probate rules that this Court approved provides: "An individual must be represented by an attorney if the individual is . . . applying to serve as an . . . administrator of an estate[.]"

Under Texas Rule of Civil Procedure 3a(1), the Court is not supposed to approve these local *pro se* rules concerning independent administrators if they are inconsistent with other extant rules of civil procedure. It follows from this that the *pro se* rules for the Dallas and Denton County probate courts are not in this Court's eyes inconsistent with Rule 7. It likewise follows that Travis County Probate Court Number One's *pro se* policy is not inconsistent with Rule 7.

CONCLUSION AND PRAYER

The Court should deny the petition for review. The Estates Code authorizes probate court to use "reasonable diligence" to ensure that personal representatives of estates administered under court orders perform their legal duties. Tex. Estates Code § 351.352. Not allowing independent administrators to appear in

court *pro se* is an exercise of the "reasonable diligence" the Legislature has demanded of probate judges.

Respectfully submitted,

__/s/ *Renea Hicks*_____
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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)-(3), I certify that this brief contains 3,409 words, excluding the portions of the brief exempted by Tex. R. App. Proc. 9.4(i)(1). This is a computer-generated document created in Microsoft Word 2010 using 14-point Century Schoolbook (12-point for footnotes), with 14- and 15-point Franklin Gothic for headings. In making this certification, I relied on the word count provided by the software used to prepare the document.

_/s/ *Renea Hicks*_____
Renea Hicks

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2019, the foregoing Brief of *Amici Curiae* was served electronically in accordance with the Texas Rules of Appellate Procedure on all counsel of record and, for petitioner *pro se*, the party of record:

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Renea Hicks

Exhibit F

TRAVIS COUNTY PROBATE COURT NO. 1

Travis County Courthouse, Room 217
1000 Guadalupe Street – P.O. Box 1748
Austin, Texas 78767

October 1, 2020

Court Policy Regarding "Pro Se" Applicants (Applicants without a Lawyer)

People who represent themselves in court are called "pro se" or "self-represented" litigants. You are not required to have a lawyer to file papers or to participate in a case. You have a right to represent yourself. **However, a pro se may not represent others. Under Texas law, only a licensed attorney may represent the interests of third-party individuals or entities, including guardianship wards and probate estates.** *See In re: Guetersloh*, 326 S.W.3d 737 (Tex. App.–Amarillo, 2010) and *Steele v. McDonald*, 202 S.W.3d 926 (Tex. App.–Waco, 2006), and the authorities cited. Therefore, individuals applying for letters testamentary, letters of administration, determinations of heirship, and guardianships of the person or estate must be represented by a licensed attorney. The only time a pro se applicant may proceed in court is when truly representing **only** himself or herself.

Frequently Asked Questions

Q: What is a pro se?
A: A pro se is an individual who has not hired a lawyer and appears in court to represent himself and no other person or entity.

Q: Can I still serve as an executor, administrator, or guardian even though I'm not a lawyer?
A: Yes. One need not be a lawyer to serve as an executor, administrator, or guardian. **However, the executor, administrator, or guardian must be represented by a lawyer.**

Q: But I'm the only one that needs letters testamentary. As executor, how would I be representing the interests of others?
A: As executor of a decedent's estate, you don't represent only yourself. An executor represents the interests of beneficiaries and creditors. This responsibility to act for the benefit of another is known as a fiduciary relationship. It gives rise to certain legal obligations and responsibilities that require legal expertise. The lawyer you hire represents you in your capacity as executor and assists you in representing those for whom you are responsible.

Q: If I get the paperwork from a law library or the Internet, can I fill it out and file it? Isn't that what lawyers do?
A: Lawyers don't just fill out forms. Lawyers (1) determine what method of probate or guardianship is appropriate in a particular situation, (2) create or adapt any necessary paperwork, and – importantly – (3) advise the client about the ongoing responsibilities of a fiduciary. If you are not a lawyer, your creating legal pleadings while acting as a fiduciary would constitute the unauthorized practice of law.

Q: As a pro se, what proceedings **can** I do on my own in Probate Court?
A: In Probate Court or any other court, the only proceedings you can handle as a pro se are those in which you truly would be representing **only** yourself. For example, a pro se applicant may probate a Will as a muniment of title when he or she is the sole beneficiary under the Will, and there are no debts against the estate other than those secured by liens against real estate. Note, though, that probating a Will as a muniment of title is not always a good option even if there are no debts and the applicant is the sole beneficiary. **Whether a muniment of title is the best probate procedure for a particular situation is a legal decision best made by a lawyer.**

As another example, all of a decedent's heirs may work together without a lawyer to file a small estate affidavit in the limited situations in which a small estate affidavit might be appropriate. For further information, see Texas Estates Code Chapter 205 and the Travis County Probate Court's Small Estate Affidavit Checklist. As the checklist notes, the complexity of the Code poses many pitfalls for non-lawyers attempting to comply with

the requirements for a small estate affidavit. An attorney's assistance in drafting a small estate affidavit may prevent the denial of an Affidavit where it would have been an appropriate probate procedure if the Affidavit had been prepared correctly.

Q: What procedures should I follow if I decide to probate a Will as a muniment of title as a pro se applicant?

A: As stated above, whether a muniment of title is the best probate procedure for a particular situation is a legal decision best made by a lawyer; Court staff cannot guide you or advise what you should do in your case. If you decide to proceed with your case without a lawyer, the County Law Library has reference materials that may be helpful. **If you proceed with an application to probate a Will as a muniment of title, note the following:**

All beneficiaries. In a pro se application to probate a Will as a muniment of title, **all** beneficiaries under the Will **must** be applicants, and **all** beneficiaries **must** testify at the hearing.

Must swear no debts. To probate a Will as a muniment of title, each applicant must be able to swear on personal knowledge that there are no debts against the estate other than those secured by liens against real estate – that includes credit card balances, doctor's bills, utility bills, Medicaid estate recovery claims, etc. – *anything* owed by decedent and not paid off. Anyone falsely swearing that the estate has no creditors is subject to a perjury charge.

Needed documents. The Court reviews all documents for Will prove-ups before the hearing. By reviewing the documents before the hearing, the Court can ensure that hearings go more smoothly for participants. Please see the Court's document titled "Submitting Paperwork for Will Prove-Ups and Heirships: When & How" for more information about when and how to submit documents.

Note there are additional procedural requirements with additional necessary documents in the following cases:

(1) the Will is not the original Will,
(2) the Will is not self-proved, or
(3) you are probating the Will more than four years after the decedent's death.

Court staff can give you a handout with information about what the additional procedural requirements are, but you will need to obtain all additional documents.

- ***At the time you file the application in the Clerk's Office***, also file (1) the Will and (2) the death certificate (cross out the social security number). Rule 57 of the Texas Rules of Civil Procedure requires that you include the following information for each applicant in the application: name, address, phone number, email address, and fax number (if available).

- ***Within 24 hours after you set the hearing:***
  - ✓ Email megan.inouye@traviscountytx.gov the proposed order and the proposed (unsigned) proof of death and other facts.
  - ✓ If you have additional proposed *testimony* that is required because the Will is a copy, is not self-proved, or is being probated more than four years after decedent's death, also email that proposed (unsigned) testimony.
  - ✓ Put the date of the hearing and decedent's name in the subject line of the email.
  - ✓ If you do not have access to email, deliver these documents to the Court, with the date and time of the hearing on a cover sheet or Post-It note.

- ***At least one week before the scheduled hearing,*** file with the **Clerk's Office** any additional *signed pleadings* required because the Will is a copy, the Will is not self-proved, or the Will is being probated more than four years after decedent's death.

Exhibit G

922 S.W.2d 920
Supreme Court of Texas.

Harvey K. HUIE, Jr., Individually, as Independent Executor of the Estate of Adeline M. Huie, Deceased, and as Trustee of the Melissa Huie Chenault Trust, Relator
v.
The Honorable Nikki DeSHAZO, Judge, Respondent.

No. 95–0873.
|
Argued Nov. 30, 1995.
|
Decided Feb. 9, 1996.
|
Rehearing Overruled June 28, 1996.

Synopsis
Trust beneficiary sought to compel discovery, from an attorney, of communications by a trustee to the attorney relating to trust administration, in a suit by beneficiary alleging that trustee breached his fiduciary duty. The trial court ordered the attorney to disclose communications made before suit was filed. The Court of Appeals denied relief and the trustee petitioned for writ of mandamus. The Supreme Court, Phillips, C.J., held that: (1) attorney-client privilege applied, notwithstanding trustee's fiduciary duties to fully disclose all material facts; (2) privilege did not affect trustee's duty to disclose and provide full trust accounting; (3) attorney-client relationship existed between trustee and attorney; (4) trust was not client; (5) crime-fraud exception to attorney-client privilege did not apply; (6) compensation of attorney with trust funds did not preclude attorney-work-product privilege; and (7) whether disputed documents were prepared in anticipation of litigation was to be considered on remand.

Writ conditionally granted.

***921** On petition for writ of mandamus.

Attorneys and Law Firms

G. David Ringer, Timothy D. Zeiger, Michael D. McKinley, Dallas, Douglas W. Alexander, Austin, Dwight M. Francis, Dallas, for Relator.

Donovan Campbell, Jr., T. Wesley Holmes, James J. Hartnett, Jr., James J. Hartnett, Sr., Jack M. Kinnebrew, Gary E. Clayton, and Kim Kelly Lewis, Dallas, for Respondent.

Jay J. Madrid, R. Gregory Brooks, Madrid, Corallo & Brooks, P.C., Dallas, for J. Peter Kline, Robert L. Miars, John A. Beckert, Richard N. Beckert, Edward J. Rohling, Jack Craycroft and Harvey Hotel Corp.

Opinion

Chief Justice PHILLIPS delivered the opinion of the Court, in which all Justices join.

The issue presented in this original mandamus proceeding is whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to trust administration from discovery by a trust beneficiary. We hold that, notwithstanding the trustee's fiduciary duty to the beneficiary, only the trustee, not the trust beneficiary, is the client of the trustee's attorney. The beneficiary therefore may not discover communications between the trustee and attorney otherwise protected under Texas Rule of Civil Evidence 503. Because the trial court ruled otherwise, we conditionally grant writ of mandamus.

I

Harvey K. Huie, the relator, is the executor of the estate of his deceased wife, who died in 1980. Huie is also the trustee of ***922** three separate testamentary trusts created under his wife's will for the primary benefit of the Huies' three daughters. One of the daughters, Melissa Huie Chenault, filed the underlying suit against Huie in February 1993 for breach of fiduciary duties relating to her trust.[1] Chenault claims that Huie mismanaged the trust, engaged in self-dealing, diverted business opportunities from the trust, and commingled and converted trust property. Huie's other two daughters have not joined in the lawsuit.

Chenault noticed the deposition of Huie's lawyer, David Ringer, who has represented Huie in his capacity as executor and trustee since Mrs. Huie's death. Ringer has

also represented Huie in many other matters unrelated to the trusts and estate during that period. Before Chenault filed suit, Ringer was compensated from trust and estate funds for his fiduciary representation. Since the suit, however, Huie has personally compensated Ringer for all work.

Although Ringer appeared for deposition, he refused to answer questions about the management and business dealings of the trust, claiming the attorney-client and attorney-work-product privileges. Chenault subsequently moved to compel responses, and Huie moved for a protective order. After an evidentiary hearing, the trial court held that the attorney-client privilege did not prevent beneficiaries of the trust from discovering pre-lawsuit communications between Huie and Ringer relating to the trust. The court's order, signed July 19, 1995, does not cite to any of the exceptions under Texas Rule of Civil Evidence 503 or otherwise disclose the court's rationale.[2] The court held that the attorney-client privilege protected only communications made under the following circumstances: 1) a litigious dispute existed between Chenault and Huie; 2) Huie obtained legal advice to protect himself against charges of misconduct; and 3) Huie paid for the legal counsel without reimbursement from the estate or trust. The court accordingly ordered Ringer to answer questions relating to events before February 1993, when suit was filed and Huie began personally compensating Ringer. The court also held that the attorney-work-product privilege did not apply to communications made before Chenault filed suit, again without stating its reasoning.

The court of appeals, after granting Huie's motion for leave to file petition for writ of mandamus, subsequently vacated that order as improvidently granted, denying relief. After Huie sought mandamus relief from this Court, we stayed Ringer's deposition pending our consideration of the merits.

II

The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney "made for the purpose of facilitating the rendition of professional legal services to the client...." TEX.R.CIV.EVID. 503(b). This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding." *West v. Solito*, 563 S.W.2d 240, 245 (Tex.1978). The privilege thus "promote[s] effective legal services," which "in turn promotes the broader societal interest of the effective administration of justice." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex.1993).

The Texas Trust Code provides that "[a] trustee may employ attorneys ... reasonably necessary in the administration of the trust estate." TEX.PROP.CODE § 113.018. Chenault ***923** does not dispute that Huie employed Ringer to assist Huie in the administration of the Chenault trust. Indeed, Chenault does not seriously dispute that an attorney-client relationship existed between Huie and Ringer about trust matters.[3] Further, Rule 503 contains no exception to the privilege for fiduciaries and their counsel. Chenault nonetheless contends that communications between Huie and Ringer regarding trust matters cannot be privileged as to Chenault, a trust beneficiary, even if the elements of Rule 503 are otherwise met. Chenault's primary argument is that Huie's fiduciary duty of disclosure overrides any attorney-client privilege that might otherwise apply.

Trustees and executors owe beneficiaries "a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights." *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex.1984). *See also* TEX.PROP.CODE § 113.151(a) (requiring trustee to account to beneficiaries for all trust transactions). This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries.

Chenault argues that the trustee's duty of disclosure extends to any communications between the trustee and the trustee's attorney. The fiduciary's affairs are the beneficiaries' affairs, according to Chenault, and thus the beneficiaries are entitled to know every aspect of Huie's conduct as trustee, including his communications with Ringer. We disagree.

The trustee's duty of full disclosure extends to all *material facts* affecting the beneficiaries' rights. Applying the attorney-client privilege does not limit this duty. In Texas, the attorney-client privilege protects confidential communications between a client and attorney made for the purpose of facilitating the rendition of professional legal services to the client. *See* TEX.R.CIV.EVID. 503(b). While the privilege extends to the entire communication, including facts contained therein, *see GAF Corp. v. Caldwell*, 839 S.W.2d 149, 151

(Tex.App.—Houston [14th Dist.] 1992, orig. proceeding); 1 STEVEN GOODE ET. AL, TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL, § 503.5 n. 15 (1993), a person cannot cloak a material fact with the privilege merely by communicating it to an attorney. *See, e.g.*, *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 199 (Tex.1993).

This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

Our holding, therefore, in no way affects Huie's duty to disclose all material facts and to provide a full trust accounting to Chenault, even as to information conveyed to Ringer. In the underlying litigation, Chenault may depose Huie and question him fully regarding his handling of trust property and other factual matters involving the trust. Moreover, the attorney-client privilege does not bar Ringer from testifying about factual matters involving the trust, as long as he is not called on to reveal confidential attorney-client communications.

The *communications* between Ringer and Huie made confidentially and for the purpose ***924** of facilitating legal services are protected. The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience. *See* *In re Prudence–Bonds Corp.*, 76 F.Supp. 643, 647 (E.D.N.Y.1948) (concluding that, without the privilege, "the experience in management and best judgment by [the trustee] is put aside ... which, in the end may result in harm to the [beneficiaries]").

Chenault relies on *Burton v. Cravey*, 759 S.W.2d 160 (Tex.App.—Houston [1st Dist.] 1988, no writ), for the proposition that the attorney-client privilege does not apply where a party has a right to information independently of the rules of discovery. In *Burton*, condominium owners filed a trial court mandamus action against the condominium association to enforce their statutory right to inspect the association's books and records. *See* TEX.PROP.CODE § 81.209; TEX.REV.CIV.STAT.ANN. art. 1396–2.23. The trial court allowed inspection of the records, including those in the possession of the association's attorney, finding as a factual matter that the attorney's records constituted part of the association's records. The court of appeals affirmed, holding that the attorney-client privilege did not apply in light of the owners' unqualified right of inspection. 759 S.W.2d at 162.

It is unclear whether the records at issue in *Burton* were merely records of the association in the possession of the attorney, or whether they contained separate confidential attorney-client communications. To the extent that they consisted of the former, we agree that they were not protected. *See* *Brotherton*, 851 S.W.2d at 199. However, to the extent that the court held that the owners' statutory right of inspection somehow trumped the privilege for confidential attorney-client communications, we disapprove of its holding, for the reasons previously discussed. We also disapprove of the court's dicta that the trial court could, in its discretion, decline to apply the attorney-client privilege even if all the elements of Rule 503 were met. *See* 759 S.W.2d at 162.

Chenault also relies on a study by the Section of Real Property, Probate and Trust Law of the American Bar Association, entitled *Report of the Special Study Committee on Professional Responsibility—Counselling the Fiduciary. See* 28 REAL PROP., PROB. & TR.J. 823 (1994). This study concludes that, while counsel retained by a fiduciary ordinarily represents only the fiduciary, the counsel should be allowed to disclose confidential communications relating to trust administration to the beneficiaries. *Id.* at 849–850. The study reasoned as follows:

> The fiduciary's duty is to administer the estate or trust for the benefit of the beneficiaries. A lawyer whose assignment is to

> provide assistance to the fiduciary during administration is also working, in tandem with the fiduciary, for the benefit of the beneficiaries, and the lawyer has the discretion to reveal such information to the beneficiaries, if necessary to protect the trust estate. The interests of the beneficiaries should not be compromised by a barrier of confidentiality.

Id. Several English common-law cases, and treatises citing those cases, also support this view. *See, e.g., In re Mason,* 22 Ch.D. 609 (1883); *Talbot v. Marshfield,* 2 Dr. & Sm. 549 (1865); *Wynne v. Humbertson,* 27 Beav. 421 (1858). *See also* BOGART, THE LAW OF TRUSTS AND TRUSTEES, § 961 (2nd. ed. 1983); SCOTT, THE LAW OF TRUSTS, § 173 (3rd ed. 1967).

We decline to adopt this approach. We find the countervailing arguments supporting application of the privilege, discussed previously, more persuasive. Moreover, Rule 503 contains no exception applicable to fiduciaries ***925** and their attorneys. If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process. Ringer testified that he had the "fullest expectation" that his communications with Huie would be privileged. This expectation was justified considering the express language of Rule 503 protecting confidential attorney-client communications. We should not thwart such legitimate expectations by retroactively amending the rule through judicial decision.

We thus hold that, while a trustee must fully disclose material facts regarding the administration of the trust, the attorney-client privilege protects confidential communications between the trustee and his or her attorney under Rule 503.[4]

III

A

We also reject the notion that the attorney-client privilege does not apply because there was no true attorney-client relationship between Huie and Ringer. This argument finds support in some other jurisdictions, where courts have held that an attorney advising a trustee in connection with the trustee's fiduciary duties in fact represents the trust beneficiaries. Accordingly, the trustee has no privilege to withhold confidential communications from the beneficiaries. *See, e.g.,* *Wildbur v. ARCO Chemical Co.,* 974 F.2d 631 (5th Cir.1992); *United States v. Evans,* 796 F.2d 264 (9th Cir.1986); *In the Matter of Torian,* 263 Ark. 304, 564 S.W.2d 521 (1978); *Riggs Nat'l Bank of Washington v. Zimmer,* 355 A.2d 709 (Del.Ch.1976); *In re Hoehl's Estate,* 181 Wis. 190, 193 N.W. 514 (1923). The court in *Riggs* reasoned as follows:

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who *chance* to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries.... In effect, the beneficiaries were the clients of [the trustees' attorney] as much as the trustees were, and perhaps more so.

355 A.2d at 713–14.

We conclude that, under Texas law at least, the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries. *See* *Thompson v. Vinson & Elkins,* 859 S.W.2d 617 (Tex.App.—Houston [1st Dist.] 1993, writ denied) (beneficiary lacked standing to sue trustee's attorney for malpractice, as no attorney-client relationship existed between them). "Client" is defined under Rule 503 as

> a person, public officer, or corporation, association, or other

> organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

TEX.R.CIV.EVID. 503(a)(1). It is the trustee who is empowered to hire and consult with the attorney and to act on the attorney's advice. While Huie owes fiduciary duties to Chenault as her trustee, he did not retain Ringer to represent Chenault, but to represent himself in carrying out his fiduciary duties. Ringer testified, for example, that he has "never given any legal advice to Mrs. Chenault," and in fact had only seen her on a few isolated occasions. It would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client. *See* *In re Prudence–Bonds Corp.*, 76 F.Supp. 643 (E.D.N.Y.1948); ***926** *Shannon v. Superior Court*, 217 Cal.App.3d 986, 266 Cal.Rptr. 242, 246 (1990). We thus hold that Huie, rather than Chenault, was Ringer's client for purposes of the attorney-client privilege.

B

Chenault also advances an argument on post-submission brief to this Court that the *trust* itself was Ringer's real client. This approach, however, is inconsistent with the law of trusts. Mrs. Huie created the testamentary trusts by devising property to *Huie* as trustee. *See* TEX.PROP.CODE § 112.001(3). It is Huie that holds the trust property for the benefit of Chenault, and it is Huie that is authorized to hire counsel. *See* TEX.PROP.CODE § 113.018. The term "trust" refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee with respect to the trust property. *See* TEX.PROP.CODE § 111.004. Ringer thus represented Huie in his capacity as trustee, not the "trust" as an entity.

IV

Chenault also argues that communications between Ringer and Huie should be disclosed under the crime-fraud exception to the attorney-client privilege. *See* TEX.R.CIV.EVID. 503(d)(1). Chenault does not argue that the alleged breaches of trust for which she is suing are crimes or fraud within this exception; rather, she contends that the failure to disclose communications in and of itself is fraud. Because we have held that the trustee's invocation of the attorney-client privilege does not violate his or her duty of full disclosure, we find Chenault's crime-fraud argument to be without merit.

V

A

The party resisting discovery bears the burden of proving any applicable privilege. *See* *State v. Lowry*, 802 S.W.2d 669, 671 (Tex.1991). Chenault argues that even if the attorney-client privilege is otherwise available, Huie failed to carry his evidentiary burden to establish its applicability in this case.

Ringer, who was allowed to give testimony in narrative form, testified in part as follows:

> The questions that were propounded to me during my deposition by [Chenault's counsel] I believe were argumentative, and they sought to go at the very core of things I understood, things that I knew, or even questions that related to whether something occurred or not, would go to the essence of the advice and communication. I have always handled my work with Mr. Huie with the fullest expectation that my correspondence with him and my communications with him and his correspondence with me and his communication with me would be privileged.... I also have Mr. Huie's instruction and expectation that his

communications be confidential....

Ringer did not specifically address any of the numerous certified questions before the court, and thus there is no testimony about whether or why each particular question calls for the disclosure of confidential communications. Chenault thus contends that Huie did not prove "what particular deposition testimony would entrench upon the alleged attorney-client privilege...." Huie responds that many of the questions on their face call for privileged communications, but at the same time concedes that other questions "arguably present a close question as to whether confidential attorney-client communications ... would be compromised."

The trial court's ruling is based on its conclusion that the attorney-client privilege does not apply to any pre-litigation communications between a trustee and the trustee's attorney, a contention we have rejected. In light of this holding, we believe the trial court should have an opportunity to consider, in the first instance, whether Huie has carried his evidentiary burden as to each of the certified questions for which Ringer claimed, on Huie's behalf, the attorney-client privilege. The court may, in its discretion, receive further evidence from the parties.

B

Chenault further argues that many of the certified questions relate to federal tax returns ***927** filed by the estate. Relying on cases interpreting the federal attorney-client privilege, she contends that the privilege does not apply when an attorney is employed to prepare tax returns, as the attorney is primarily performing accounting, rather than legal, services. *See, e.g.,* *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir.1987); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.1981); *Canaday v. United States*, 354 F.2d 849, 857 (8th Cir.1966). *But see* *Colton v. United States*, 306 F.2d 633, 637 (2d Cir.1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963).

The attorney-client privilege embodied in Rule 503 requires that the communication be "made for the purpose of facilitating the rendition of professional legal services to the client...." The trial court, in considering whether Huie has met his evidentiary burden, should in the first instance determine whether this element is satisfied as to each of the certified questions.

VI

The trial court also overruled Huie's attorney-work-product objections as to communications made before the date Chenault filed suit. Huie contends that the work-product privilege protects communications made after 1988, the time when he contends that he anticipated litigation.

An attorney's "work product" refers to "specific documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories, prepared and assembled in actual anticipation of litigation or for trial." *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 200 (Tex.1993). The trial court did not rule on Huie's claims of work-product privilege independently of his claims of attorney-client privilege; rather, the court summarily overruled both of these claims as to all pre-litigation communications. It thus appears that the trial court concluded, as it did for the attorney-client privilege, that the work-product privilege simply does not apply in the fiduciary-attorney relationship prior to the time suit is actually filed.

We disagree with this conclusion. The policy reasons supporting the attorney-client privilege in the context of the fiduciary-attorney relationship support even more strongly the work-product privilege, as the latter protects the confidentiality of work prepared in anticipation of litigation. There can be little dispute that a fiduciary must be allowed some measure of confidentiality in defending against an anticipated suit for breach of fiduciary duty. Further, we do not believe it is determinative that Ringer was compensated from trust funds, rather than by Huie personally, before Chenault filed suit. The determinative factor for the work-product privilege is instead whether litigation was anticipated. While we express no opinion on whether it was *proper* for Ringer to be compensated from trust funds for any work that may have been done in anticipation of litigation, we hold that any such impropriety would not abrogate the work-product privilege. *See* *Lasky, Haas, Cohler & Munter v. Superior Court*, 172 Cal.App.3d 264, 218 Cal.Rptr. 205 (1985) (public policy underlying full disclosure by trustee does not overcome work-product privilege, even where attorney is compensated from trust corpus).

Because the trial court concluded that the work-product privilege did not apply to materials or communications generated prior to the time suit was filed and Huie began personally compensating Ringer, it appears that the court never reached the issue of when Huie anticipated litigation. The court should therefore reconsider Huie's work-product objections in accordance with this opinion.

VII

Chenault argues that because the legal question confronting the trial court was an issue of first impression in Texas, the court could not have "abused its discretion" in resolving the issue, and thus mandamus relief is inappropriate. We disagree. "A trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992). Consequently, the trial court's erroneous legal conclusion, even in an ***928** unsettled area of law, is an abuse of discretion. *See* *Lunsford v. Morris*, 746 S.W.2d 471 (Tex.1988). Moreover, because the trial court's order compels the disclosure of potentially privileged information, Huie lacks an adequate remedy by appeal. *See* *Walker*, 827 S.W.2d at 843.

We therefore conditionally grant the writ of mandamus and direct the trial court to vacate its July 19, 1995, discovery order. The trial court shall reconsider Huie's claims of attorney-client and attorney-work-product privilege in accordance with this opinion. The court may in its discretion receive additional evidence from the parties.

All Citations

922 S.W.2d 920, 64 USLW 2540, 39 Tex. Sup. Ct. J. 288

Footnotes

1 Chenault sued individually, as next friend of her minor daughter, and as next friend of her minor niece, who is under Chenault's conservatorship. Chenault also named several business associates of Huie as additional defendants.

2 The trial court initially relied on Texas Rule of Civil Evidence 503(d)(5), which creates an exception to the attorney-client privilege as between joint clients of an attorney regarding matters of common interest to the clients. The court, however, later amended its order to delete this reference.

3 Chenault argues for the first time in a post-submission brief that Ringer represented the trust itself as an entity, rather than Huie as trustee. This argument is addressed in section III–B below.

4 Chenault also argues that Huie, by accepting the appointment as trustee with knowledge of his duty of disclosure, impliedly waived the protection of the attorney-client privilege. Because we conclude that a trustee does not violate the duty of full disclosure by invoking the attorney-client privilege, we reject this waiver argument.

Tab 2

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: February 14, 2023

Re: September 15, 2022 Referral Letter relating to TRAP 28.3

I. Matter referred to subcommittee

> **Permissive Appeals.** The Court requests the Committee to consider whether Rule 28.3 or Rule 47 of the Texas Rules of Appellate Procedure should be amended to require a court of appeals to provide more than the "basic" reasons for its decision to reject a permissive appeal and to draft any recommended amendments. *Industrial Specialists, LLC v. Blanchard Refining Company LLC*, 2022 WL 2082236 (Tex. 2022) may inform the Committee's work.

II. Subcommittee recommendations

The Subcommittee recommends that Rule 28.3 be amended by adding Rule 28.3(*l*):

> ***(l) When Petition Denied.*** If the petition is denied, the court must specifically identify [explain] in its order the reasons, if any, the petition does not satisfy the statutory or procedural requirements for a permissive appeal.

The Subcommittee also recommends that the Court consider repealing Rule 28.2, because, as discussed below, it is unlikely that there are going to be any more appeals to which Rule 28.2 would apply.

III. Discussion

A. Statutory history

CPRC 51.014(d) was intended to provide an additional avenue for immediate appeals of certain interlocutory orders where immediate appeal would advance termination of the litigation. In its first iteration (adopted in 2001), section 51.014(d) required that the parties agree to an interlocutory appeal. *See* Acts 2001, 77th Leg., R.S., Ch. 1389, § 1. The Court adopted TRAP 28.2 to provide procedures for agreed interlocutory appeals.

In 2011, section 51.014(d) was amended to remove the requirement that the parties agree to the appeal. *See* Acts 2011, 82nd Leg., ch. 203, § 3.01. At the same time, the Legislature enacted section 51.014(f), which gives the court of appeals discretion to accept an appeal under section 51.014(d). *Id.* The amended statute applies only to cases filed after September 1, 2011. *Id.* To effectuate the amendments, the Court adopted TRAP 28.3 and TRCP 168 to set out the procedures for parties to seek

the trial court's permission to appeal and for parties to ask the court of appeals to accept the appeal. At the time, the Court retained Rule 28.2 for any case filed before September 1, 2011, which would be governed by the former version of section 51.014(d).

Under the current version of section 51.014(d), a trial court may grant permission to appeal an otherwise unappealable interlocutory order if: "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *see also* TEX. R. CIV. P. 168. If the trial court grants permission, then the party seeking to appeal must file a petition for permission to appeal in the court of appeals. TEX. R. APP. P. 28.3.

Additional background about the procedural and statutory requirements for permissive interlocutory appeals can be found in "*Permissive Appeals in the Wake of* Sabre Travel," which is attached to this memo.

B. *Sabre Travel* and *Industrial Specialists*

In *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, the Supreme Court considered intermediate appellate courts' discretion regarding appeals under section 51.014(d). 567 S.W.3d 725, 729 (Tex. 2019). The Court unanimously held that section 51.014(f) gives appellate courts discretion to deny permission to appeal even if the statutory and procedural requirements for appeal are met. *Id.* at 732. But the Court also strongly encouraged appellate courts to accept these appeals when the requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33.

The Supreme Court was again asked to address intermediate appellate courts' discretion in *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, 652 S.W.3d 11 (Tex. 2022). A copy of the opinion is attached to this memo.

The court of appeals had issued a 3-sentence opinion denying the petition for permission to appeal. *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, 634 S.W.3d 760 (Tex. App.—Houston [14th Dist.] 2019) (mem. op.). In the first sentence the court identified the parties. *Id.* In the second, the court set out the statutory requirements for a permissive appeal. *Id.* And in the third, the court stated: "Because we conclude that the petition fails to establish each requirement of Rule 28.3(3)(e)(4), we deny the petition for permissive appeal." *Id.* Both parties petitioned for review in the Supreme Court, arguing that the court of appeals abused its discretion by (1) denying the petition for permission to appeal and (2) failing to adequately explain its reasoning.

There was no majority opinion, but the judgment of the Court was that the court of appeals did not abuse its discretion. Justice Boyd authored a plurality opinion, joined by Justice Devine and Justice Huddle. *Id.* at 13. Justice Blackrock wrote a concurring opinion, joined by Justice Bland. *Id.* at 21. And Justice Busby dissented, joined by Chief Justice Hecht and Justice Young. *Id.* at 23. (Justice Lehrmann did not participate in the decision. *Id.* at 21.)

The Court's holding (in Justice Boyd's plurality and joined by the concurring justices) is:

> We hold that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.

Id. at 21 & n.16.

The parties in *Industrial Specialists* argued that after *Sabre Travel*, the courts of appeals had not followed the Court's encouragement to grant permission to appeal when the statutory requirements are met. They also pointed out that courts of appeals routinely deny permission to appeal in short opinions similar to the one the court of appeals had issued. And some courts issue opinions that simply note that the court has reviewed the petition and denied it.

A statistical analysis in "*Permissive Appeals in the Wake of* Sabre Travel" found that from February 1, 2019 through June 2022, approximately 129 petitions for permission to appeal were filed in courts of appeals. Of those, only about 35 (or about 27%) were granted. Interestingly, the grant rate appears to have declined after *Sabre Travel*. A prior version of the article found that the grant rate on petitions for permission to appeal filed between 2011 and 2016 was about 40%. Courts of appeals appear to have focused more on the comments about discretion in *Sabre Travel* than on the encouragement to grant permission to appeal.

The table below summarizes some of the key positions of and disagreements among the three opinions in *Industrial Specialists*.

Plurality	Concurrence	Dissent
"If the two [statutory] requirements are satisfied, the statute then grants vast--indeed unfettered--discretion to accept or permit the appeal." The court of appeals' opinion was sufficient because it stated that the court considered whether the statutory requirements were met and found that they were not. "We could perhaps impose stricter requirements by amending our rules, but we cannot do so by holding that the statute imposes limits it simply does not impose." An opinion that merely states that the court of appeals considered the petition and denied it might not be sufficient.	"The plurality and dissent spend dozens of thoughtful pages analyzing the appellate courts' discretion to deny permissive appeals. One word would have been enough, and we have already said it. The discretion is 'absolute.'"	Would have held that the courts of appeals' discretion is not "absolute," but must adhere to guiding principles and cannot be exercised arbitrarily or unreasonably. Would have held that the courts of appeals do not have discretion in their analysis of the statutory requirements. Would have held that the court of appeals' opinion was not adequate. Points out that there is a lack of authority about the statutory requirements and about the factors courts of appeals should consider in exercising their discretion to grant or deny permission to appeal.

C. Considerations and Concerns

The Court's referral asks the Committee to consider first *whether* the rules should be amended to require more than "basic" reasons for denial of a petition for permission to appeal.

The Subcommittee discussed several possible issues that weigh against requiring additional detail. There was a concern that an amendment would increase the burdens on already busy courts of appeals. Moreover, the Subcommittee did not want to propose an amendment that would micromanage how the courts of appeals write their orders or that would require a full opinion (especially because the record will not be fully developed at the petition stage). Moreover, the statute expressly grants discretion to the courts of appeals over whether to grant permission to appeal and the Subcommittee does not want to propose an amendment that would interfere with that discretion.

Some members of the Subcommittee also expressed concerned about whether a detailed order (particularly an order explaining why there is not a substantial ground for difference of opinion) could be treated as law of the case and affect further proceedings in the case even though the issues are not

fully briefed. For example, an order saying that there is not a ground for difference of opinion because the law is settled could be interpreted as law of the case on that issue.

On the other hand, as noted in the dissent in *Industrial Specialists*, there is a lack of authority interpreting the statutory and procedural requirements for a permissive interlocutory appeal. Parties and trial courts need additional guidance about how these requirements are being interpreted and applied by the appellate courts. Moreover, as the unanimous Court noted in *Sabre Travel*, permissive interlocutory appeals can aid in the "early, efficient resolution of determinative legal issues" in proper cases. An amended rule could encourage courts of appeals to grant permission to appeal in those cases.

Accordingly, the Subcommittee agreed to recommend a narrow rule that requires some additional explanation of the statutory and procedural requirements without imposing too much on the appellate courts' discretion or requiring a full opinion on the merits.

D. Proposed Rule 28.3(*l*)

The Subcommittee first recommends that any rule about the requirements of an opinion denying permission to appeal should be included in Rule 28.3, rather than in Rule 47. Because these requirements would apply only to permissive interlocutory appeals, putting the requirements in the rule that specifically governs these appeals will make it easier for parties and courts to find them and follow them. Moreover, there was some disagreement among the justices in *Industrial Specialists* about whether Rule 47 even applies to the denial of a petition for permission to appeal. Thus, the most natural place for a rule about what a court of appeals must do in denying permission to appeal is Rule 28.3. Moreover, putting the new rule in Rule 28.3 will make clear that its requirements apply only to petitions for permission to appeal under section 51.014(d) and avoid any potential spillover into orders on other discretionary actions like mandamus petitions or petitions for review.

The Subcommittee next considered what aspects of the court of appeals' analysis should be required in the opinion. The Subcommittee recommends that the rule require specific identification of any statutory or procedural requirement it finds not to be satisfied and an explanation for why it is not satisfied. The dissent in *Industrial Specialists* noted the scarcity of appellate authority interpreting and applying the statutory and procedural requirements. And as noted in "*Permissive Appeals in the Wake of* Sabre Travel," there is inconsistency in decisions that do address the requirements. In particular, it is not clear when there is "substantial ground for difference of opinion." Some courts have held that if it is matter of first impression, this requirement is met. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied). Others have held that if it is a matter of first impression, it is not met. *See Devillier v. Leonards*, No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.). A rule requiring courts of appeals to identify and analyze compliance with the statutory and procedural requirements will help parties and trial courts better understand their meaning and application.

The Subcommittee also considered a provision that would require courts of appeals to explain a decision to exercise their discretion not to grant permission to appeal even when the statutory and

procedural requirements are met. The Subcommittee rejected that provision in light of the concerns discussed in section C, above.

E. HB 1561

After the Supreme Court's referral to the Committee, Representative Smithee filed HB 1561, "An Act relating to the decision of a court of appeals not to accept certain interlocutory appeals." A copy of HB 1561 (as introduced) is attached to this memo. The bill has not yet been assigned to a committee. HB 1561 would add section 51.014(g) and (h):

> (g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).
>
> (h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) under an abuse of discretion standard.

The Subcommittee does not recommend using this formulation of a requirement for the court of appeals to explain its reasoning. Arguably, a court of appeals that issues an opinion similar to the opinion at issue in *Industrial Specialists* would satisfy proposed subsection (g). In stating that the statutory requirements are not met, the court of appeals would state the specific reason for finding that the appeal is not warranted. Moreover, proposed subsection (f) seems superfluous because it is consistent with the decision in *Industrial Specialists* that the Supreme Court has the power to review a decision to deny permission to appeal.

F. TRAP 28.2

In addition to adding Rule 28.3(*l*), the Subcommittee recommends that the Court consider repealing Rule 28.2 As noted above, Rule 28.2 was adopted to provide procedures for agreed interlocutory appeals under the former version of section 51.014(d). The 2011 comments to Rule 28.3 note that "Rule 28.2 applies only to appeals in cases that were filed in the trial court before September 1, 2011." Given that it has been nearly 12 years since September 1, 2011, it is unlikely that there are any remaining cases to which Rule 28.2 could apply. To avoid confusion about the proper procedures under section 51.014(d), the Court should consider repealing Rule 28.2.

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Permissive Appeals in the Wake of *Sabre Travel*

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I. INTRODUCTION

Interlocutory orders cannot be appealed absent specific authority to do so. *E.g.*, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). "Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal." *De La Torre v. AAG Props., Inc.*, No. 14-15-00874-CV, 2015 WL 9308881, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.); *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 140 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In addition to granting authority for interlocutory appeals from an ever-increasing list of specific orders, the Legislature has also granted trial courts the authority to certify other orders for immediate appeal if certain criteria are met. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d).

The current version of section 51.014(d) was enacted in 2011. The prior version permitted an interlocutory appeal only with the parties' agreement. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 1051, § 1, 2005 Tex. Gen. Laws 3512, 3513. The 2011 amendment made section 51.014(d) similar to federal law. *See* Act of May 25, 2011, 82d Leg., ch. 203, § 3.01, 2011 Tex. Gen. Law 758 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(d)); TEX. R. APP. P. 28.3 cmt.; *see also* 28. U.S.C. § 1292(b).

This article outlines the requirements of a permissive interlocutory appeal under section 51.014(d) and examines how appellate courts have applied those requirements. While the case authority is still somewhat scant on the exact application of some of the statutory requirements, there are cases that provide some guidance.

A prior version of this article also looked at how often appellate courts granted permission to appeal and looked at common reasons for denial. That article found that statewide, about 40% of petitions for permission to appeal were granted and that many denials were based on the courts' conclusion that one or more statutory requirements were not met. The statistics also showed that grant rates tended to be higher in the smaller appellate courts.[1]

In 2019, the Supreme Court of Texas decided *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 729 (Tex. 2019). While the Supreme Court confirmed that appellate courts have discretion over whether to grant permission to appeal, the Court strongly encouraged courts to grant permission when the statutory requirements are met. Thus, this version of the article looks at some statistics about how appellate courts have responded to *Sabre Travel*. It will also look at some lessons that can be drawn from post-*Sabre Travel* decisions on petitions for permission to appeal.

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[1] That article also noted that the statistical analysis was limited by the fact that the appellate courts do not always track or report how many petitions for permission to appeal were filed or granted.

II. SECTION 51.014(D) AND RELATED RULES

The amendment to section 51.014(d) was introduced as part of tort reform legislation aimed at lowering the costs of litigation and improving judicial efficiency by allowing appellate courts to address and answer controlling questions of law without the need for the parties to incur the expense of a full trial. *See* House Research Organization, Bill Analysis, H.B. 274, 82d Leg., R.S. (2011).[2]

As amended, section 51.014(d) authorizes a trial court, on the motion of a party or on its own initiative, to permit an appeal from an order that is not otherwise appealable if (1) the order involves a controlling question of law as to which there is a substantial ground for disagreement; and (2) an immediate appeal will materially advance the termination of the litigation. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). The amendment eliminates the previous requirement that the parties agree to an immediate appeal and allows the trial court to grant an appeal on its own initiative or on the motion of a party. The amendment also imposes a two-tiered approval process in which both the trial court and the appellate court must authorize the appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(f).

Section 51.014(f) specifies the procedure for bringing a permissive interlocutory appeal under section 51.014(d):

> (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

TEX. CIV. PRAC. & REM. CODE § 51.014(f).

The Rules of Appellate Procedure were also amended in 2011 to address the new permissive interlocutory appeal procedure. *See* TEX. R. APP. P. 28.3 cmt. (noting that the amendment to section 51.014(d) necessitated the addition of Rule 28.3 and the adoption of Rule of Civil Procedure 168). Appellate Rule 28.3 was added to provide in part:

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[2] The amendment was deemed an important component of tort reform legislation aimed at making the Texas civil justice system "more efficient, less expensive, and more accessible." C.S.H.B. 274, Committee Report, Bill Analysis; *see* TEX. CIV. PRAC. & REM. CODE § 51.014(d). *See also* Lynne Liberato, Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 APP. ADVOC. 287, 287 (2013).

> (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
>
> (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

TEX. R. APP. P. 28.3(a), (b). In addition, Rule 28.3(e) specifies the required contents for a petition for permission to appeal. Under this rule, the petition must:

> (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
>
> (2) attach a copy of the order from which appeal is sought;
>
> (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
>
> (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

TEX. R. APP. P. 28.3(e).

Texas Rule of Civil Procedure 168 was also added in 2011 to implement the new permissive-appeal procedure. The rule states:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

TEX. R. CIV. P. 168. Under this rule, the trial court's permission, the controlling legal issue, and the reasons why an immediate appeal will materially advance the litigation must be stated in the order to be appealed. TEX. R. CIV. P. 168.

In sum, following the 2011 amendments to section 51.014, the amendment to Texas Rule of Appellate Procedure 28, and the related adoption of Texas Rule of Civil Procedure 168, the following must occur to perfect a permissive interlocutory appeal:

(1) on a party's motion or on its own initiative, the trial court must issue a written order (or amend a prior order) that includes both an interlocutory order that is not otherwise appealable and a statement of the trial court's permission to appeal this order under Texas Civil Practice and Remedies Code § 51.014(d);

(2) in this statement of permission, the trial court must identify and rule on the controlling question of law as to which there is a substantial ground for difference of opinion and must state why an immediate appeal may materially advance the ultimate termination of the litigation;

(3) after the trial court signs the order granting permission in accordance with Texas Civil Practice and Remedies Code § 51.014(f) and Texas Rule of Appellate Procedure 28.3, the appellant must timely file a petition seeking permission from the court of appeals to appeal; and

(4) the court of appeals must grant the petition for permission to appeal.

See TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f); TEX. R. APP. P. 28.3 & cmt; TEX. R. CIV. P. 168. The procedure for bringing a permissive appeal is discussed in greater detail in the following section.

III. SECTION 51.014(D) IN PRACTICE

A. Step One: The Trial Court's Permission to Appeal

The appeal process under section 51.014(d) begins in the trial court. After an interlocutory order is entered, a party seeking appeal should file a motion with the trial court for permission to appeal. TEX. R. CIV. P. 168. The motion should explain how the order to be appealed involves "a controlling question of law" as to which there is a substantial ground for difference of opinion and why an immediate appeal may "materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. The rules do not set a deadline for a party to ask the trial court to amend an order to grant permission to appeal. *Id.* The trial court may also grant permission to appeal on its own initiative. TEX. R. CIV. P. 168.

If the trial court grants permission to appeal, it must state its permission in the order being appealed, not in a separate order. TEX. R. CIV. P. 168. The court may amend a previously entered interlocutory order to include the required information. TEX. R. CIV. P. 168.

The trial court's order must "identify," but does not have to explain or discuss, the controlling legal question as to which there is a substantial ground for difference of opinion. But the order must explain the basis for the court's finding that the order to be appealed involves a controlling issue of law, and it must state why an immediate appeal may materially advance the ultimate termination of the litigation. *See* TEX. R. CIV. P. 168.

B. Step Two: The Court of Appeals' Permission to Appeal

After the trial court enters the order granting permission to appeal, the appellant must file a petition for permissive appeal in the court of appeals. Prior to the 2011 amendment, when the trial court authorized an agreed permissive appeal, the court of appeals could not reject the appeal unless it lacked jurisdiction. Under the new statute and amended rules, the court of appeals ultimately decides whether an interlocutory appeal may proceed. *See* TEX. R. APP. P. 28.2.

The petition for permission to appeal must be filed with the clerk of the court having jurisdiction over the action. TEX. R. APP. P. 28.3(b). For appeals that would go to either the First or the Fourteenth Court of Appeals, the petition should be filed with the clerk of the First Court during the first half of the calendar year and with the clerk of the Fourteenth Court during the second half of the calendar year. 1st & 14th Tex. App. Loc. R. 1.6. The petitions are then assigned to either the First or the Fourteenth Court on an alternating basis. *Id.*

The time period to file the petition is relatively short: the petition must be filed within 15 days after the order to be appealed is signed, unless the order is amended to add the permission to appeal, in which case the 15-day period runs from the date on which the amended order is signed. TEX. R. APP. P. 28.3(c); . An extension may be granted if the party files the petition within 15 days after the deadline and files a motion complying with Texas Rule of Appellate Procedure 10.5(b).

The petition for permission to appeal must: (1) contain the information required for a notice of appeal Texas Rule of Appellate Procedure 25; (2) attach a copy of the order from which appeal is sought; (3) contain a table of contents, an index of authorities, issues presented, and a statement of facts; and (4) argue "clearly and concisely" why the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion." TEX. R. APP. P. 28.3(e). The petition must also explain "how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e). In the First and Fourteenth Courts, the petition must also state whether a related appeal or original proceedings has previously been filed in or assigned to either the First or the Fourteenth Court. 1st & 14th Tex. App. Loc. R. 6.1(d).

The briefing schedule for a petition for permission is abbreviated, although the court has discretion to grant extensions. A cross-petition may be filed within 10 days after an initial petition is filed. TEX. R. APP. P. 28.3(f). A response to a petition or cross-petition

is due 10 days after the petition or cross-petition is filed. TEX. R. APP. P. 28.3(f). A petitioner or cross-petitioner may reply to any matter in a response within 7 days after the day on which the response is filed. TEX. R. APP. P. 28.3(f). The petition and any cross-petitions, responses, and replies, must comply with the word-count and page limitations for petitions generally. TEX. R. APP. P. 28.3(g). This means a petition and response cannot exceed 4,500 words, and a reply is limited to 2,400 words. *See* TEX. R. APP. P. 9.4(i)(2)(D)–(E).

The court will generally rule on a petition without oral argument "no earlier than 10 days after the petition is filed." TEX. R. APP. P. 28.3(j). In some cases, the court may order additional jurisdictional briefing from the parties. *See generally, Double Diamond-Del., Inc. v. Walkinshaw*, No. 05-12-01140-CV, 2013 WL 3327523, at *1 (Tex. App.—Dallas June 27, 2013, no pet.) (requesting additional jurisdictional briefing); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 594 (Tex. App.—Dallas 2012, no pet.) (requesting additional briefing under former 51.014(d)).

If the petition for permissive appeal is granted, the notice of appeal is deemed to have been filed under Appellate Rule 26.1(b) on the date the petition is granted, and the appellant is not required to file a separate notice of appeal. TEX. R. APP. P. 28.3(k). The case is considered an accelerated appeal with the appellant's brief on the merits due 20 days after filing of the clerk's record. TEX. R. APP. P. 28.3(i).

Granting permission to appeal does not automatically stay proceedings in the trial court. Either the parties must agree to a stay or the trial court or court of appeals must order a stay. TEX. CIV. PRAC. & REM. CODE § 51.014(e)(1), (2).

IV. RECENT CASES ADDRESSING 51.014(D) APPEALS

A. What is the scope of the appellate court's discretion?

In 2019, the Supreme Court of Texas issued its decision in *Sabre Travel*, a case in which the court of appeals had denied permission to appeal. 567 S.W.3d at 729. The Supreme Court first held that because the court of appeals had discretion to grant or deny review, the Court could not hold that the court had abused its discretion in denying permission. *Id.* at 732. But at the same time, the Court also expressly encouraged intermediate appellate courts to exercise their discretion to grant permission to appeal when the statutory requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of

> appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33. Finally, the Court held that it had jurisdiction to grant a petition for review even if the court of appeals had denied permission to appeal. *Id.* at 736.

Then, in June 2022, the Supreme Court decided *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, No. 20-0174, __ S.W.3d __, 2022 WL 2082236 (Tex. June 10, 2022). The trial court granted permission to appeal, but the court of appeals denied the petition with just a cursory statement that the statutory requirements were not met. *Id.* at *1. Both parties argued in the Supreme Court that the court of appeals had abused its discretion in denying permission to appeal. *Id.* at *3. The Supreme Court disagreed. Justice Boyd authored a plurality opinion (joined by Justice Devine and Justice Huddle), noting that "the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal." *Id.* at *3. Thus, the plurality reasoned that the court of appeals did not (and could not) abuse its discretion in denying permission to appeal. *Id.* at *6. The plurality also rejected the parties' contention that the court of appeals was required to give a more detailed explanation for its decision to deny permission to appeal. *Id.* at *7. It was sufficient that the court stated that it found that the statutory requirements were not met. *Id.*[3]

Justice Blacklock wrote a concurring opinion (joined by Justice Bland), agreeing with the plurality's conclusion that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Id.* at *7–9. Otherwise, Justice Blacklock and Justice Bland concurred in the judgment.

Justice Busby (joined by Chief Justice Hecht and Justice Young) dissented. *Id.* at *9–23. The dissent notes that *Sabre Travel*'s admonition did not appear to have the desired effect of encouraging courts of appeals to grant permission to appeal when the statutory requirements are met. *Id.* The dissenters would have held that the court of appeals abused its discretion by not adequately advising the parties of the basis for its decision. *Id.* They also would have held that the court of appeals abused its discretion in finding that the

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[3] In a footnote, the plurality notes that an opinion that simply states "Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal," may not be sufficient. *Id.* at *6 n.13.

statutory requirements were not met. *Id.* They would have remanded the case for the court of appeals to exercise its discretion in deciding whether to accept an appeal where the statutory requirements are met. *Id.*

Thus, the Supreme Court has held that the courts of appeal have discretion to deny permission to appeal even if the statutory requirements are met. Moreover, the court of appeals does not have to fully explain the basis of its decision to deny permission to appeal. But a mere statement that the court has considered the petition and denies it, may not be sufficient. The dissenters in *Industrial Specialists* recognize that the courts of appeals have discretion to deny permission to appeal even if the statutory requirements are met but did not elaborate on how to review that exercise of that discretion.

B. What is the scope of the appeal?

The Supreme Court addressed the scope of a permissive appeal in *Elephant Insurance Co., LLC v. Kenyon*, 644 S.W.3d 137 (Tex. 2022). The controlling question of law at issue was whether the insurance company owed a duty to its insured "to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request." *Id.* at 140. The court of appeals "constrained its principal analysis to only a portion of the duty inquiry—whether any duty exists at all." *Id.* at 147. The Supreme Court held that this was too narrow. Instead, "when an appellate court—this or any other—accepts a permissive interlocutory appeal, the court should do what the Legislature has authorized and "address the merits of the legal issues certified." *Id.* And this means, just as with any other appeal, that the appellate court can address and resolve "all fairly included subsidiary issues and ancillary issues pertinent to resolving the controlling legal issue." *Id.*

C. How should the statutory requirements be analyzed?

The dissent in *Industrial Specialists* noted that one reason for requiring a more detailed explanation for denying permission to appeal is "to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future case." 2022 WL 2082236, at *10. There has been relatively little development in the case law about what some of the statutory requirements mean or how they should be applied. In particular, there is not much guidance about how to determine whether there is a substantial ground for difference of opinion.

(1) What constitutes a controlling question of law?

The meaning of "question of law" is fairly straightforward. Courts consistently hold that if the trial court's decision turns on fact issues, there is no controlling question of law to support a permissive appeal. *E.g.*, *Progressive Cty. Mut. Ins. Co. v. Wade*, No. 03-21-00415-CV, 2022 WL 406360, at *2 (Tex. App.—Austin Feb. 10, 2022, no pet.) (denying permission to appeal because the legal issue turned on determinations of fact issues); *Estate of Barton*, No. 06-21-00009-CV, 2021 WL 1031540, at *4 (Tex. App.—Texarkana Mar. 18,

2021, no pet.) (determining certified question does not constitute controlling question of law because "the fact-intensive nature of the question before the trial court" resulted in "a controlling fact issue, not a legal one"); *Pueblitz v. Lemen*, No. 13-21-00395-CV, 2021 WL 6060980, at *2 (Tex. App.—Corpus Christi Dec. 21, 2021, no pet.) ("A permissive appeal to a denial of summary judgment on that issue would be inappropriate because whether Lemen used due diligence and brought his suit within reasonable time is a fact question."); *R&T Ellis Excavating, Inc. v. Page*, No. 09-20-00080-CV, 2020 WL 1592977, at *3 (Tex. App.—Beaumont Apr. 2, 2020, pet. denied) (denying permissive appeal because "whether immunity applies depends on the outcome of issues that involve unresolved questions of fact").

But the meaning of "controlling" is still not as clear. The observation that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue about which there is a difference of opinion and the resolution of which disposes of primary issues in the case" still holds true. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, No. No. 14–13–00991–CV, 2015 WL 393407 at *4 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.).

One commentator has suggested a few characteristics of a "controlling question of law:"

- The issue "deeply affects the ongoing process of litigation."
- Resolution of the issue "will considerably shorten the time, effort, and expense of fully litigating the case."
- "[T]he viability of a claim rests upon the court's determination" of the question.

Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747–49 (1998) (cited with approval by *Gulf Coast Asphalt*, 2015 WL 393049 at *4)).

One court found that the identified question of law—whether Texas law or New Mexico law governed the dispute—was not "controlling." *JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *3 (Tex. App.—San Antonio Dec. 29, 2021, no pet.). The court noted that the petitioners did not establish a "material variance" in Texas law and New Mexico law. *Id.* Moreover, the petitioners argued only that the choice of law issues "may" be outcome determinative. *Id.* Ultimately, whether a legal issue is "controlling" is still within the eye of the beholder.

Texas courts have apparently still not resolved whether a permissive appeal may involve more than one controlling question of law. In *Johnson v. Walters*, 14-15-00759-CV, 2015 WL 9957833, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2015, no pet.), the panel denied the petition for permissive appeal because the summary judgment order at issue required the court to consider and decide more than just a "single" controlling question of law. Strictly construing the plain language of the statute, the court found that

the use of the singular, in referring to controlling "issue" of law, required that any permissive appeal only involve a single issue. *See also Armour Pipe Line Co. v. Sandel Energy, Inc.,* No. 14-16-00010-CV, 2016 WL 514229, at *3 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.) (questioning whether the court has jurisdiction to hear more than one controlling question of law). In contrast, other courts have accepted permissive appeals presenting multiple questions. *See Ho v. Johnson*, No. 09-15-00077-CV, 2016 WL 638046, at *1 (Tex. App.—Beaumont Feb. 18, 2016, pet. filed) (accepting permissive appeal of multiple issues in healthcare liability suit); *Landmark Am. Ins. Co. v. Eagle Supply & Manufacturing L.P.*, No. 11-14-00262-CV (accepting permissive appeal of multiple issues arising out of trial court orders denying motions for summary judgment).

(2) When is there a substantial ground for difference of opinion?

Whether there is a substantial ground for difference of opinion is even less clear. The fact that the trial court disagreed with the appellant's position is not sufficient to satisfy the threshold for "substantial ground for difference of opinion." *WC Paradise Cove Marina, LP v. Herman*, No. 03-13-00569-CV, 2013 WL 4816597, at *1 (Tex. App.—Austin Sept. 6, 2013, no pet.) ("The fact that the trial court ruled against petitioners does not mean that the court decided a controlling question of law about which there is substantial ground for a difference of opinion.").

Some courts have held that if the issue is one of first impression, there is a substantial ground for difference of opinion. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied) (granting review of interlocutory permissive appeal and noting that issue presented was matter of first impression). But more recently, in *Devillier v. Leonards*, the court held that the mere fact that the issue was one of first impression was *not* sufficient to show that there was a substantial ground for a difference of opinion. No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.).

And in *Snowden v. Rivkin*, the court held that there was not a substantial ground for difference of opinion because the petitioner's arguments were based on settled law. No. 05-20-00188-CV, 2020 WL 3445812, at *1 (Tex. App.—Dallas June 24, 2020, no pet.). *See also Target Corp. v. Ko*, No. 05-14-00502-CV, 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (holding that because the law was well-settled on the issue, "the fact that the trial court may have erred in not granting summary judgment is not a basis for permissive appeal").

The most obvious scenario for a substantial ground for difference of opinion is a split of authority. But short of that, it is not clear how to demonstrate that this requirement is met. In any event, the petition must attempt to show why the legal issue is open to interpretation or disagreement. *See also Barton*, 2021 WL 1031540, at *4 (denying petition and observing that "nothing in the record suggests that the issue before the trial court presented a novel or difficult legal question or one that presents a conflict among the courts of appeals").

(3) When will an immediate appeal materially advance termination of the litigation?

The requirement of a controlling question of law is tethered to the question of whether an immediate appeal "may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). That is, there must be a "controlling legal question as to which there is a substantial ground for difference of opinion," the immediate appeal of which will "materially advance the ultimate termination of the litigation." *Id.* § 51.014(d)(1)&(2). Noting the interplay between these requirements, courts and commentators have (as noted above) described the latter portion as being satisfied "when resolution of the legal question dramatically affects recovery in a lawsuit.":

> If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling... Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling ... law is doubtful, when controlling ... law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely.... *Generally, a district court will make [a finding that the appeal will facilitate final resolution of the case] when resolution of the legal question dramatically affects recovery in a lawsuit*.

Barton, 2021 WL 1031540, at *4 (quoting *Gulf Coast Asphalt*, 457 S.W.3d at 545 and Renee F. McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747 (1998) (emphasis added)); *ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, No. 05-15-00646-CV, 2015 WL 4554519, at *2 (Tex. App.—Dallas July 29, 2015, no pet.).

Courts have observed, however, that, even if the ultimate appeal is successful, the presence of "other" legal issues counsels against granting a permissive appeal. *See Barton*, 2021 WL 1031540, at *5 (collecting cases); *see Harden Healthcare, LLC v. OLP Wyo. Springs, LLC*, No. 03-20-00275-CV, 2020 WL 6811994, at *1 (Tex. App.—Austin Nov. 20, 2020, no pet.) (collecting cases and denying petition because, even if appeal were successful, issue of liability would remain pending to be tried with other remaining issues); *Trailblazer Health Enters. v. Boxer F2, L.P.*, No. 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.) (mem. op.) (noting that "there are several other issues in the litigation; there is no evidence that the ultimate termination of the litigation would be advanced by allowing this appeal").

The critical inquiry seems to be whether granting the appeal would be dispositive of most or all of the issues in any given case. *See Barton*, 2021 WL 1031540, at *5 ("[A] permissive appeal should provide a means for expedited appellate disposition of focused and potentially dispositive legal questions.") (citation omitted); *see also Triple P.G. Sand Dev., LLC v. Nelson*, No. 14-21-00066-CV, 2022 WL 868868, at *2 n.1 (Tex. App.—Houston [14th Dist.] Mar. 24, 2022, no pet. h.) (granting permission to appeal and noting that "resolution of over seventy percent of the pending claims in the MDL litigation would be a material advancement in the ultimate termination of the litigation.").

As noted, both the trial court's order, *see* TEX. R. CIV. P. 168, and the petition, *see* TEX. R. APP. P. 28.3(e), must explain how an immediate appeal may materially advance the ultimate termination of the litigation—courts will deny petitions where either of these requirements are not satisfied. *E.g.*, *Devillier v. Leonards*, No. 01-20-00223-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020), *reh'g denied* (Dec. 31, 2020) ("Further, the trial court's orders do not explain how the determination of the appeals would materially advance the ultimate termination of the litigation. Nor do appellants explain in their petitions how resolution of the issue would materially advance the ultimate termination of the litigation."); *Feagan v. Wilson*, No. 11-21-00032-CV, 2021 WL 1134804, at *1 (Tex. App.—Eastland Mar. 25, 2021, no pet.) (denying petition because "the trial court's order d[id] not comply with the requirements of Rule 168").

Some courts require the trial court's order to contain more in the way of analysis. In *International Business Machines Corp. v. Lufkin Industries, Inc.*, for example, the trial court's order identified three "novel issues under Texas law," and stated that an immediate appeal "may materially advance the ultimate termination of the litigation because it will foreclose duplicative litigation costs and remove years of litigation expense and effort from this case." No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, pet. dism'd). The Sixth Court dismissed the petition, however, noting the lack of substantive rulings on the issues of law and that the order "d[id] not state why an immediate appeal may materially advance the ultimate termination of the litigation." *Id.* On the other end of the spectrum, some courts require less in the way of explanation. *E.g.*, *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (granting petition where order stated only that immediate appeal may materially advance the ultimate termination of this litigation because remaining damages claims were based on duty to defend).

All things considered, whether an immediate appeal will materially advance the litigation's ultimate resolution may be largely conditioned on the presence of a controlling question of law. Indeed, one dissenting opinion appears to suggest that the presence of a controlling question of law necessarily means that the litigation's ultimate termination would be materially advanced. *Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting) ("The petitions clearly seek a ruling on a controlling question of law as to which there is substantial ground for difference of opinion, so granting the petitions would materially advance the ultimate resolution of the litigation, with substantial savings of litigation and judicial resources.").

V. STATISTICS SINCE *SABRE TRAVEL*

In *Industrial Specialists*, the dissent noted that even after *Sabre Travel*, courts of appeals were still frequently denying permission to appeal. 2022 WL 2082236, at *20. One purposes of this updated article is to look at statistics since *Sabre Travel* to evaluate the impact, if any, of the Supreme Court's encouragement to the appellate courts to grant review when the statutory requirements are met.

The statistical analysis is hampered somewhat by record-keeping differences among the courts of appeals. Some of the courts use the "permissive appeal" event in TAMES, which allows easier searching of cases in which petitions were filed. But most do not. As a result, in preparing this paper, we used a combination of Westlaw and the Texas Courts online database to search for any Texas case, written order, or written opinion citing to section 51.014(d), 51.014(f), or Texas Rule of Appellate Procedure 28.3. We then removed opinions and orders arising out of petitions filed before February 1, 2019 (*i.e.*, before *Sabre Travel* was decided). We also contacted the clerks of the intermediate appellate courts to see if they had better information than we had been able to find; some were able to provide their internal statistics. We are grateful to the clerks for their assistance. Note this statistical analysis is subjected to variances. The first complexity is that while denials tend to be issued through memorandum opinions, grants are issued through orders that do not generally show up on Westlaw. Thus, we generally found grants only for cases in which the court has issued an opinion on the merits. We are aware of some permissive appeals that have been granted but are awaiting a decision. We have included those we are aware of in our statistics. But it is likely that there are other grants that we were unable to find. Further, docket-equalization orders and consolidations may affect these statistics.

A. Petitions for Permissive Appeal Post-*Sabre Travel*

We found 129 petitions for permissive appeal have been filed in Texas courts under amended section 51.014(d) between February 1, 2019, when *Sabre Travel* was decided, and the date of this article. The following chart breaks down the number of petitions addressed by each court of appeals and the outcomes for those petitions.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Houston [1st]	18	15	2[4]	11%
Fort Worth [2nd]	22	20	2	9%
Austin [3rd]	16	8	7[5]	44%
San Antonio [4th]	9	7	2	22%
Dallas [5th]	17	15	2	12%

[4] As of the date of this article, one of the petitions for permission to appeal remains pending.

[5] As of the date of this article, one of the petitions for permission to appeal remains pending.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Texarkana [6th]	1	1	0	0%
Amarillo [7th]	2	1	1	50%
El Paso [8th]	5	1[6]	4	80%
Beaumont [9th]	6	3	3	50%
Waco [10th]	1	1	0	0%
Eastland [11th]	4	3	1	25%
Tyler [12th]	6	2	4	67%
Corpus Christi [13th]	11	6	5	45%
Houston [14th]	11	9	2	18%
Totals	**129**	**92**	**35**	**27%**

B. Lessons from Post-*Sabre Travel* Cases

(1) Limitations of the Statistics

The raw numbers above seem to bear out the concern expressed in the dissent in *Industrial Specialists*. In fact, while the prior version of this paper found that from 2011 through 2016, the statewide grant rate was around 40%. And the analysis above suggests that the grant rate has fallen since *Sabre Travel* to around 26%. But these numbers may not reflect the appellate courts' willingness to grant review for several reasons.

First, a sizable portion of the denials relate to procedural defects, rather than the appellate court's discretion. The prior version of this paper noted that one of the most common reasons for denial was failure to satisfy procedural requirements. This continues to be a common theme in decisions that explain the denial of permission to appeal. For example, in several cases, the appellant simply failed to establish that the trial court granted permission to appeal, *see e.g., Estate of Tenison, v. Brookshire Grocery Co.*, No. 05-21-00455-CV, 2021 WL 3160522, at *1 (Tex. App.—Dallas July 26, 2021, no pet.) (dismissing appeal

[6] This one was initially granted but was later dismissed as improvidently granted. *El Paso Tool & Die Co., Inc. v. Mendez*, 593 S.W.3d 800, 805–06 (Tex. App.—El Paso 2019, no pet.).

where trial court did not grant permission); *Hudnall v. Smith & Ramirez Restoration, L.L.C.*, No. 08-19-00217-CV, 2019 WL 4668508, at *1 (Tex. App.—El Paso Sept. 25, 2019, no pet.) (dismissing appeal where trial court did not grant permission); *Progressive County Mut. Ins. Co. v. McCormack*, No. 04-21-00001-CV, 2021 WL 186675, at *2 (Tex. App.—San Antonio Jan. 20, 2021, pet. denied) (per curiam) (no permission from trial court).

Other petitions were dismissed where the trial court failed to rule on the ultimate issue to be appealed. *See, e.g., Mid-Continent Cas. Co. v. Harris Cty. Mun. Util. Dist. No. 400*, No. 09-21-00326-CV, 2021 WL 6138974, at *2 (Tex. App.—Beaumont Dec. 30, 2021, no pet.) (denying petition for permissive appeal where "nothing in the record show[ed] the trial court made a substantive ruling on any of the issues presented"); *Scott v. West*, 594 S.W.3d 397, 401 n. 5 (Tex. App.—Fort Worth 2019, pet. denied) (refusing to rule on issues the trial court did not rule on).

The fact that so many denials hinge on procedural failures means that the overall grant rate likely does not accurately reflect the appellate courts' willingness to accept permissive appeals. Removing the procedural default cases from the analysis would increase the grant rate. Accurately removing those denials is not possible because some of the denial orders do not distinguish between procedural issues and other statutory issues (such as a controlling question of law). Moreover, it is not clear (and is, in fact, unlikely) that the courts would have granted permission to appeal in all cases in which the procedural failures were cured. But the appellate courts are likely somewhat more willing to grant permission to appeal than the raw statistics would suggest.

Second, as discussed above, one limitation in searching for cases is that some grants can only be "found" when the court issues its opinion on the merits. Until then, only the parties and the court know about the grant and we have not found a good way to find those orders. So, it is almost certain that there are an additional number of granted petitions that won't be searchable until the court issues its opinion on the merits.

In short, while the statistics have value, it is important to understand these limitations before relying on them to make any conclusions about the likelihood that a particular court will or won't grant permission to appeal.

(2) Other Issues

A few other lessons can be drawn from these post-*Sabre Travel* decisions. First, as noted above, careful attention to exact compliance with the procedural issues is essential. In particular, there appears to still be some confusion about the timing for filing a petition for permission to appeal in the court of appeals. More than one petition was denied because the petitioner filed in the court of appeals before the trial court granted permission to appeal, mistakenly believing that the deadline to seek permission was about to expire. For example, in *Houston Foam Plastics, Inc. v. Anderson*, the trial court had not granted permission to appeal. No. 01-20-00714-CV, 2020 WL 7349090 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020). The petitioner explained that it filed without permission because,

even though it was in the process of seeking permission from the trial court, "it was necessary for appellant to file its petition now because the fifteen-day time period provided under Section 51.014(d) for filing the petition [in the appellate court] runs from the signing of the 'the order to be appealed.'" *Id.* at *1. The court of appeals denied the petition, explaining that the 15-day deadline to file the petition in the court of appeals did not start to run until after the trial court amended the order at issue to grant permission to appeal. *Id.*

Second, the trial court must actually decide the legal issue that is the subject of the appeal; it is not sufficient merely to identify the issue. For example, in *IBM v. Lufkin*, the trial court denied summary judgment and identified three issues of law. No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, no pet.) But the trial court did not actually decide any of the three issues. *Id.* The court of appeals noted that:

> The order sets forth no substantive ruling on any of the three issues identified therein. Nor does the record otherwise indicate the trial court's substantive ruling on each issue. As such, the order serves as nothing more than an attempt to certify three legal questions for our review.

Id. Accordingly, the court denied the petition for permission to appeal. *See also Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00196-CV, 2019 WL 3293699, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (denying permission to appeal because "the trial court's order identified 'the controlling question[ ] of law decided by the [c]ourt' but did not include a substantive ruling on that issue").

Third, if you find that there may be a procedural issue after you have filed a petition for permission to appeal, all may not be lost. In *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, the court of appeals noted that the trial court had not granted permission for an appeal. No. 03-21-00244-CV, 2021 WL 2604053, at *1 (Tex. App.—Austin June 25, 2021, no pet.). But the court noted that "the record reflects that Duncan has sought permission to appeal and we have been informed the trial court has conducted a hearing and rendered an oral ruling on Duncan's motion." *Id.* The court therefore abated the appeal to allow the petitioner to secure a written ruling and to supplement the record on appeal with that written order granting permission to appeal. *Id.* at *2.[7]

Finally, the Supreme Court has rejected a party's attempt to use the theoretical availability of a permissive interlocutory appeal to avoid mandamus relief. In *In re American Airlines, Inc.*, the real party in interest argued that the relator had an adequate remedy by appeal because it could have sought to appeal under section 51.014(d). 634 S.W.3d 38, 43 (Tex. 2021). The Supreme Court found that the relator did not have an adequate remedy by appeal because the requirements of section 51.014(d) were not met. *Id.* The order at

[7] After the record was supplemented, the court granted permission to appeal. *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, No. 03-21-00244-CV, 2021 WL 3118420, at *2 (Tex. App.—Austin July 22, 2021, no pet.)

issue allowed an apex deposition. So, it is not hard to see why that order would not satisfy the requirements. The Supreme Court's opinion seems to leave open the possibility that the availability of a permissive appeal could preclude mandamus relief. But since the Court has now repeatedly held that appellate courts have discretion to deny permissive appeals even if the statutory requirements are met, it seems unlikely that the Court would hold that the mere possibility of a permissive appeal would preclude mandamus relief.

VI. Conclusion

Just over 10 years after section 51.014(d) was adopted, courts are still wrestling with how it should be applied. The fractured opinion in *Industrial Specialties* illustrates these difficulties. The statute grants appellate courts discretion in whether to accept permissive appeals, but does not set the parameters of that discretion. It appears that the Supreme Court's encouragement to intermediate appellate courts to accept these appeals has not had the desired effect. But because of the number of denials based on procedural defects, the raw numbers likely do not tell the whole story.

Because opinions denying review have tended to be fairly short, the case law has not really developed about what the statutory requirements mean or how they should be applied. This is particularly true for the requirement that there be a substantial ground for difference of opinion and the requirement that an immediate appeal may materially advance the termination of the litigation. Nor has there been any development of the factors that might inform the decision to grant review when all of the factors are met.

The main lessons from the first decade of permissive interlocutory appeals are: (1) follow the procedures in the statute and the rules to the letter; (2) make sure that the trial court expressly decides the controlling issues of law; and (3) in explaining how the statutory requirements are met, be sure to give the court of appeals a good reason to exercise its discretion to grant review. That is, a petition for permission to appeal needs to look a bit like a petition for review; it will need to convince the court of appeals that an immediate appeal is a good use of judicial resources. Merely showing compliance with the statutory requirements will not be enough.

INDUSTRIAL SPECIALISTS, LLC, Petitioner,

v.

BLANCHARD REFINING COMPANY LLC and Marathon Petroleum Company LP, Respondents

No. 20-0174

Supreme Court of Texas.

Argued February 1, 2022

OPINION DELIVERED: June 10, 2022

Background: Refinery owner brought action against turnaround-services company to recover under indemnity provision of the parties' contract, which demand stemmed from refinery owner's settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel. The 212th District Court, Galveston County, Patricia Grady, J., denied the parties' competing summary-judgment motions but granted refinery owner's unopposed motion to pursue a permissive interlocutory appeal. In a one-page memorandum decision, the Houston Court of Appeals, First District, 634 S.W.3d 760, denied refinery owner's petition for permissive interlocutory appeal. Refinery owner petitioned for review.

Holdings: The Supreme Court, Boyd, J., held that:

(1) the Court of Appeals did not abuse its discretion by denying the petition for permissive appeal, and

(2) the Court of Appeals' memorandum decision, although brief, sufficiently explained its reasons for denying the petition.

Affirmed.

Blacklock, J., concurred in part, concurred in the judgment, and filed opinion, which Bland, J., joined.

Busby, dissented and filed opinion, which Hecht, C.J., and Young, J., joined.

1. Appeal and Error ⚿366

Court of Appeals did not abuse its discretion by denying refinery owner's petition for permissive interlocutory appeal of trial court's denial of summary judgment on its claim that turnaround-services company was contractually required to indemnify it for settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel; despite argument that the two statutory requirements were satisfied, i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation, nothing in the interlocutory-appeal statute or in the rules implementing that statute provided that the courts had to permit and accept an interlocutory appeal when the requirements were met. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4).

2. Appeal and Error ⚿366

Interlocutory-appeal statute permits appellate courts to accept a permissive interlocutory appeal when the two statutory requirements—i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation—are met, but it grants the courts discretion to reject the appeal even when the requirements are met. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

3. Courts ⚿89

A trial court's conclusion that the statutory requirements for an interlocutory appeal are met has no bearing on a Court of Appeals' subsequent evaluation of the requirements. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

4. Appeal and Error ⚿4785

Court of Appeals' memorandum decision sufficiently explained its reasons for denying refinery owner's petition for permissive interlocutory appeal of trial court's denial of summary judgment on its claim that turnaround-services company was contractually required to indemnify it for settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel; although brief, the decision stated that the statutory requirements i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation, were not met, and that sufficed. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4), 47.1, 47.4.

5. Appeal and Error ⚿4785

Opinions issued solely to deny permissive interlocutory appeals must be memorandum opinions. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4), 47.4.

6. Appeal and Error ⚿4117

The Supreme Court may review an interlocutory appeal that the trial court has permitted even when the Court of Appeals has refused to hear it. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

7. Appeal and Error ⚿4117

The Supreme Court has broad discretion in choosing whether to exercise jurisdiction over a permissive interlocutory appeal. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

On Petition for Review from the Court of Appeals for the First District of Texas

Matthew H. Frederick, Lehotsky Keller LLP, Austin, Scott Keller, Lehotsky Keller LLP, Dallas, for Amici Curiae The American Petroleum Institute, The National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, The Texas Oil & Gas Association.

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Joel Zane Montgomery, Jonathan Bruce Smith, Zachary Alex Rodriguez, Amy Douthitt Maddux, Shipley Snell Montgomery LLP, Houston, for Respondents.

Justice Boyd announced the Court's judgment and delivered an opinion in which Justice Devine and Justice Huddle joined.

After denying the parties' competing summary-judgment motions, the trial court entered an order permitting an interlocutory appeal. The court of appeals, however, refused the application for permissive appeal, stating that the application failed to establish the statutory requirements. Both parties contend the court of appeals abused its discretion, both by refusing the permissive appeal and by failing to adequately explain its reasons. We disagree with both arguments and affirm.

I.

Background

Blanchard Refining Company [1] hired Industrial Specialists to provide turnaround services at Blanchard's refinery in Texas City. Three years into the five-year contract, a fire occurred in a regenerator vessel, injuring numerous Industrial Specialists employees and one employee of another contractor. The employees sued Blanchard and all of its other contractors, but they did not sue Industrial Specialists.[2] Blanchard demanded a defense and indemnity from Industrial Specialists pursuant to an indemnity provision in the parties' contract. Industrial Specialists rejected the demand.

Blanchard and the other contractors ultimately settled all the employees' claims for $104 million. Blanchard paid $86 million of that total. Blanchard then filed this suit against Industrial Specialists, seeking to enforce the indemnity provision. Blanchard and Industrial Specialists filed competing summary-judgment motions. The trial court denied both without explaining its reasons but granted Industrial Specialists' unopposed motion to pursue a permissive interlocutory appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code.

The court of appeals denied Industrial Specialists' petition for permissive appeal. 634 S.W.3d 760, 760 (Tex. App.—Houston [1st Dist.] 2019). In a one-page memorandum opinion, the court concluded that "the petition fail[ed] to establish each requirement" for a permissive appeal. *Id.* (citing TEX. R. APP. P. 28.3(e)(4)). We granted Industrial Specialists' petition for review.

II.

Permissive Interlocutory Appeals

Since at least as early as the federal Judiciary Act of 1789, American law has generally permitted appeals only from "final decrees and judgments."[3] We have honored this final-judgment rule in Texas, recognizing that it promotes "[c]onsistency, finality, and judicial economy" and ensures that courts decide cases expediently and on a full record. *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 730 (Tex. 2019).

1. Blanchard is a wholly owned subsidiary of Blanchard Holdings Company, LLC, which is owned by Marathon Petroleum Company. Blanchard and Marathon are both parties and respondents in this case. We will refer to them collectively as Blanchard.

2. The Workers' Compensation Act barred the Industrial Specialists employees from suing their employer. *See* TEX. LABOR CODE § 408.001(a). The other contractor's employee apparently elected not to sue Industrial Specialists.

3. *See* Judiciary Act of 1789, ch. XX, § 22, 1 Stat. 73, 84 (codified at 28 U.S.C. § 1291 (2012)) (permitting circuit courts to review "final decrees and judgments" from district courts).

The final-judgment rule, however, has its exceptions.[4] The Texas Legislature has created numerous exceptions through the years, first allowing interlocutory appeals in a few narrow circumstances as early as 1892.[5] In 1985, the legislature enacted section 51.014(a) of the Texas Civil Practice and Remedies Code, gathering into one subsection the four types of then-existing interlocutory appeals by right.[6] By 2001, those original four had doubled to eight, prompting then-JUSTICE HECHT to observe a "recent and extensive legislative expansion of the jurisdiction of the courts of appeals over a wider variety of interlocutory orders." *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 350 (Tex. 2001) (HECHT, J., dissenting) (citing TEX. CIV. PRAC. & REM. CODE §§ 15.003, 51.014(a)(7), (8)).

That same year, however, we continued to characterize the final-judgment rule as "the general rule, with a few mostly statutory exceptions." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). But the legislature continued to create additional exceptions, expanding section 51.014(a) by 2019 to permit appeals from fourteen different types of interlocutory orders. We acknowledged the shifting legal landscape that year, observing that the practice of "[l]imiting appeals to final judgments can no longer be said to be the general rule." *Dall. Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019). In 2021, the legislature amended section 51.014(a) to authorize interlocutory appeals in three additional circumstances, increasing the total to seventeen.[7]

In addition to authorizing appeals from specific types of interlocutory orders, the legislature added a broader exception in 2011, authorizing permissive appeals from interlocutory orders that are "not otherwise appealable." TEX. CIV. PRAC. & REM. CODE § 51.014(d). Subsection (d) says trial courts "may" permit an appeal from an interlocutory order that is not otherwise appealable if (1) the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* And subsection (f) provides that, if a trial court permits such an appeal, the court of appeals "may" accept the appeal if the appealing party timely files "an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d)." *Id.* § 51.014(f).

We enacted two new procedural rules in 2011 to accommodate this new permissive-appeal exception. First, we enacted rule 168 of the Texas Rules of Civil Procedure, requiring that trial-court orders authorizing permissive appeals "identify the con-

4. For example, article V, section 3-b of the Texas Constitution, adopted in 1940, authorizes the legislature to permit appeals directly to this Court from "an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." TEX. CONST. art. V, § 3-b.

5. *See* Elizabeth L. Thompson, *Interlocutory Appeals in Texas: A History*, 48 ST. MARY'S L.J. 65, 69–70 (2016).

6. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3280.

7. *See* Act effective Sept. 1, 2021, 87th Leg., R.S., ch. 167, § 1, 2021 Tex. Gen. Laws ——, ——; Act effective June 14, 2021, 87th Leg., R.S., ch. 528, § 1, 2021 Tex. Gen. Laws ——, ——; Act effective June 16, 2021, 87th Leg., R.S., ch. 813, § 1, 2021 Tex. Gen. Laws ——, —— (collectively codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(15)).

trolling question of law as to which there is a substantial ground for difference of opinion" and "state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. We then enacted rule 28.3 of the Texas Rules of Appellate Procedure, addressing the procedural requirements for perfecting a permissive appeal in the courts of appeals. *See* TEX. R. APP. P. 28.3. Subsection (e) of rule 28.3 requires that a petition for permission to appeal must "argue clearly and concisely why the order to be appealed" meets those two requirements. TEX. R. APP. P. 28.3(e)(4).

In this case, the trial court granted Industrial Specialists' unopposed motion for permission to appeal, and the parties do not dispute that the court's order complied with rule 168. The court of appeals, however, declined to accept the appeal and issued a memorandum opinion stating its conclusion "that the petition fails to establish each requirement of Rule 28.3[ ](e)(4)." 634 S.W.3d at 760. In this Court, Industrial Specialists argues (and Blanchard agrees) that the court of appeals abused its discretion by refusing to accept the appeal and by failing to adequately explain its reasons for that decision. Based on the plain language of section 51.014(f) and the applicable rules, we disagree.

A. Discretion to Refuse a Permissive Appeal

[1] As explained, section 51.014(d) provides that a trial court "*may* . . . permit an appeal from an order that is not otherwise appealable *if*" the two requirements are met, and section 51.014(f) provides that a court of appeals "*may* accept" such an appeal "*if* the appealing party" timely files an application "explaining why an appeal is warranted under Subsection (d)." TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (emphases added). Similarly, the rules this Court enacted to implement subsections (d) and (f) provide that "a trial court *may* permit" a permissive appeal, TEX. R. CIV. P. 168 (emphasis added), and an appeal "is deemed" filed "[i]f" the court of appeals grants the petition, TEX. R. APP. P. 28.3(k).

We recently reviewed these provisions for the first time in *Sabre Travel.* We held in a unanimous opinion that the use of the phrase "may accept" in section 51.014(f) "convey[s] a discretionary function in the court of appeals," and the phrase "may . . . permit" in subsection (d) grants similar discretion to the trial court. 567 S.W.3d at 731. Based on the statute's unambiguously permissive language, we held that "courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d)," and added that "[o]ur procedural rules make that clear." *Id.* at 732.

Nevertheless, Industrial Specialists argues that the court of appeals abused its discretion by refusing this permissive appeal because the trial court concluded that the two requirements are satisfied and both parties agree with that conclusion. Arguing that the court of appeals' discretion "cannot be unlimited," Industrial Specialists insists that the court's actions were "arbitrary and unreasonable" because, as both parties agree, "this case falls squarely within" subsection (d)'s requirements "and is precisely the type of case for which [the permissive-appeal] process was designed."

[2] We agree that section 51.014 limits courts' discretion when addressing permissive appeals. But the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal. A trial court may permit an appeal only "if" subsection (d)'s two requirements are met, and the court of appeals "may accept" the appeal only if the application explains "why an appeal is warranted under Subsection (d)." TEX. CIV.

PRAC. & REM. CODE § 51.014(d), (f). The courts have no discretion to permit or accept an appeal if the two requirements are not satisfied. But if the two requirements *are* satisfied, the statute then grants courts vast—indeed, unfettered—discretion to accept or permit the appeal. Nothing in the statute or in our rules implementing the statute can be read to provide that the courts *must* permit and accept an appeal when the requirements are met.

Nor do the "guiding principles" recognized by our precedent—which cabin discretion by prohibiting arbitrary and unreasonable acts—impose a limit here. *See, e.g., Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985) (describing abuse of discretion as "a question of whether the court acted without reference to any guiding rules and principles"). Section 51.014 does not expound on the guiding principles that limit a court of appeals' discretion, but its application does not intrinsically implicate them. The statute instead defines *when* a court of appeals "may" exercise discretion and when it may not. Even if we, like our dissenting colleagues, believe that guiding principles are "particularly important" in these circumstances, we cannot rewrite a statute that imposes no such principles. *Post* at 24 (BUSBY, J., dissenting). Section 51.014 addresses whether discretion exists at all; it does not impose principles to guide the exercise of that discretion when it does exist.

Industrial Specialists argues that a court of appeals would act arbitrarily and unreasonably if it were to accept or refuse a permissive appeal without considering whether the two requirements are satisfied. In response to this point, we note that subsection (f)'s requirement that the appealing party explain in its application "why an appeal is warranted under subsection (d)" is not accompanied by any express command that the courts of appeals then consider the appealing party's explanation. But given that this obligation would be rendered essentially meaningless if the statute did not implicitly charge courts of appeals with the duty to consider the party's explanation, a court of appeals might abuse its discretion by failing to do so. But here, the court of appeals' opinion confirms that the court did consider the two requirements and concluded that the petition did not satisfy them. The statute does not expressly state whether more or less is required. Our dissenting colleagues would require more, *post* at 39 (BUSBY, J., dissenting); our concurring colleagues would require less, *post* at 22 (BLACKLOCK, J., concurring). Which view is correct is not a question we must resolve today. The court of appeals' opinion states that it considered the statute's two requirements and determined they were not satisfied, so we need not decide whether it would have abused its discretion if it had rejected the appeal without considering the requirements.

[3] We do not agree that a trial court's conclusion that the requirements are met (or the parties' agreement with that conclusion) somehow constrains the court of appeals' discretion. Under subsection (f), the trial court's decision to permit the appeal is merely the prerequisite for the court of appeals to exercise its discretion at all. The trial court's conclusion regarding the two requirements has no bearing on the court of appeals' subsequent evaluation of the requirements under subsection (f).[8]

8. Our dissenting colleagues agree with the trial court's conclusion that the two requirements "have been met," *post* at 25 (BUSBY, J., dissenting), but that assertion—even if true—is irrelevant. Our disagreement with the result of the court of appeals' properly exercised discretion as to the two requirements cannot, standing alone, establish abuse of discretion.

Nor does the federal permissive-appeals statute impose or suggest a limit on the discretion of Texas courts of appeals. As we explained in *Sabre Travel*, "the Legislature modeled section 51.014(d) after the federal counterpart to permissive interlocutory appeals," and the United States Supreme Court has interpreted that counterpart "as providing federal circuit courts *absolute discretion* to accept or deny permissive appeals." *Sabre Travel*, 567 S.W.3d at 731–32 (emphasis added) (addressing 28 U.S.C. § 1292(b)). Industrial Specialists suggests that section 1292(b) is distinguishable, however, because it states that a court of appeals "may . . . *in its discretion*, permit an appeal to be taken." 28 U.S.C. § 1292(b) (emphasis added). But the legislature's choice to omit "in its discretion" while retaining the word "may" cannot be read as diminishing the fundamentally discretionary nature of the word "may." *See* TEX. GOV'T CODE § 311.016(1) (" 'May' creates discretionary authority or grants permission or a power."); *May*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/may (last visited May 27, 2022) (defining "may" as an auxiliary verb "used to indicate possibility or probability" and meaning to "have permission to" or "be free to"); *May*, DICTIONARY.COM, https://www.dictionary.com/browse/may (last visited May 27, 2022) (defining "may" as an auxiliary verb "used to express possibility" or "opportunity or permission"). Discretion is the indispensable precondition for meaningful judgment, and as such it cannot be capped by a party's own wishful revisionism, self-serving interpretation, or impatience with time-tested methods of just and measured adjudication. We cannot interpose a firm limit on a court of appeals' discretion under section 51.014(f) when the statute itself grants the court discretion and imposes no such limit.

In our comment accompanying rule 28.3(e)(4), we noted that it was "intended to be similar" to rule 53.1, which governs petitions for review in this Court. TEX. R. APP. P. 28.3 cmt. Rule 53.1, which states that this Court "*may* review" properly filed petitions for review, does not require that we grant any particular petition, even if the lower courts and the parties all agree that we should grant it. *See* TEX. R. APP. P. 53.1, 56.1(a) ("Whether to grant review is a matter of judicial discretion."). As we concluded in *Sabre Travel*, "the courts of appeals can similarly accept or deny a permissive interlocutory appeal as we can a petition for review." 567 S.W.3d at 731 (citing TEX. R. APP. P. 28.3 cmt.).

In this case, the court of appeals acknowledged subsection (d)'s requirements and concluded that this appeal fails to satisfy either of them. We need not analyze whether the court of appeals reached the correct conclusion because it acted within its discretion in exercising its independent judgment. But we note that its conclusion was, at a minimum, plausible. Although both Blanchard and Industrial Specialists filed summary-judgment motions and the trial court denied them both, only Industrial Specialists requested and received permission to appeal. *If* the court of appeals concluded that the trial court correctly denied Industrial Specialists' summary-judgment motion, subsection (d)'s second requirement would not be satisfied because granting the permissive appeal simply to affirm the trial court's denial of a summary-judgment motion would not have materially advanced the litigation. In any event, the abuse-of-discretion stan-

And if we believe the court of appeals objectively erred, as our dissenting colleagues believe, our procedural rules permit us to accept the appeal ourselves even though the court of appeals declined it. *See Sabre Travel,* 567 S.W.3d at 729–30. Ironically, our dissenting colleagues do not even suggest that we should do so here.

dard does not permit us to second-guess the court's judgment on that question.

The parties highlight the admonition we expressed in *Sabre Travel*: "Just because courts of appeals *can* decline to accept permissive interlocutory appeals does not mean they *should*." *Id.* at 732–33 (emphases added). As they note, the court of appeals' denial of Industrial Specialists' permissive interlocutory appeal follows a clear trend: since our 2019 decision in *Sabre Travel*, this same court of appeals has reviewed requests from nine parties that received a trial court's permission to pursue an interlocutory appeal under section 51.014(d).[9] The court denied permission in eight of the nine cases, twice incurring a dissent from denial of rehearing,[10] and tellingly published an identical typographical error—"Rule 28.3(3)(e)(4)" instead of "Rule 28.3(e)(4)"—in four of those eight orders.[11] The court's duplicative denials could at least be read to indicate its disagreement with our exhortation in *Sabre Travel*.

We observed in *Sabre Travel* that "[i]f all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted." *Id.* at 732. But our warning in *Sabre Travel* was issued to "caution," not to command. *Id.* The court of appeals' recurring rejections may signify disrespect for the line between discretion and dereliction, but that is a line the legislature chose to draw quite loosely in section 51.014(f). We could, perhaps, impose stricter requirements by amending our rules, but we cannot do so by holding that the statute imposes limits it simply does not impose. We thus conclude that the court of appeals did not abuse its discretion by refusing to accept this permissive interlocutory appeal.

B. Explanations for Refusals

[4, 5] Industrial Specialists argues that, even if the court of appeals did not

9. *See Devillier v. Leonards*, Nos. 01-20-00223-CV & 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.) (per curiam) (mem. op.); *Quintanilla v. Mosequeda*, No. 01-20-00387-CV, 2020 WL 3820256, at *1 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.) (per curiam) (mem. op.); *Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00923-CV, 2020 WL 536013, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2020, pet. denied) (per curiam) (mem. op.); 634 S.W.3d at 760; *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied); *By the Sea Council of Co-owners, Inc. v. Tex. Windstorm Ins. Ass'n*, No. 01-19-00415-CV, 2019 WL 3293701, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (per curiam) (mem. op.); *Thien Nguyen v. Garza*, No. 01-19-00090-CV, 2019 WL 1940802, at *1 (Tex. App.—Houston [1st Dist.] May 2, 2019, pet. denied) (per curiam) (mem. op.); *Thompson v. Landry*, No. 01-19-00203-CV, 2019 WL 1811087, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 2019, no pet.) (per curiam) (mem. op.); *Mosaic Baybrook One, L.P. v. Simien*, No. 01-18-00995-CV, 644 S.W.3d 671, 671–72 (Tex. App.—Houston [1st Dist.] Feb. 12, 2019, pet. granted) (per curiam) (mem. op.).

10. *See Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *1–3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting from denial of rehearing) (arguing that review was necessary because the case involved an issue of first impression); *Mosaic Baybrook One, L.P. v. Simien*, No. 01-18-00995-CV, 650 S.W.3d 1, 3–4 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. granted) (Keyes, J., dissenting from denial of rehearing en banc) (arguing that the court abused its discretion by denying appeal of a controlling issue of law that would determine a class-certification issue).

11. *See Devillier*, 2020 WL 5823292, at *1; *Sealy Emergency Room*, 2020 WL 536013, at *1; 634 S.W.3d at 760; *Mosaic Baybrook One*, 644 S.W.3d at 671– 72.

abuse its discretion by refusing the appeal, it did abuse its discretion by failing to adequately explain its reasons for doing so. For support, it relies on Texas Rule of Appellate Procedure 47.1, which requires courts of appeals to "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal," and rule 47.4, which requires that memorandum opinions be "no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TEX. R. APP. P. 47.1, 47.4.[12] Blanchard agrees, asserting that "the court of appeals erred in denying [Industrial Specialists'] request for a permissive interlocutory appeal without giving any reason for its ruling."

But the court of appeals' opinion in this case complied with these rules. The court's "decision" was to reject the interlocutory appeal, and its opinion explained that its decision was based on its conclusion that "the petition fails to establish each requirement of Rule 28.3[ ](e)(4)." 634 S.W.3d at 760. The opinion addressed the only issue "raised and necessary to final disposition of the appeal," as rule 47.1 requires, and advised the parties "of the court's decision [to refuse the appeal] and the basic reasons for it," as rule 47.4 requires. According to the opinion, the court of appeals did not refuse the appeal without having considered whether (or despite a finding that) the requirements were met; rather, it refused the appeal *because* it concluded they were not met.[13] And the opinion explained this while remaining "as brief as practicable" and "no longer than necessary," as the rules also require.

Our dissenting colleagues demand far more from the court of appeals' opinion than our rules and our precedent require. Critically, the dissent interprets rule 47.4 as requiring the opinion to "explain the basic reasons" it disagreed with the parties' arguments that "the two requirements for a permissive appeal were met." *Post* at 25 (BUSBY, J., dissenting). But the court's decision and disposition were to reject the interlocutory appeal, and its opinion duly described its basic reason for doing so: "Because we conclude the petition fails to establish [the two requirements], we deny the petition for permissive appeal." 634 S.W.3d at 760. This was the basic, and only, reason for the court's decision not to accept the appeal.[14] But our

12. Opinions issued solely to deny permissive interlocutory appeals must be memorandum opinions, which are required where the opinion does not establish or modify a rule of law, apply a rule to novel facts likely to recur, involve constitutional or other important legal issues, criticize existing law, or resolve an apparent conflict of authority. *See* TEX. R. APP. P. 47.4(a)–(d).

13. It is the presence of *reasoning*—not a ''boilerplate conclusion,'' as envisioned by the dissent—that separates the court of appeals' opinion here from the seven other opinions cited by the dissent, *see post* at 34 (BUSBY, J., dissenting), all of which fail to state the ''basic reasons'' for their decision. *See, e.g., BPX Operating Co. v. 1776 Energy Partners, LLC*, No. 04-21-00054-CV, 2021 WL 1894830, at *1 (Tex. App.—San Antonio May 12, 2021, no pet.) (per curiam) (mem. op.) (''Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal.'').

14. The dissenting opinion describes four issues that might motivate a court of appeals to deny permission for permissive appeal, only one of which concerns whether the two requirements of section 51.014(d) are met. *Post* at 25–28 (BUSBY, J., dissenting). Had the court of appeals' opinion here relied on one of these other reasons, such as untimely filing, there would of course be no need to address the two requirements. And given section 51.014(f)'s instruction that the court of appeals may accept the appeal if the application explains ''why an appeal is *warranted*,'' the dissent is correct to note that other factors beyond the two requirements might prompt a court to deny permissive appeal. TEX. CIV. PRAC.

dissenting colleagues would require more, demanding that the court engage with the parties' arguments against those reasons. *Post* at 30 (BUSBY, J., dissenting). Rule 47.4 imposes no such requirement, and our precedent—contrary to the dissenting opinion's characterizations—does not require more, either. *See, e.g., Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam) (holding court of appeals violated rule 47.4 by "failing to give *any reason whatsoever* for its conclusion that the evidence established a finding of nonpayment" (emphasis added)).

Industrial Specialists and Blanchard raise various policy reasons why the Court should require courts of appeals to provide more than the "basic" reasons for their decision to reject a permissive appeal. We have imposed similar requirements in other circumstances. *See, e.g., In re Columbia Med. Ctr.*, 290 S.W.3d 204, 212–13 (Tex. 2009) (requiring trial courts to give reasons for disregarding a jury verdict and granting a new trial); *Gonzalez v. McAllen Med. Ctr.*, 195 S.W.3d 680, 680–81 (Tex. 2006) (per curiam) (requiring courts of appeals to explain reasons for concluding that factually sufficient evidence supports a jury verdict); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (requiring courts of appeals to detail relevant evidence and "clearly state" their reasons for finding the evidence factually insufficient to support a jury verdict). Although these decisions are distinguishable because they aimed to protect the sanctity of the constitutional right to jury trial, we do not completely disregard the parties' point. And in a similar vein, the dissenting opinion supplies an abundance of policy considerations to support its view that we "should" require explanations from courts denying permissive appeals, including ensuring meaningful deliberation, facilitating appellate review, developing Texas jurisprudence, fostering predictability, and furthering the statute's purpose. *Post* at 34 (BUSBY, J., dissenting). To the extent we agree with these policy arguments, or believe that more thorough explanations are desirable, we may consider amending rule 47 to revise its requirements. But we will not supplant our proven and principled method of revising our rules by imposing such a change today by judicial fiat.

We are asked whether the court of appeals abused its discretion, and we cannot conclude that it did so by failing to comply with what the rules *ought* to say. We thus conclude that the court of appeals did not abuse its discretion by failing to more thoroughly explain its reasons for refusing to accept this permissive appeal.

C. This Court's Discretion

[6] Finally, as we explained in *Sabre Travel*, a trial court's conclusion that subsection (d)'s two requirements are satisfied and decision to permit an appeal under section 51.014(d) "permits an appeal" from the order, "and this Court's jurisdiction is then proper under [Texas Government Code] section 22.225(d) regardless of how the court of appeals exercises its discretion over the permissive appeal." *Sabre Travel*, 567 S.W.3d at 733. Thus, we may review an interlocutory appeal that a trial court has permitted even when the court of appeals has refused to hear it.[15] Both parties urge

& REM. CODE § 51.014(f) (emphasis added); *post* at 26 (BUSBY, J., dissenting). And as noted, we expressly decline to rule further than necessary by opining on whether a court of appeals that failed to consider the two requirements would abuse its discretion. Here, the court unequivocally rested its denial on the petition's failure to establish the two requirements, 634 S.W.3d at 760, so by stating they were unmet, the court gave its "basic reasons." TEX. R. APP. P. 47.4.

15. Although we exercised jurisdiction in *Sabre Travel* under the now-superseded section 22.225(d), we have interpreted section

us to exercise our jurisdiction here, arguing that "[j]udicial efficiency weighs in favor of this Court deciding those issues now, rather than remanding for the court of appeals."

[7] Like the courts of appeals, we have broad discretion in choosing whether to exercise our jurisdiction. We are reluctant, however, to intervene at the summary-judgment stage, with an incomplete record, and before the courts below have resolved the case on the merits. *See, e.g., Pidgeon v. Turner*, 538 S.W.3d 73, 81 & n.15 (Tex. 2017). The final-judgment rule may entail "inevitable inefficiencies," *Sabre Travel*, 567 S.W.3d at 732, and permissive appeals may reduce those inefficiencies, but we are not inclined to allow the permissive-appeal process to morph into an alternative process for direct appeals to this Court, particularly from orders denying summary-judgment motions. A just and deliberate judicial system remains far preferable to a merely efficient one.

III.

Conclusion

We hold that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.[16] And rule 47 requires the courts to state only their basic reasons for their decision to accept or reject the appeal. Accordingly, we conclude that the court of appeals did not abuse its discretion by refusing to accept this permissive interlocutory appeal or by failing to provide more thorough reasons for that decision. We decline to reach the merits of the underlying case, affirm the court of appeals' judgment, and remand the case to the trial court for further proceedings.

Justice Blacklock filed a concurring opinion in which Justice Bland joined.

Justice Busby filed a dissenting opinion in which Chief Justice Hecht and Justice Young joined.

Justice Lehrmann did not participate in the decision.

Justice Blacklock, joined by Justice Bland, concurring.

The plurality and dissent spend dozens of thoughtful pages analyzing the appellate courts' discretion to deny permissive appeals. One word would have been enough, and we have already said it. The discretion is "absolute." *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019). This Court held unanimously three years ago that "Texas courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d), *just as federal circuit courts do*." *Id.* (emphasis added). This, we said, is because "the [Texas] Legislature modeled section 51.014(d) after

22.001(a)'s jurisdictional grant as being broader than section 22.225(d), *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 549 (Tex. 2019), ensuring that *Sabre Travel* is still both relevant and instructive here. *Sabre Travel*, 567 S.W.3d at 733–34 (holding that a trial court's certification of an interlocutory order under section 51.014(d) was sufficient to implicate our jurisdiction even where the appellate court denied permissive appeal).

16. Our concurring colleagues join in this holding, making it a holding of the Court. *See post* at 23 (BLACKLOCK, J., concurring). And even the dissenting opinion, for all of its bluster, agrees that "nothing in the statute or our rules requires a court to accept the appeal when section 51.014(d)'s requirements are met." *See post* at 27 (BUSBY, J., dissenting). Considering we unanimously said this just three years ago in *Sabre Travel*, our unanimous agreement today should be no surprise.

the federal counterpart to permissive interlocutory appeals." *Id.* at 731. *Compare* 28 U.S.C. § 1292(b), *with* TEX. CIV. PRAC. & REM. CODE § 51.014 (d), (f). In the federal system, courts of appeals may "deny review on the basis of *any* consideration." *Microsoft Corp. v. Baker*, —— U.S. ——, 137 S. Ct. 1702, 1710, 198 L.Ed.2d 132 (2017) (quotation omitted) (emphasis in original). Thus, Texas courts of appeals, like federal courts of appeals, have "absolute discretion" to accept or deny an appeal under section 51.014(f). *Sabre Travel*, 567 S.W.3d at 732.

If the Legislature wants to require courts of appeals to take more interlocutory appeals, it can certainly do so. I tend to think that earlier and quicker appellate review of dispositive legal issues would be a salutary thing. But the Legislature has not amended section 51.014(f) in response to our observation in *Sabre Travel* that Texas's permissive appeal scheme mirrors its well-known federal counterpart. Nor has this Court amended the Rules of Appellate Procedure. When we decided *Sabre Travel*, we thought that "[o]ur procedural rules make [courts of appeals' absolute discretion] clear." *Id.* The rules have not changed, so resolving the issue today ought to require nothing more than a citation to *Sabre Travel.*

Sabre Travel is not just this Court's precedent. It is correct. A court of appeals "may" accept a permissive appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(f). Not "shall" or "must" or "should," but "may." The dissent is right, of course, that "may" does not always confer unfettered discretion. *Post* at 31–32. But it often does. One place it does is in the rules governing petitions for review in this Court: "The Supreme Court *may* review a court of appeals' final judgment on a petition for review." TEX. R. APP. P. 53.1 (emphasis added). Elsewhere, the rules state that "[w]hether to grant [a petition for] review is a matter of judicial discretion." TEX. R. APP. P. 56.1(a). *Sabre Travel*, section 51.014, and the procedural rules together make clear that whether to grant a petition for permissive appeal is likewise a matter of judicial discretion. *See* 567 S.W.3d at 732.

Absolute discretion to decide whether to review another judge's decision *right now*—instead of later—is a far cry from absolute discretion to, for instance, set aside a jury verdict. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (requiring a trial court "to give its reasons for disregarding the jury verdict"). Indeed, unreviewable discretion *to decide which cases to hear* is well within the confines of traditional appellate judging. Contrary to the dissent's concerns, unfettered discretion over which cases to hear is not an abandonment of reasoned decision-making or an impediment to confidence in the rule of law. And if it is, then we are in trouble. Deciding which cases to hear—with absolute discretion and without explanation—is the daily business of this Court. Under section 51.014 and the Rules of Appellate Procedure, it is also, occasionally, the business of the courts of appeals.

I am not the first to note the similarity between this Court's absolute discretion to deny petitions for review and an appellate court's absolute discretion to deny petitions for permission to appeal. We described it in *Sabre Travel. See* 567 S.W.3d at 731. And the comments to Rule 28.3, which governs permissive appeals, explain succinctly that "[t]he petition procedure in Rule 28.3 is intended to be similar to the Rule 53 procedure governing petitions for review in the Supreme Court."[1] The com-

1. One difference, which we recognized in *Sabre Travel,* is that this Court may take up a

ment's guidance is well supported by the statute and the rules, and we reinforced it in *Sabre Travel.* We need say no more to explain our decision today. I would hold that a court of appeals' decision to grant or deny a petition for permissive appeal is entirely discretionary and need not be explained.[2] If that is a bad rule, the Legislature should amend the statute, or this Court should amend the appellate rules within the confines of the statute.[3]

I join the Court's holding that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Ante* at 21. Otherwise, I respectfully concur in the judgment.

Justice Busby, joined by Chief Justice Hecht and Justice Young, dissenting.

For many years, this Court has demonstrated its commitment to the efficient administration of justice, transparency, and a substance-over-form approach to procedure. Regrettably, the plurality and concurrence sound a retreat on all these fronts today, allowing courts of appeals to avoid hearing permissive appeals at their pleasure and with no explanation so long as their standard-form denials recite the following pass-phrase: "the petition fails to establish each requirement." *See ante* at 19.

The plurality recognizes that this approach thwarts the statute's express goal of advancing the termination of litigation, but it concludes that the Legislature sig-

permissive appeal that the court of appeals has declined to hear, whereas when this Court denies a petition for review there is usually no further recourse. *See* 567 S.W.3d at 733.

2. Both the dissent and the plurality interpret Rule 47.1 to require courts of appeals to issue written opinions explaining the denial of permissive appeals. I disagree. Rule 47.1 requires a "written opinion" explaining the "final disposition of the appeal." Under section 51.014 and the Rules of Appellate Procedure, however, there is no "appeal" to be finally disposed of under Rule 47.1 until the court of appeals accepts a permissive appeal. A permissive appeal "is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal," but this is only "[i]f the court of appeals accepts the appeal." TEX. CIV. PRAC. & REM. CODE § 51.014(f). Likewise, "[t]he date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal." *Id.* In other words, the statute indicates that only after the petition to appeal is accepted do the usual procedures governing appeals apply. The Rules indicate the same. A notice of appeal is "deemed to have been filed" when the petition for permission to appeal is granted, not when the petition is filed. TEX. R. APP. P. 28.3(k). Thus, until the court of appeals accepts the appeal, there is no appeal. There is only a "petition" for "permission to appeal." TEX. R. APP. P. 28.3(a).

Such a petition is akin to a motion, to which Rule 47.1's written-opinion requirement does not apply. An even closer analogue is this Court's disposition of petitions for review, which very rarely includes a written explanation—even though, like the courts of appeals, this Court is obligated to explain in writing its decisions on cases it has chosen to hear. *See* TEX. R. APP. P. 63. As with permissive appeals, the procedural rules describe factors this Court considers when ruling on a petition for review. *See* TEX. R. APP. P. 56.1(a). The existence of these factors—like the two factors courts of appeals should consider when deciding whether to hear permissive appeals—does not constrain this Court's discretion or require it to explain why the factors were not satisfied when it denies a petition for review. The same is true for courts of appeals deciding petitions for permission to appeal.

3. Parties and judges ought to be able to know exactly how to approach a procedural question of this nature by consulting the relevant statutes and procedural rules. They should not also have to consult, and attempt to harmonize, multiple opinions of this Court.

naled an intent to sabotage its own work by including the word "may" in the statute. That conclusion is wrong: our cases have held in many contexts that "may" alone does not confer unreviewable discretion. And our appellate rules independently require courts of appeals to explain why each requirement was not met. I respectfully dissent.

Section 51.014(d) of the Civil Practice and Remedies Code authorizes an appeal from an interlocutory order that (1) "involves a controlling question of law as to which there is a substantial ground for difference of opinion" when (2) "an immediate appeal ... may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d). After obtaining the trial court's written permission to appeal, the appealing party must file "an application for interlocutory appeal" in the court of appeals. *Id.* § 51.014(f). Assuming the application is timely filed, the court of appeals "may accept [the] appeal." *Id.*

A majority of the Court reads into the word "may" a grant of unfettered discretion that empowers a court of appeals to deny a permissive interlocutory appeal for any reason (according to the plurality), or even for no expressed reason at all (according to the concurrence). This decision rests on a misreading of our rules, which require a court of appeals to issue a written opinion that explains—as to "every issue ... necessary to final disposition of the appeal"—"the court's decision and the basic reasons for it." TEX. R. APP. P. 47.1, 47.4.

The Court's embrace of discretion to shield such a denial from any scrutiny is a straw man. What little the court of appeals did say in its opinion shows that the only issue it decided—whether subsection (d)'s two prerequisites were satisfied—is not an issue committed to the court of appeals' discretion, as the plurality concedes. *Ante* at 15–16 (explaining that "courts have no discretion" unless "the two requirements *are* satisfied"). And it cannot be disputed that the court of appeals failed to advise the parties of the reasons why it concluded those prerequisites were not met.

Yet even if discretion were implicated here, neither text nor precedent supports insulating that discretion from review; our cases require courts exercising discretion to follow guiding principles and refrain from acting arbitrarily or unreasonably. The only contrary example that the plurality and concurrence identify is our discretion to deny petitions for review. But the rules expressly authorize us to do so with a brief notation rather than an opinion, and as a matter of jurisdiction and court structure we have the last word on state-law procedural matters.

The opposite is true in the intermediate courts of appeals. And in the context of permissive appeals, it is particularly important that their opinions discuss and apply guiding principles for three reasons: (1) to facilitate each panel's reasonable consideration of whether the requirements selected by the Legislature have been met in a particular case; (2) to reveal whether the panel is denying permission to appeal on discretionary or non-discretionary grounds and enable further review when necessary; and (3) to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future cases.

Finally, the Court casts aside the Legislature's recognized goal of providing for early, efficient appellate resolution of determinative legal issues—which the plurality candidly acknowledges courts of appeals are flouting with their "recurring rejections." *Ante* at 18–19. In 2019, we

cautioned courts of appeals to accept permissive interlocutory appeals when section 51.014(d)'s requirements are satisfied. *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019). But as the parties and amici note, courts of appeals continue to deny the vast majority of permissive appeals—and they do so without giving any explanation of the reasons for their actions. The plurality at least acknowledges in passing our original admonition to the courts of appeals, but there is no reason to think that finger-wagging will have any more effect this time than it did in *Sabre Travel.*

The parties and the trial court in this case were unanimous in concluding that the requirements for a permissive appeal were met and that addressing the merits would promote the efficient resolution of this dispute. Yet the court of appeals disagreed that the requirements were met without even providing them the courtesy of an explanation, and the plurality's effort to imagine what the reason might have been does not withstand scrutiny. To the contrary, the trial court's determination that subsection (d)'s requirements have been met is legally correct. Because the court of appeals' opinion does not comply with our rules, and there are also compelling reasons grounded in the statute and our precedent for requiring the court to advise the parties of its reasons for denying a permissive appeal, I would reverse.

I. By failing to disclose its basic reasons for deciding that the petition did not meet each requirement for a permissive appeal, the court of appeals violated Appellate Rule 47.

In this Court, all parties contend that the court of appeals erred by failing to hand down an opinion that explained the basic reasons for its decision on each issue necessary to its denial of permission to appeal. A careful examination of our statutes, rules, and precedents demonstrates that they are correct. The plurality's opinion skips some key steps in this inquiry, which must take into account what issues are necessary to dispose of a petition for permission to appeal, as well as what sort of explanation our rules require as to each of those issues.

Here, as the plurality recognizes, the disputed issue necessary to the court of appeals' denial of the petition was whether it established the two predicate requirements for a permissive appeal. *Ante* at 14–15. The court of appeals provided no explanation whatsoever for its decision that the petition "fails to establish each requirement." 634 S.W.3d 760 (Tex. App.—Houston [1st Dist.] 2019).

A. There are four issues a court of appeals may encounter in determining whether to accept a section 51.014(d) appeal.

The Legislature has granted our courts of appeals jurisdiction to hear appeals of certain otherwise unappealable interlocutory orders if the trial court's order permits the appeal and the appealing party timely files an application—or, as our rules call it, a petition for permission to appeal—in the court of appeals. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f); TEX. R. APP. P. 28.3; TEX. R. CIV. P. 168. There are at least four types of issues that can be presented to a court of appeals considering whether to accept an appeal permitted by the trial court.

First, the parties may dispute whether the trial court followed the requirements for an order granting permission to appeal. The order must decide "a controlling question of law." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *Orion Marine Constr., Inc. v. Cepeda*, No. 01-18-00323-CV, 2018 WL 3059756, at *3 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.)

(Bland, J.) ("The courts of appeals are not statutorily authorized to decide controlling questions of law in the first instance.").[1] In addition, the trial court's permission "must be stated in the order to be appealed," and "[t]he permission must identify the controlling question of law ... and ... state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. Failure to satisfy these requirements will result in rejection of the appeal.[2] And appellate courts generally decline to address issues not specified in the trial court's order. *E.g.*, *BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189, 195 n.4 (Tex. 2021).

Second, there may be a question about whether the appellant timely filed a petition for permission to appeal the order. "[N]ot later than the 15th day after the date the trial court signs the order to be appealed," the appealing party must file an "application for interlocutory appeal" in the court of appeals. TEX. CIV. PRAC. & REM. CODE § 51.014(f); *see also* TEX. R. APP. P. 28.3(c) (detailing requirements for "petition" for permission to appeal), 28.3(d) (providing for extension of time to file petition). When the appealing party fails to do so, courts of appeals have concluded that they lack jurisdiction over the appeal entirely. *E.g.*, *Progressive Cnty. Mut. Ins. Co. v. McCormack*, No. 04-21-00001-CV, 2021 WL 186675, at *2 (Tex. App.—San Antonio Jan. 20, 2021, pet. denied) (per curiam) (mem. op.).

Third, there are two minimum requirements that must be met before the court of appeals may accept an appeal permitted by the trial court, and there may be a dispute about whether one or both of those prerequisites are satisfied. Section 51.014(f) provides that the court of appeals "may accept" the appeal "*if* the appealing party ... files ... an application for interlocutory appeal explaining why an appeal is warranted under [section 51.014(d)]." TEX. CIV. PRAC. & REM. CODE § 51.014(f) (emphasis added). As discussed above, the two requirements of subsection (d)—echoed in Rule of Appellate Procedure 28.3(e)(4)—are that (1) the trial court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and (2) an immediate appeal from that order may materially advance the ultimate termination of the litigation.[3]

Because courts of appeals may accept a permissive interlocutory appeal only "if" section 51.014(d)'s requirements are met, *see id.*, I agree with the plurality that courts of appeals "have no discretion to permit or accept an appeal" when section 51.014(d)'s "requirements are not satis-

1. *See also, e.g., Garcia v. Garcia*, No. 14-19-00375-CV, 2019 WL 2426680, at *2 (Tex. App.—Houston [14th Dist.] June 11, 2019, no pet.) (per curiam) (mem. op.); *Borowski v. Ayers*, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.) (collecting cases); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 597 (Tex. App.—Dallas 2012, no pet.).

2. *See Patel v. Nations Renovations, LLC*, No. 02-21-00031-CV, 2021 WL 832719, at *1 (Tex. App.—Fort Worth Mar. 4, 2021, no pet.) (per curiam) (mem. op.) (rejecting interlocutory appeal where trial court's order neither identified controlling question of law nor stated why immediate appeal would materially advance litigation's termination); *Cather v. Dean*, No. 05-20-00737-CV, 2020 WL 5554924, at *1 (Tex. App.—Dallas Sept. 17, 2020, no pet.) (mem. op.) (rejecting interlocutory appeal due to order's lack of "statement of permission").

3. Subsection (e)(4) tracks section 51.014(d)'s language and requires that the petition "argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e)(4).

fied." *Ante* at 15–16. Indeed, there is no reason for us to review the court of appeals' views regarding those requirements deferentially as an exercise of discretion; we are in an equally good position to determine whether there are substantial grounds for a difference of legal opinion and whether immediate review would materially speed the resolution of the litigation. *E.g.*, TEX. R. APP. P. 56.1(a)(1)–(2) (listing factors this Court may consider in granting review, including disagreement on important legal points); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (considering whether mandamus review would "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings").

Fourth, if section 51.014(d)'s requirements are met, the court of appeals can decide whether it wishes to exercise its discretion to accept the appeal. Beyond providing that the court of appeals "may accept an appeal permitted by [section 51.014(d)]," TEX. CIV. PRAC. & REM. CODE § 51.014(f), the statute offers little guidance to courts regarding which appeals to accept.

The plurality and I agree that this fourth issue is the only one involving an exercise of discretion. *Ante* at 16 ("[I]f the two requirements [of subsection (d)] *are* satisfied, the statute then grants courts . . . discretion to accept or permit the appeal."). I also agree with the plurality that nothing in the statute or our rules requires a court to accept the appeal when section 51.014(d)'s requirements are met. *See id.* In such situations, we have said, "[t]he principles that are to guide [the] court's discretionary decision are determined by the purposes of the rule at issue." *Samlowski v. Wooten*, 332 S.W.3d 404, 414 (Tex. 2011) (Guzman, J., concurring); *see id.* at 410 (plurality op.); *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding). Unfortunately, the courts of appeals are not exploring those principles in their opinions.

The failure to distinguish among these four issues has led to some confusion and contradiction in court of appeals decisions. There are several opinions in which courts of appeals have both dismissed a permissive interlocutory appeal for want of jurisdiction—purportedly because section 51.014(d)'s requirements are not satisfied—and denied the petition for permission to appeal, seemingly exercising discretion they believed themselves without jurisdiction to exercise.[4]

B. The court failed to give reasons for its decision on every issue necessary to the final disposition of the appeal.

Understanding the issues at play helps to inform how a court of appeals must

4. *See, e.g., JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *4 (Tex. App.—San Antonio Dec. 29, 2021, no pet.) (per curiam) (mem. op.); *Corley v. Corley*, No. 04-21-00181-CV, 2021 WL 2669343, at *1 (Tex. App.—San Antonio June 30, 2021, pet. denied) (per curiam) (mem. op.); *ConocoPhillips Co. v. Camino Agave, Inc.*, No. 04-20-00282-CV, 2020 WL 4929794, at *1 (Tex. App.—San Antonio July 29, 2020, pet. denied) (per curiam) (mem. op.); *Thompson v. Landry*, No. 01-19-00203-CV, 2019 WL 1811087, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 2019, no pet.) (per curiam) (mem. op.); *Rubicon Representation, LLC v. Johnson*, No. 05-18-00798-CV, 2018 WL 3853475, at *1 (Tex. App.—Dallas Aug. 14, 2018, no pet.) (mem. op.); *Total Highway Maint., LLC v. Sixtos*, No. 05-17-00102-CV, 2017 WL 1020663, at *1 (Tex. App.—Dallas Mar. 16, 2017, no pet.) (mem. op.). Some courts have properly dismissed a permissive appeal for lack of jurisdiction without addressing the petition. *See Hudnall v. Smith & Ramirez Restoration, L.L.C.*, No. 08-19-00217-CV, 2019 WL 4668508, at *2 (Tex. App.—El Paso Sept. 25, 2019, no pet.) (mem. op.).

address those issues under the Rules of Appellate Procedure that govern their opinions. "[C]ourt[s] of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1. The requirement that Texas appellate courts explain the reasons for their decisions stretches back more than a century,[5] and its obvious and salutary purposes include promoting respect for court decisions and confidence in the rule of law, enhancing the transparency we strive to achieve in our legal system, and upholding parties' reasonable expectations that their arguments will be fairly heard and reasonably considered. *E.g., In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). There are circumstances in which Rule 47.1 does not apply, *see* TEX. R. APP. P. 52.8(d), but those are not present here.

When "the issues are settled," our rules provide that courts of appeals "should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TEX. R. APP. P. 47.4. But the memorandum-opinion rule does not excuse the court from addressing every issue necessary to the final disposition, as Rule 47.1 requires. *See West v. Robinson*, 180 S.W.3d 575, 576–77 (Tex. 2005) (per curiam) (reviewing memorandum opinion and reversing because court of appeals failed to address every issue in violation of Rule 47.1). Thus, as to each issue necessary to the court's disposition denying a petition for permission to appeal, the court must "advise the parties of the court's decision" on that issue "and the basic reasons for it." TEX. R. APP. P. 47.4.

As the cases cited throughout this opinion show, courts of appeals uniformly issue memorandum opinions when they dispose of "[a]n appeal under Subsection (d)"[6] of section 51.014 by denying the petition. I join the plurality in concluding that Rule 47 applies to these opinions denying permissive appeals. But I disagree with the plurality's conclusion that the court of appeals' opinion here complies with the rule. *Ante* at 18–19. The plurality paints an incomplete picture of what Rule 47 requires, and it loses sight of the particular issue that was the basis of the court of appeals' disposition.

Though our memorandum-opinion rule demands brevity, a court of appeals cannot "fail[ ] to give any reason whatsoever for its conclusion." *Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam). "[A] memorandum opinion generally should focus on the basic reasons why the law applied to the facts leads to the court's decision." *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (per curiam). Even when a court of appeals affirms a jury verdict in the face of a factual-sufficiency challenge, "merely stating that [the challenge] *is* overruled does not count as providing the 'basic reasons' for that decision." *Id.*

The court of appeals' three-sentence memorandum opinion in this case does not satisfy these requirements. The opinion identifies the parties and the order that the trial court granted permission to appeal, recites the two requirements "[t]o be

5. *See* Act of March 30, 1905, 29th Leg., R.S., ch. 51, § 1, 1905 Tex. Gen. Laws 71 (requiring courts of appeals "to decide all issues presented to them ... and announce in writing their conclusions so found"). This statute was repealed when the Legislature gave this Court full power to make rules of procedure. *See* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

6. TEX. CIV. PRAC. & REM. CODE § 51.014(e).

entitled to a permissive appeal" set out in section 51.014(d) and repeated in Rule of Appellate Procedure 28.3(e)(4), and includes a single sentence stating its analysis and ruling: "Because we conclude that the petition fails to establish each requirement of Rule 28.3(3)(e)(4) [sic], we deny the petition for permissive appeal." 634 S.W.3d at 760.

The issue the court of appeals identified as necessary to its disposition was the third type of issue discussed above: whether "the petition fail[ed] to establish each requirement" of section 51.014(d) and "Rule 28.3[ ](e)(4)." *Id.* The plurality agrees. *Ante* at 19. But as to that issue, the court of appeals merely stated its conclusion that the requirements were not established; it did not offer any reason whatsoever for its decision that the petition failed to do so. *But see Gonzalez*, 195 S.W.3d at 681; *Citizens Nat'l Bank*, 195 S.W.3d at 96.

The plurality attempts to support its departure from the rule and our precedent by misstating my position, suggesting that I would require the court of appeals to engage with each of the parties' arguments underlying a particular disputed issue. *Ante* at 19–20. Not at all. I would simply require the court of appeals to do what Rule 47 plainly says it must: fairly consider and provide the basic reasons for its decision as to "*every issue* raised [by the parties] and necessary to final disposition of the appeal"[7] —in particular, the issue whether the requirements of section 51.014(d) were met here. Nowhere does the plurality explain why those requirements should not be considered a distinct issue for Rule 47 purposes on which a reasoned decision was needed. The plurality's view that the court need only identify a basis for its bottom-line "decision" or "disposition" of the entire appeal[8]—whether to deny, affirm, or reverse—is flatly contrary to our decisions in *West*, *Gonzalez*, and *Citizens National Bank*, cited above.[9]

The concurrence, for its part, concludes that Rule 47 is inapplicable because an application for interlocutory appeal is not an actual "appeal" until it is accepted. *Ante*

7. TEX. R. APP. P. 47.1 (emphasis added).

8. *Ante* at 19.

9. Specifically, the court of appeals in *West* reversed the trial court's judgment confirming an arbitration award, giving as the reason for its disposition that the arbitrator had exceeded his authority. No. 11-03-00028-CV, 2004 WL 178586, at *3 (Tex. App.—Eastland Jan. 30, 2004) (mem. op.). We held that the court's memorandum opinion "did not comply with Rule 47.1" because it did not address "modification and waiver as *distinct issues associated with the relief* the parties requested." 180 S.W.3d at 576 (emphasis added). In *Gonzalez*, the court of appeals affirmed the trial court's judgment, explaining that the decision was based on its conclusion "that appellants' factual sufficiency challenge fails because the jury's verdict was not against the great weight of the evidence." No. 13-00-296-CV, 2003 WL 21283132, at *2 (Tex. App.—Corpus Christi–Edinburg June 5, 2003) (mem. op.). We concluded this memorandum opinion "does not count as providing the 'basic reasons' " for the court's holding on the issue of "*why* the jury's verdict can or cannot be set aside." 195 S.W.3d at 681, 682 (emphasis added). And in *Citizens National Bank*, the court of appeals reversed the trial court's judgment on a note, giving as the reason for its disposition that "the evidence conclusively establishes, as a matter of law, all vital facts to support a finding of payment." No. 10-03-00322-CV, 2005 WL 762585, at *2 (Tex. App.—Waco Mar. 30, 2005) (mem. op.). We held that the court's memorandum opinion "fail[ed] to give *any reason whatsoever for its conclusion* that the evidence established a finding of nonpayment." 195 S.W.3d at 96 (emphasis added).

Here, the court of appeals identified section 51.014(d)'s requirements as the distinct issue that formed the basis of its decision to deny the petition. But it likewise failed to give any reason for its conclusion on that issue.

at 23 n.2 (Blacklock, J., concurring). That conclusion is not consistent with the text of section 51.014. For example, subsection (f) refers to "an appeal permitted by Subsection (d)"—that is, "an appeal" permitted "by written order" of "a trial court"—as "*the* appeal" that "[a]n appellate court may accept." TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (emphasis added); *see also id.* § 51.014(e) (referring to "[a]n appeal under Subsection (d)").

Industrial Specialists provided the court of appeals ample support for its position that the requirements of subsection (d) were met here, explaining that each side's competing interpretation of the indemnity provision was supported by authority and that determining its proper interpretation would speed resolution of the case. Courts of appeals have taken different approaches to the merits issue presented by the permissive appeal, which we agreed to review.[10] Notably, Marathon did not oppose Industrial Specialists' motion for permission to appeal the denial of its motion for summary judgment. Nor did Marathon file a response to or otherwise challenge Industrial Specialists' petition for permission to appeal. *See* TEX. R. APP. P. 28.3(f).

Faced with these substantial reasons why the two requirements for a permissive appeal were met, our rules required the court of appeals to explain the basic reasons for its contrary conclusion on this issue. This requirement "is mandatory, and the courts of appeals are not at liberty to disregard it." *West*, 180 S.W.3d at 577. Because the court of appeals did so here, our rules and precedents require that we remand to give the court of appeals another opportunity to provide the explanation to which the parties are entitled. *Id.*; *see also Gonzalez*, 195 S.W.3d at 681; *Citizens Nat'l Bank*, 195 S.W.3d at 96. We should reverse and remand on this basis alone.[11]

II. Though section 51.014(f) gives courts of appeals discretion whether to accept interlocutory appeals that meet the requirements, it does not permit them to act arbitrarily.

Our rules of procedure are not the only reason for requiring courts of appeals to explain their reasons on all issues necessary to the denial of a permissive appeal. Such a requirement is also necessary to ensure that the courts are properly exercising their discretion rather than arbitrarily flouting the clear intent of the Legislature in authorizing such appeals.

Together, the plurality and concurrence form a majority for the holding that courts of appeals have unfettered discretion to grant or deny permissive appeals that meet the criteria set out in the statute and

10. *Compare Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 669 & n.7 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (determining express-negligence test's applicability by looking to whether claims for which indemnity is sought are for indemnitee's negligence), *with Helicopter Textron, Inc. v. Hous. Helicopters, Inc.*, No. 2-09-316-CV, 2010 WL 3928741, at *3 (Tex. App.—Fort Worth Oct. 7, 2010, pet. denied) (mem. op.) (determining whether express-negligence test applies by looking to whether contract at issue indemnifies indemnitee for its own negligence).

11. The plurality expresses a sense of "iron[y]" regarding why I do not advocate that we decide this appeal on the merits ourselves. *Ante* at 16–17 n.8. One reason is that it would take five votes to render such a decision, and neither the plurality nor the concurrence say that they favor doing so. Another reason is that it would be more efficient in the long run for courts of appeals to do their job and decide permissive appeals like this one in the first instance. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519 (Tex. 2015).

rules.[12] Both the plurality and concurrence place abundant emphasis on section 51.014(f)'s use of the word "may," concluding that we "cannot interpose a firm limit on the court of appeals' discretion ... when the statute itself grants the court discretion and imposes no such limit." *Ante* at 16 (plurality op.) (citing TEX. CIV. PRAC. & REM. CODE § 51.014(f)); *see also ante* at 22–23 (Blacklock, J., concurring) (characterizing the court's decision as "entirely discretionary"). This emphasis is misplaced because the court of appeals was not exercising discretion here. Rather, as explained in Part I.B., the court decided that the requirements for a permissive appeal were not satisfied. And as the plurality agrees, "courts have no discretion to permit or accept an appeal if the two requirements are not met." *Ante* at 16.

Yet even if the court of appeals were exercising discretion, our cases have held time and again that "may" alone does not confer unreviewable discretion, and they support requiring the court to explain the reasons for its exercise. "While the permissive word 'may' imports the exercise of discretion, 'the court is not vested with unlimited discretion.'" *Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011) (quoting *Womack*, 291 S.W.2d at 683); *see also, e.g., Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008) (observing that "abuse-of-discretion review" is not "the same as no review at all"); *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 683 (Tex. 2007) (orig. proceeding) (Willett, J., concurring) ("Permissive does not mean limitless, and while appellate courts should not second-guess trial court rulings cavalierly, the word 'may' does not render such rulings bullet-proof and unreviewable.").[13]

As we have frequently explained, a court's discretionary decisions must not be "arbitrary" or "unreasonable" and must "adhere to guiding principles." *Pirelli Tire*, 247 S.W.3d at 676. Courts are "required to exercise a sound and legal discretion within limits created by the circumstances of the particular case" and "the purpose of the rule" at issue. *Womack*, 291 S.W.2d at 683; *see also Samlowski*, 332 S.W.3d at 410 (plurality op.), 414 (Guzman, J., concurring). Accordingly, we have imposed limits on courts' discretion and required them to explain their reasons even when the source of their authority is silent regarding that discretion's bounds. *E.g., Columbia Med. Ctr.*, 290 S.W.3d at 212–13 (requiring trial court that sets aside jury verdict to explain its reasoning because trial judge cannot "substitute his or her own views for that of the jury without a valid basis"); *Gonzalez*, 195 S.W.3d at 681 (observing that under Rule 47.4, appellate court cannot overrule factual sufficiency challenge to jury verdict without explain-

12. *Ante* at 15–16 (plurality op.); *id.* at 23 (Blacklock, J., concurring).

13. To the extent the plurality and concurrence rely on descriptions of federal courts' discretion to grant permissive appeals as "unfettered," *cf. Microsoft Corp. v. Baker*, —— U.S. ——, 137 S. Ct. 1702, 1709, 198 L.Ed.2d 132 (2017), the federal permissive appeal statute is different in that it contains an express reference to discretion. *See* 28 U.S.C. § 1292(b) (providing that court of appeals "may ..., in its discretion, permit an appeal"). And even with this express discretion, federal appellate courts have issued many more substantive opinions on permissive appeals than their Texas counterparts, developing a body of law that provides useful guidance to bench and bar regarding the exercise of that discretion. *See, e.g., ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1131–32 (9th Cir. 2022); *Nice v. L-3 Commc'ns Vertex Aerospace, LLC*, 885 F.3d 1308, 1312–13 (11th Cir. 2018); *Union County v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 646–47 (8th Cir. 2008); *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675–77 (7th Cir. 2000) (Posner, C.J.).

ing why); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) ("[C]ourts of appeals, when reversing on insufficiency grounds, should, in their opinions, ... clearly state why the jury's finding is factually insufficient...."). It is particularly appropriate to require an explanation from an intermediate appellate court—which, after all, is in the business of explaining its decisions.

The plurality asserts that *Columbia Medical Center*, *Gonzalez*, and *Pool* are "distinguishable because they aimed to protect the sanctity of the constitutional right to jury trial." *Ante* at 20. Yet interestingly, many of the reasons the plurality gives for its decision today mirror those in the *Columbia Medical Center* dissent. *See* 290 S.W.3d at 216 (O'Neill, J., dissenting).

Moreover, the plurality is simply wrong that section 51.014 "grants courts vast—indeed, unfettered—discretion." *Ante* at 16. There are many other instances in which we have concluded that a "grant[ ] of authority couched in permissive terms" does not exempt a court from "adher[ing] to guiding principles" or authorize it to act arbitrarily or unreasonably. *Pirelli Tire*, 247 S.W.3d at 676 (plurality op.). Former section 71.051(a) of the Civil Practice and Remedies Code gave courts discretion to dismiss an action based on forum non conveniens, but we rejected the contention that this discretion was "virtually unlimited." *Id.* at 675. Although trial courts have "broad discretion" in determining whether to dismiss a case on grounds of forum non conveniens, their decision—"as with other discretionary decisions"—is still "subject to review for clear abuse of discretion." *Id.* at 676; *see id.* at 682–83 (Willett, J., concurring) (" '[M]ay' simply confirms that the district court's decision is a matter of discretion, subject to review for abuse of that discretion, or, when the case is before us on mandamus, a *clear* abuse of discretion.").

Similarly, former Rule of Civil Procedure 215a(c) provided that a trial court "may" strike an answer in certain circumstances. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). But we held the court's decision was reviewable for abuse of discretion—that is, for whether the trial court's act was "arbitrary or unreasonable" or taken "without reference to any guiding rules and principles." *Id.* at 241–42; *see Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 138, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807) (Marshall, C.J.))).[14]

In addition, our procedural rules provide that a court "*may* order a separate trial" of a claim or issue. TEX. R. CIV. P. 174(b) (emphasis added). But we have held that its discretion to do so is "not unlimited." *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) (orig. proceeding). Courts also have "broad discretion" to consolidate cases. *Pirelli Tire*, 247 S.W.3d at 676 (citing TEX. R. CIV. P. 174(a)). Yet they can abuse that discretion by failing to consider specific factors. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (per curiam) (orig. proceeding) (granting mandamus relief from trial court's consolidation order in mass tort case). We also afford courts discretion to exclude relevant

14. *See also Alexander v. Smith*, 20 Tex.Civ. App. 304, 49 S.W. 916 (Tex. App.—San Antonio 1899, no writ) ("The judicial discretion is not an arbitrary right to do whatever an individual judge's whim, caprice, or passion may suggest, for what is not reasonable, or not in accordance with common justice, no judge has a right to do.").

evidence when its prejudicial effect outweighs its probative value, *see* TEX. R. EVID. 403, but this discretion is "not boundless." *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 25–26 (Tex. 2008).[15]

The plurality chides us for looking beyond the supposedly plain meaning of the word "may" to discern the limits of the discretion it confers, which the plurality characterizes as an attempt to "rewrite [the] statute" or "revis[e] our rules ... by judicial fiat." *Ante* at 16, 20–21. Yet it is our typical practice to consider context—not merely dictionaries—when the Legislature chooses to employ a word with a legal meaning that we have previously expounded in similar situations. *E.g.*, TEX. GOV'T CODE § 311.011(b); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 106–07 (Tex. 2021); *Phillips v. Bramlett*, 407 S.W.3d 229, 241 (Tex. 2013) ("We therefore must conclude that the Legislature selected the term 'judgment' for the purpose of conveying a meaning consistent with that which we historically afforded to it."). And that is precisely what we did in the cases just discussed, which hold that "may" alone does not confer discretion to act arbitrarily, unreasonably, or without reference to guiding principles and that an explanation may be necessary to ensure that courts are not doing so. It is unclear what is different about today's case.

The only example the plurality and concurrence give in which the word "may" confers unreviewable discretion is this Court's discretion to deny petitions for review without explanation. *See* TEX. R. APP. P. 56.1. But the word "may" *alone* does not produce that result. Rather, our rules expressly authorize us to "deny or dismiss the petition ... with one of the following notations"—"Denied." or "Dismissed w.o.j."—rather than with an explanatory opinion. TEX. R. APP. P. 56.1(b). And a matter of jurisdiction and court structure, we have the last word on state-law procedural matters, which are not subject to review by the Supreme Court of the United States. *See* 28 U.S.C. § 1257(a). On both counts, the opposite is true of our intermediate courts of appeals. *See* TEX. R. APP. P. 47 (requiring reasoned opinions); *ante* at 20–21 & n.15 (addressing our jurisdiction to review permissive appeal after court of appeals has declined to accept it).

Consistent with the authorities just discussed, requiring courts of appeals to explain their rulings on petitions for permission to appeal would ensure that the panel has not acted arbitrarily but has meaningfully and reasonably discharged its "duty to consider" the particular issues raised by the petition—a duty the plurality half-heartedly acknowledges. *Ante* at 16.[16] As discussed in Part I.A. above, many of those issues do not involve any exercise of discretion. An explanation by the court of appeals would also facilitate our review of the court's rulings on the issues in play when necessary. *See, e.g., In re RSR Corp.*, 475 S.W.3d 775, 779 (Tex. 2015) (orig. proceeding) (holding trial court abused discretion because order on attorney disqualification reflected it did not

15. *See also, e.g., McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995) (holding trial court's failure to apply correct law in dismissing juror as disabled was abuse of discretion); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (holding court's "clear failure ... to analyze or apply the law correctly will constitute an abuse of discretion").

16. *Cf. Ahrenholz*, 219 F.3d at 677 (Posner, C.J.) (emphasizing "the duty of the district court and of [the Seventh Circuit] as well to allow an immediate appeal to be taken when [the federal permissive appeal statute's] criteria are met").

consider relevant factors). And an explanation is particularly called for in this case, where the court of appeals "based [its decision] on other reasons not even urged by . . . and still unknown to both parties. [They] should be told why" the court concluded the requirements were not met. *Columbia Med. Ctr.*, 290 S.W.3d at 213.

Requiring courts of appeals to explain their permissive appeal rulings would also develop Texas jurisprudence regarding why such appeals should be accepted or denied, providing guidance for future courts and fostering comparable outcomes in similar cases. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139, 126 S.Ct. 704 (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)).

As it currently stands, Texas precedent on accepting a permitted appeal is quite sparse. *See, e.g., Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 544 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (noting that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue"). Indeed, some courts issue opinions even shorter than the one issued by the court of appeals here, stating simply that "[a]fter considering" the parties' filings, "we deny the petition and dismiss the appeal for want of jurisdiction."[17]

The plurality believes that these opinions fall short of Rule 47's requirements because they "fail to state the 'basic reasons' for their decision." *Ante* at 19 n.13. But it says adding the boilerplate conclusion that "the petition fails to establish each requirement of Rule 28.3(3)(e)(4) [sic]," 634 S.W.3d at 760, is enough to comply with the rule. *Ante* at 19. I fail to see the sense in the line the plurality draws. It certainly cannot be tied to the language of Rule 47, which as explained in Part I.B. above requires the court to give its reasons as to "every issue" necessary to its decision—here, the issue whether each requirement for a permissive appeal has been met.

The plurality eventually acknowledges that it might be arbitrary and unreasonable for a court of appeals to "refuse a permissive appeal without considering whether the two requirements [of section 51.014(d)] are satisfied." *Ante* at 16. Why the plurality harbors any doubt on this point is hard to fathom. It is obvious to me, though apparently not to our concurring colleagues, that a court of appeals would abuse its discretion if it denied a permissive appeal because a flipped coin came up tails or the panel members wanted to take a vacation. But how will anyone know whether a court of appeals acted without properly considering the statute's requirements unless the court is required to say why it decided the issue as it did?

17. *Danylyk v. City of Euless*, No. 05-21-01074-CV, 2022 WL 818964, at *1 (Tex. App.—Dallas Mar. 18, 2022, no pet.) (mem. op.); *see also BioTE Med., LLC v. Carrozzella*, No. 02-21-00272-CV, 2021 WL 4205000, at *1 (Tex. App.—Fort Worth Sept. 16, 2021, no pet.) (per curiam) (mem. op.); *BPX Operating Co. v. 1776 Energy Partners, LLC*, No. 04-21-00054-CV, 2021 WL 1894830, at *1 (Tex. App.—San Antonio May 12, 2021, no pet.) (per curiam) (mem. op.); *Nationstar Mortg. LLC v. Earley*, No. 13-19-00618-CV, 2020 WL 241956, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 16, 2020, no pet.) (mem. op.); *LeBlanc v. Veazie*, No. 09-18-00470-CV, 2019 WL 150947, at *1 (Tex. App.—Beaumont Jan. 10, 2019, no pet.) (mem. op.); *Thompson*, 2018 WL 6540152, at *1 (Tex. App.—Houston [1st Dist.] Dec. 13, 2018, no pet.); *Morgan Stanley & Co. v. Fed. Deposit Ins. Corp.*, No. 14-14-00849-CV, 2014 WL 6679611, at *1 (Tex. App.—Houston [14th Dist.] Nov. 25, 2014, no pet.) (per curiam) (mem. op.).

The plurality offers no answer. Its acknowledgment that a court of appeals might act arbitrarily or unreasonably thus has no real meaning, and the true message its opinion sends to those courts is clear: say as little as possible in denying permission to appeal.

That approach undermines in fact—and tarnishes in appearance—the "just and deliberate judicial system" the plurality claims to prefer. *Ante* at 21. Absent a requirement that the court of appeals share its reasons, there will continue to be no predictability regarding which cases should be heard on permissive interlocutory appeal. Courts of appeals have developed some conflicting understandings of section 51.014(d)'s requirements. *Compare Patel v. Patel*, No. 05-16-00575-CV, 2016 WL 3946932, at *2 (Tex. App.—Dallas July 19, 2016, no pet.) (mem. op.) (concluding "substantial ground for difference of opinion" prong is not satisfied where disagreement is between parties), *with Austin Com., L.P. v. Tex. Tech Univ.*, No. 07-15-00296-CV, 2015 WL 4776521, at *2 (Tex. App.—Amarillo Aug. 11, 2015, no pet.) (per curiam) (suggesting that "substantial ground for difference of opinion" prong can be satisfied by disagreement between parties). That is unlikely to change under our decision today, which both incentivizes courts of appeals not to issue reasoned opinions and fully insulates those opinions from any scrutiny.

Indeed, even the requirement to include the now-approved boilerplate sentence seems rather pointless. According to the plurality, even if the court of appeals concludes that the requirements are perfectly met, it may freely reject the appeal without further discussion. Nor does anything change if the court of appeals is *wrong*—objectively wrong, as-a-matter-of-law wrong—in its recitation that the requirements are not met. If such an error arises, the plurality contends, this Court is powerless to take the modest step of sending the case back so that, shorn of its error, the court of appeals could reconsider.

But for all we know, the court of appeals may have desperately *wanted* to take the appeal, yet believed itself to be without discretion—or even without jurisdiction—to do so because it genuinely thought that one of the statutory requirements was unmet.[18] As I discuss below, the court of appeals' assessment of the requirements in this case was legally wrong. That conclusion would be good news to an appellate court that stayed its hand only because it believed itself to lack jurisdiction to proceed. Under our normal practice, we could correct that error and then remand so that the court of appeals could accept the appeal after all. Or even if the court did not particularly want to decide the appeal, correcting its legal error would at least allow it to provide a non-erroneous ground for denying permission. *Ante* at 15–16.

Yet the plurality's new doctrine of "discretion" would deem Rule 47 satisfied even if a court of appeals were to say the following:

> We have considered the timely application for an interlocutory appeal. We conclude that the trial court's order, which it granted permission to appeal, decided a controlling question of law. We agree that there is a substantial ground for difference of opinion about that question. We also agree that an immediate appeal may materially advance the ultimate termination of the litigation. We nonetheless dismiss the application for

18. I do not take a position here on whether a court of appeals would lack jurisdiction or simply lack discretion to accept an appeal in a case where the statutory requirements are not met. As noted above, courts of appeals have taken both approaches.

want of jurisdiction. *See* TEX. R. APP. P. 28.3(e)(4).

Under the plurality's approach, a self-contradictory opinion like this one must be upheld because it includes what the plurality requires: a statement that the court of appeals has *considered* the statutory factors. If such a gibberish opinion *could* be reversed, it would only be because there must in fact be some limit to the court of appeals' discretion, which would doom the plurality's whole theory. Of course there *is* such a limit. Just a few weeks ago we reiterated the (until today, at least) unquestioned principle that "[a] court clearly abuses its discretion when it makes an error of law." *In re Abbott*, 645 S.W.3d 276, 282, 67 Tex. Sup. Ct. J. 1071, 1074 (Tex. 2022). Only time will tell whether the plurality's error today will tear down any more of that previously venerable principle.[19]

I doubt, of course, that any court of appeals will be quite as blatant as this hypothetical opinion, although some of them have come close. My point is only that the plurality's approach deems any error of law or any act of caprice—blatant or otherwise—to *not* be an abuse of discretion. That approach transforms judicial discretion into judicial fiat.

Another reason we should require courts of appeals to explain their permissive appeal rulings is that doing so furthers "the purpose of the [statute]," which we consider in shaping the principles that should guide the courts' discretion. *Womack*, 291 S.W.2d at 683; *see also Samlowski*, 332 S.W.3d at 410 (plurality op.), 414 (Guzman, J., concurring). The permissive appeal statute is expressly designed to "materially advance the ultimate termination of . . . litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). Thus, in *Sabre Travel*, we explained that the Legislature's evident purpose in enacting section 51.014(d) and (f) was to promote "early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation," 567 S.W.3d at 732, thereby "mak[ing] the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." *Id.* (quoting Senate Comm. on State Affs., Engrossed Bill Analysis, Tex. H.B. 274, 82d Leg., R.S. (2011)).

Yet many courts of appeals continue to deny the vast majority of permissive appeals despite our exhortations in *Sabre Travel*.[20] In doing so, these courts thwart

19. The plurality even says that "the abuse-of-discretion standard does not permit us to second-guess the court [of appeals]' judgment" on the purely legal question whether the statute's requirements have been satisfied. *Ante* at 17–18.

20. As the plurality notes, since *Sabre Travel*, the First Court of Appeals has been denying permission to appeal using a recycled order. *Ante* at 18 & n.9. And the Fifth Court of Appeals has also been issuing recurring denials using what appears to be a recycled form opinion even shorter than that used by the First Court. In some opinions, it cites to section 51.014(f). *See, e.g., Danylyk*, 2022 WL 818964, at *1; *Cae Simuflite, Inc. v. Talavera*, No. 05-21-01022-CV, 2022 WL 202987, at *1 (Tex. App.—Dallas Jan. 24, 2022, pet. filed) (mem. op.); *Novo Point, LLC v. Katz*, No. 05-21-00395-CV, 2021 WL 5027761, at *1 (Tex. App.—Dallas Oct. 29, 2021, no pet.) (mem. op.); *Scott & White Health Plan v. Lowe*, No. 05-20-00049-CV, 2020 WL 4592790, at *1 (Tex. App.—Dallas Aug. 11, 2020, no pet.) (mem. op.); *Heron v. Gen. Supply & Servs., Inc.*, No. 05-20-00491-CV, 2020 WL 2611260, at *1 (Tex. App.—Dallas May 22, 2020, no pet.) (mem. op.); *Driver Pipeline Co. v. Nino*, No. 05-19-01409-CV, 2020 WL 1042648, at *1 (Tex. App.—Dallas Mar. 3, 2020, pet. denied) (mem. op.). In others, the court uses the same basic language but cites to subsection (d). *See, e.g., Snowden v. Ravkind*, No. 05-20-00188-CV, 2020 WL 3445812, at *1 (Tex. App.—Dallas June 24, 2020, no pet.) (mem. op.). Regardless of the statutory provision cited,

the Legislature's intent in enacting the statute. *See Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting) (arguing that panel abused discretion by denying rehearing of petitions for permission to appeal); *Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00923-CV, 2020 WL 536013, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2020, pet. denied) (per curiam) (mem. op.).

It is unclear what good the plurality thinks quoting those exhortations will do. Given the plurality's "prefer[ence]" for a "deliberate judicial system" over an "efficient one," and its dim view of the "impatience with time-tested methods of ... measured adjudication" that the parties and the trial court supposedly displayed by invoking this legislatively created appellate remedy, *ante* at 21, 17, perhaps it is not meant to do any good at all. If nothing else, perhaps today's opinion and the courts of appeals' continued course of thwarting the Legislature's intent will cause the Legislature to reconsider its 2011 decision to restore discretion to the courts of appeals to decline permissive appeals—discretion that the Legislature had previously eliminated in 2005.[21]

Finally, the Court's other justification for refusing to intervene—that the order being appealed is a denial of summary judgment—is unavailing. The Court suggests that it is inappropriate to hear a permissive appeal when the record is incomplete and the lower courts have yet to resolve the case on the merits. *Ante* at 21. But the "controlling question of law" requirement indicates that a full record is unnecessary in permissive interlocutory appeals. *See Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (Posner, C.J.) (observing that federal permissive appeal statute's reference to a "question of law" envisions "something the court of appeals could decide quickly and cleanly without having to study the record").

Moreover, although "[a] denial of summary judgment is a paradigmatic example of an interlocutory order that normally is not appealable," *id.* at 676, that has not dissuaded courts of appeals from hearing such interlocutory appeals when section 51.014(d)'s requirements are satisfied. *E.g., City of Houston v. Hous. Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1, 7–8 (Tex. App.—Houston [14th Dist.] 2021, pet. granted); *State Farm Mut. Auto. Ass'n v. Cook*, 591 S.W.3d 677, 679 (Tex. App.—San Antonio 2019, no pet.). For all these reasons, courts of appeals should be required to explain their decision on the issue whether those requirements are satisfied. I would at minimum reverse and remand for the court of appeals to do so.

III. The court of appeals was incorrect in concluding that the requirements of section 51.014(d) are not satisfied.

Clearing away the plurality's argument regarding the denial of summary judgment reveals a second, independent basis for reversing the court of appeals' decision to deny permission to appeal: not only did that court fail to explain its reasons for concluding that section 51.014(d)'s requirements have not been established, the record shows that its conclusion regarding those requirements is every bit as incor-

each opinion both denies the petition for permission to appeal and—confusingly—dismisses the appeal for want of jurisdiction.

21. *See* Act of May 30, 2005, 79th Leg., ch. 1051, § 2, 2005 Tex. Gen. Laws 3512, 3513 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code § 51.014(f)).

rect as the hypothetical order I described above. As discussed in Part I.A., whether subsection (d)'s two prerequisites are satisfied is not an issue committed to the court of appeals' discretion.

In the disputed contract provision at issue here, Industrial Specialists agreed to indemnify Blanchard "from and against all ... suits and other liabilities ... except to the extent the liability, loss, or damage is attributable to and caused by the negligence of [Blanchard]." Blanchard moved for partial summary judgment on its claim for a declaratory judgment that this provision required Industrial Specialists to indemnify it for amounts it paid to settle liabilities attributable to other parties. And Industrial Specialists moved for summary judgment on various grounds, including that the indemnity is unenforceable because it fails the express-negligence test.

The trial court initially denied both parties' motions. But in its subsequent amended order granting permission to appeal, the court "makes the following substantive ruling" in favor of Blanchard:

> The March 14, 2013 Major Service Contract between [Industrial Specialists] and Plaintiff Blanchard Refining Company LLC does not prohibit Plaintiffs Blanchard and Marathon Petroleum Company LP from seeking indemnity from [Industrial Specialists] for personal-injury settlement payments Plaintiffs made, to the extent those payments were attributable to or caused by the negligence of parties other than Plaintiffs.

The trial court went on to find that there was "substantial ground for difference of opinion" regarding "whether the parties' written agreement prohibits Plaintiffs from seeking indemnity," and that "an immediate appeal of ... this Court's ruling on this controlling question of law" may "materially advance the ultimate termination of this litigation."

The trial court's determinations on the section 51.014(d) requirements are legally correct. Regarding substantial ground for difference of opinion, courts of appeals are divided regarding the enforceability of Industrial Specialists' agreement to indemnify Blanchard. *See* p. 15 n.10, *supra.* We regarded this difference as substantial enough that we granted review to resolve it. And as to advancing termination, reversing the trial court's substantive ruling that indemnity is not prohibited would resolve the case entirely in Industrial Specialists' favor, while affirming it would "considerably shorten the time, effort, and expense of" litigating Blanchard's remaining claim for breach of the indemnity provision. *Gulf Coast Asphalt*, 457 S.W.3d at 544–45 (quoting Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747–49 (1998)).

The plurality is wrong to bless the court of appeals' contrary conclusion as, "at a minimum, plausible." *Ante* at 17. There is no plausible argument that a substantial ground for difference of opinion is lacking; even the plurality pushes no such theory. The second requirement is only that the appeal "*may* materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2) (emphasis added). The statute does not say that the appeal "will certainly" or even "probably" bring the litigation to a sooner end. There is genuine contradiction in how the plurality treats the word "may" in this statute. It rides "may" to its outermost limit when the statute says that the court of appeals "may accept" the appeal. *Id.* § 51.014(f). But the plurality all but ignores "may" when the Legislature used that word to set a generous threshold for taking permissive appeals. It is implausible to conclude that regardless of how the

court of appeals might rule on the summary judgment, the end of this litigation would not be substantially hastened. The opposite is true.

For these reasons, the court of appeals erred in concluding that "the petition fails to establish each requirement" of section 51.014(d) and Rule 28.3(e)(4). 634 S.W.3d at 760. I would reverse and remand for the court of appeals to exercise its discretion whether to accept this appeal meeting the statutory requirements.

* * *

Although section 51.014(d) appeals are "permissive" in nature, courts of appeals still must adhere to guiding principles in determining whether to accept or deny such an appeal. An error of law can never be a proper exercise of discretion, and it is a modest request that a court of appeals provide enough reasoning to ensure that its broad discretion was not abused. Despite acknowledging that courts of appeals continue to deny permissive appeals without any indication of having meaningfully considered them, the plurality and concurrence conclude the discretion given to those courts is so broad that we cannot intervene. Because the statutory text does not support this conclusion, our procedural rules require more, and these unexplained denials undermine section 51.014(d)'s utility, I respectfully dissent.

Glenn HEGAR, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, Petitioners,

v.

HEALTH CARE SERVICE CORPORATION,
Respondent

No. 21-0080

Supreme Court of Texas.

Argued February 3, 2022

OPINION DELIVERED: June 17, 2022

Background: Insurer brought action against Comptroller of State of Texas, seeking refund of premium and maintenance taxes paid over course of year for premiums collected on "stop-loss" policies issued to employers that self-funded health insurance for their employees. The 200th District Court, Travis County, Amy Clark Meachem, J., granted insurer's summary judgment motion. Comptroller appealed. The Austin Court of Appeals, Rose, C.J., 2020 WL 7294614, affirmed. Comptroller petitioned for review.

Holdings: The Supreme Court, Bland, J., held that:

(1) policies covered risks on "individuals" and "groups" within meaning of statute imposing tax on insurance policy premiums;

(2) policies "arose from the business of health insurance" within meaning of statute; and

(3) premiums collected by insurer were subject to maintenance tax.

Reversed.

Blacklock, J., filed dissenting opinion which was joined by Devine, J., Busby, JJ., and Young, JJ.

By: Smithee H.B. No. 1561

A BILL TO BE ENTITLED

AN ACT

relating to the decision of a court of appeals not to accept certain interlocutory appeals.

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

SECTION 1. Section 51.014, Civil Practice and Remedies Code, is amended by adding Subsections (g) and (h) to read as follows:

(g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).

(h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) under an abuse of discretion standard.

SECTION 2. The change in law made by this Act applies only to an application for interlocutory appeal filed on or after the effective date of this Act.

SECTION 3. This Act takes effect September 1, 2023.

Tab 3

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: February 2, 2023

Re: September 15, 2022 Referral Letter relating to TRAP 52 notice and opportunity to cure

I. Matter referred to subcommittee

> **Texas Rule of Appellate Procedure 52.** The Court requests the Committee to consider whether Texas Rule of Appellate Procedure 52 should be amended to require notice of procedural defects and an opportunity to cure before a petition is denied or dismissed and to draft any recommended amendments.

II. Subcommittee recommendation

The Subcommittee recommends adding new sections 52.8(d) and (e) to (1) provide for dismissal of the petition when circumstances merit; and (2) require notice of procedural defects and an opportunity to cure before a petition in an original proceeding is dismissed or denied:

> **52.8. Action on Petition**
>
> (d) *Petition Dismissed*. Except as provided in subsection (e), the court may dismiss the petition based on lack of jurisdiction, for want of prosecution, or as required by statute.
>
> (e) *Defects in Procedure.* The court must not deny or dismiss the petition for formal defects or irregularities in appellate procedure without providing notice of, and a reasonable time to correct or amend, the defects or irregularities.

III. Discussion

The Texas Rules of Appellate Procedure are founded on the premise that appeals should be decided on their merits rather than curable procedural defects. The TRAPs expressly provide that the appellate courts may not dismiss an appeal based on curable defects.

> **44.3. Defects in Procedure.** A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

> **61.3. Defects in Procedure.** The Supreme Court will not affirm or reverse a judgment or dismiss a petition for review for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

Numerous other appellate rules provide notice and an opportunity to cure before dismissing based on a procedural defect. TRAP 1.2(c) (appellate court may not dismiss for failure to comply with local rule without first providing notice and an opportunity to cure); TRAP 28.2 (notice and opportunity to amend before dismissing an agreed interlocutory appeal for want of jurisdiction); TRAP 37.3(b) (notice and opportunity to cure before dismissing for failure to pay for clerk's record); TRAP 37.3(c) (notice and opportunity to cure before dismissing when no reporter's record was filed due to fault of appellant); TRAP 38.8 (appellate court may dismiss an appeal for failure to file a brief unless the party provides a reasonable explanation); TRAP 42.3 (appellate court may dismiss for failure to comply with rules or for want of prosecution only after first giving 10 days' notice).

These rules, however, relate to appeals and not to original proceeding under TRAP 52. There is no parallel provision in TRAP 52, which provides:

> **52.8. Action on Petition**
>
> (a) Relief Denied. If the court determines from the petition and any response and reply that the relator is not entitled to the relief sought, the court must deny the petition. If the relator in a habeas corpus proceeding has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond to be forfeited and render judgment against the surety.

Under this rule, the appellate court may deny a petition in an original proceeding even if the basis for the dismissal is a curable procedural defect. There is no provision requiring notice and an opportunity to correct prior to denial of the petition.

The subcommittee recommends that petitions in original proceedings be given the same treatment as appeals and petitions for review. TRAP 52 should be amended to provide for notice and an opportunity to cure procedural defects.

Although beyond the referral request, in reviewing the rule, the subcommittee also noticed that TRAP 52 does not expressly provide for dismissal of the proceeding. Dismissal would be the proper disposition if the court lacks jurisdiction, the relator has failed to prosecute, or dismissal is required by statute, such as in the case of a vexatious litigant. Technically, under current TRAP 52 the court has only two options—grant or deny. A court is arguably required to deny the petition even though dismissal is proper The Subcommittee recommends that the rule expressly recognize that a petition may be dismissed if circumstances require.

Accordingly, the Subcommittee recommends that TRAP 52 be amended to provide for notice and an opportunity to cure procedural defects and to provide for dismissal of a proceeding if circumstances so require.

Tab 4

From: Jaclyn Daumerie <Jaclyn.Daumerie@txcourts.gov>
Sent: Monday, February 6, 2023 12:06 PM
To: Elaine Carlson (elainecarlson@comcast.net)
Cc: Tom Riney; Babcock, Chip; Zamen, Shiva; Vernis McGill
Subject: SCAC - TRCP 226a - Implicit Bias
Attachments: Court Rules Committee Proposed Amendments to TRCP 226a.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Professor Carlson,

In 2021, the Court asked SCAC to review the SBOT Court Rules Committee's proposal to amend TRCP 226a to add an instruction regarding implicit bias. SCAC discussed the proposal at the September 3, 2021 meeting (Tr. at 32734-778). SCAC didn't take any votes and it's unclear whether this item was passed to the Court, but the discussion centered around whether such an instruction would actually move the needle and when it would be most effective (e.g. during voir dire, after close of evidence, etc.). Last week, the CRC submitted a new proposal (attached)—I think to try to address some of the concerns raised by SCAC.

The Court is now requesting that your subcommittee please review and bring back the proposals to the full SCAC for an update and discussion.

If you have any questions about the proposals, Andy Jones (ajones@sawickilawfirm.com) is the CRC's Chair and liaison to SCAC. Of course, I'm here to help too.

Thanks very much in advance,
Jackie

Tab 5

Zamen, Shiva

From: Elaine Carlson <ecarlson@stcl.edu>
Sent: Sunday, February 12, 2023 1:53 PM
To: Zamen, Shiva
Cc: Babcock, Chip; Riney, Thomas
Subject: Re: Draft SCAC Agenda Assignments
Attachments: Fwd: menu selection

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Shiva,

Rule 226a pertaining to jury instructions re implicit bias is on the proposed agenda for this Friday. The subcommittee just received this assignment last week so have not met to discuss. You may recall a proposal was made by the State Bar Rules Committee in 2021 regarding this issue. The subcommittee recommended adoption of that proposal at the September 3, 2021 full committee meeting. (see Transcript pages 32582-32778). It was presented by Tom Riney, as Vice-Chair of the subcommittee. The majority of the full committee who commented supported including an implicit bias instruction in Rule 226a but no formal votes were taken. The Court has not acted on this matter.

The State Bar Rules Committee has now suggested amended Rule 226a instructions. Jackie sent an email last week asking the subcommittee to revisit the issue and this new proposal. We have not had time to meet so it seems premature to present to the full committee at this time. I am copying Chip with this email to see if he concurs. That said, the full committee could vote on preliminary matters, without regard to the merits of the language, as to:

Without regard to the language in the amended proposal, should some instruction regarding implicit bias be included in TRCP 226a?

If you support inclusion of some implicit bias instruction in TRCP 226a, should such an instruction be given to the venire panel before voir dire?

Should TRCP 226a expressly address trial court discretion to allow (or deny) written jury questionnaires before the beginning of oral voir dire questioning?

Thanks,
Elaine

From: Zamen, Shiva <szamen@jw.com>
Sent: Friday, February 10, 2023 5:42 PM
To: Harvey.Brown@LanierLawFirm.com <Harvey.Brown@LanierLawFirm.com>; John Kim (jhk@thekimlawfirm.com) <jhk@thekimlawfirm.com>; psbaron (psbaron@baroncounsel.com) <psbaron@baroncounsel.com>; Bill Boyce (bboyce@adjtlaw.com) <bboyce@adjtlaw.com>; lbenton (lbenton@levibenton.com) <lbenton@levibenton.com>; aestevez77@yahoo.com Ana Estevez <aestevez77@yahoo.com>; Elaine Carlson <ecarlson@stcl.edu>; Tom Riney <tom.riney@uwlaw.com>

Cc: Babcock, Chip <cbabcock@jw.com>; Jaclyn Daumeire (jaclyn.daumerie@txcourts.gov) <jaclyn.daumerie@txcourts.gov>; Vernis McGill <vernis.mcgill@txcourts.gov>
Subject: Draft SCAC Agenda Assignments

Good Evening,

The attached is a draft of our upcoming meeting's agenda and your sub-committee has been assigned. Please review and let me know if there needs to be any changes.

If you could get your reports/paperwork to me by Weds, Feb. 15th to be distributed to the entire committee.

Thanks so much,
Shiva Zamen

Tab 6

STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO

TEXAS RULE OF CIVIL PROCEDURE 226a

****

I. Exact Language of Existing Rule

RULE 226a. INSTRUCTIONS TO JURY PANEL AND JURY

The court must give instructions to the jury panel and the jury as prescribed by order of the Supreme Court under this rule.

Approved Instructions

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the members of the jury panel after they have been sworn in as provided in Rule 226 and before the voir dire examination:

Members of the Jury Panel [or Ladies and Gentlemen of the Jury Panel]:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

If you are chosen for the jury, your role as jurors will be to decide the disputed facts in this case. My role will be to ensure that this case is tried in accordance with the rules of law.

Here is some background about this case. This is a civil case. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection. But before their questions begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This

would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions.

1. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin to ask their questions.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury immediately after the jurors are selected for the case:

Members of the Jury [or Ladies and Gentlemen]:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:

a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;

b. go to places mentioned in the case to inspect the places;

c. inspect items mentioned in this case unless they are presented as evidence in court;

d. look anything up in a law book, dictionary, or public record to try to learn more about the case;

e. look anything up on the Internet to try to learn more about the case; or

f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors about your own experiences or other people's experiences. For Page 163 example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

III.
Court's Charge

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury [or Ladies & Gentlemen of the Jury]:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your

deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

Preceding question (ii):

Answer Question (ii) for D1 only if you unanimously answered "Yes" to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer "Yes" to [any part of] Question (ii), your answer must be unanimous. You may answer "No" to [any part of] Question (ii) only upon a vote of 10 [5] or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) for D1 only if you answered "Yes" to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2.]

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

These examples are given by way of illustration.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

a. have the complete charge read aloud if it will be helpful to your deliberations;
b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
c. give written questions or comments to the bailiff who will give them to the judge;
d. write down the answers you agree on;
e. get the signatures for the verdict certificate; and

f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of 10 [5] jurors. The same 10 [5] jurors must agree on every answer in the charge. This means you may not have one group of 10 [5] jurors agree on one answer and a different group of 10 [5] jurors agree on another answer.

2. If 10 [5] jurors agree on every answer, those 10 [5] jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 [6] of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 [6] of you agreeing on some answers, while only 10 [5] or 11 of you agree on other answers. But when you sign the verdict, only those 10 [5] who agree on every answer will sign the verdict.

4. [Added if the charge requires some unanimity] There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all 12 [6] of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____

Judge Presiding

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All 12 [6] of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 [6] of us.

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten [Five] of us have agreed to each and every answer and have signed the certificate below.

	SIGNATURE	NAME PRINTED
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

If you have answered Question No. _____ [the exemplary damages amount], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are released from jury duty:

Thank you for your verdict.

I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others may ask you questions to see if the jury followed the instructions, and they may ask you to give a sworn statement. You

are free to discuss the case with them and to give a sworn statement. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

Notes and Comments

Comment to 2005 change: The rule is clarified. With these amendments, the Supreme Court has ordered changes in the prescribed jury instructions consistent with Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as Tex. Civ. Prac. & Rem. Code § 41.003.

II. Proposed Amendments to Existing Rule

RULE 226a. INSTRUCTIONS TO JURY PANEL AND JURY

The court must give instructions to the jury panel and the jury as prescribed by order of the Supreme Court under this rule.

Approved Instructions

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the members of the jury panel after they have been sworn in as provided in Rule 226 and before the voir dire examination:

Members of the Jury Panel [or Ladies and Gentlemen of the Jury Panel]:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

If you are chosen for the jury, your role as jurors will be to decide the disputed facts in this case. My role will be to ensure that this case is tried in accordance with the rules of law.

Here is some background about this case. This is a civil case. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection. But before their questions begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions.

1. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all.

They have to follow these instructions too, so you should not be offended when they follow the instructions.

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3. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Our system of justice depends on judges like me and people like you making careful, unbiased, and fair decisions. When we interact with other people, we often group or categorize people. Sometimes these categorizations involve negative or positive biases or prejudices, which may be conscious or unconscious. Such preferences or biases, whether they are conscious or unconscious, should be discussed now. If you are selected for the jury, our goal is to treat all parties equally and to arrive at a just, fair, and unbiased verdict.

~~5~~6. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin to ask their questions.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury immediately after the jurors are selected for the case:

Members of the Jury [or Ladies and Gentlemen]:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:

a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;

b. go to places mentioned in the case to inspect the places;

c. inspect items mentioned in this case unless they are presented as evidence in court;

d. look anything up in a law book, dictionary, or public record to try to learn more about the case;

e. look anything up on the Internet to try to learn more about the case; or

f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors about your own experiences or other people's experiences. For Page 163 example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

8. Your verdict must be based on the evidence admitted in court and my instructions on the law.

Our system of justice depends on judges like me and jurors like you making careful, unbiased, and fair decisions. During our interactions with other people, it is not unusual for us to group or categorize people. Sometimes these categorizations involve negative or positive biases or prejudices, which may be conscious or unconscious. Such preferences or biases, whether they are conscious or unconscious, have no place in a courtroom or your deliberations, where our goal is to treat all parties equally and to arrive at a just, fair, and unbiased verdict. All people deserve fair treatment in our system of justice, regardless of their race, color, national origin or ancestry, religion or creed, age, disability (physical or mental), sex, gender (including gender identity), sexual orientation, education, income level, familial status, or any other personal characteristic.

Techniques that you can use as jurors to check whether any unconscious biases are influencing you include slowing down and examining your thought processes thoroughly to identify where you may be relying on reflexive, gut reactions, and considering whether you are making assumptions that have no basis in the evidence admitted in this case. Ask yourself whether you would view the evidence differently if the parties, witnesses, or attorneys had different personal characteristics.

In sum, your task is to render a verdict based on the evidence admitted in the case and from the law as stated in my instructions to you, and not based on bias or prejudice for or against any party or person involved in the trial.

~~8~~9. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

~~9~~10. Do not consider or guess whether any party is covered by insurance unless I tell you to.

1~~0~~1. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

1~~1~~2. I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

III.

Court's Charge

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury [or Ladies & Gentlemen of the Jury]:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Our system of justice depends on judges like me and jurors like you making careful, unbiased, and fair decisions. During our interactions with other people, it is not unusual for us to group or categorize people. Sometimes these categorizations involve negative or positive biases or prejudices, which may be conscious or unconscious. Such preferences or biases, whether they are conscious or unconscious, have no place in a courtroom or your deliberations, where our goal is to treat all parties equally and to arrive at a just, fair, and unbiased verdict. In sum, your task is to render a verdict based on the evidence admitted in the case and from the law as stated in my instructions to you, and not based on bias or prejudice for or against any party or person involved in the trial.

~~2~~3. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

~~4~~3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

~~4~~5. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

~~5~~6. All the questions and answers are important. No one should say that any question or answer is not important.

~~7~~6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

~~7~~8. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

~~9~~8. Do not answer questions by drawing straws or by any method of chance.

10~~9~~. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

1~~0~~1. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

12~~1~~. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

Preceding question (ii):

Answer Question (ii) for D1 only if you unanimously answered "Yes" to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer "Yes" to [any part of] Question (ii), your answer must be unanimous. You may answer "No" to [any part of] Question (ii) only upon a vote of 10 [5] or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) for D1 only if you answered "Yes" to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2.]

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

These examples are given by way of illustration.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

a. have the complete charge read aloud if it will be helpful to your deliberations;
b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
c. give written questions or comments to the bailiff who will give them to the judge;
d. write down the answers you agree on;
e. get the signatures for the verdict certificate; and
f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of 10 [5] jurors. The same 10 [5] jurors must agree on every answer in the charge. This means you may not have one group of 10 [5] jurors agree on one answer and a different group of 10 [5] jurors agree on another answer.

2. If 10 [5] jurors agree on every answer, those 10 [5] jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 [6] of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 [6] of you agreeing on some answers, while only 10 [5] or 11 of you agree on other answers. But when you sign the verdict, only those 10 [5] who agree on every answer will sign the verdict.

4. [Added if the charge requires some unanimity] There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all 12 [6] of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____

Judge Presiding

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All 12 [6] of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 [6] of us.

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten [Five] of us have agreed to each and every answer and have signed the certificate below.

SIGNATURE NAME PRINTED

1. _____ _____
2. _____ _____
3. _____ _____
4. _____ _____
5. _____ _____
6. _____ _____
7. _____ _____
8. _____ _____
9. _____ _____
10. _____ _____
11. _____ _____

If you have answered Question No. _____ [the exemplary damages amount], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are released from jury duty:

Thank you for your verdict.

I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others may ask you questions to see if the jury followed the instructions, and they may ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

Notes and Comments

Comment to 2005 change: The rule is clarified. With these amendments, the Supreme Court has ordered changes in the prescribed jury instructions consistent with Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as Tex. Civ. Prac. & Rem. Code § 41.003.

III. Brief Statement of Reasons for Requested Amendments to Tex. R. Civ. P. 226a and Advantages Served by Them

Implicit bias is an important issue that needs to be, but is not, addressed in Tex. R. Civ. P. 226a. This proposed instruction is intended to address implicit bias through instructions given to the jury panel and jurors. The proposed instruction is designed to instruct jurors on the appropriate basis to weigh the evidence presented to them and the importance of making an unbiased and just decision through their verdict. The proposed addition is designed to help the jury panel and jurors better understand bias and provide trial judges and advocates a basis to better discuss biases and prejudices in *voir dire* should they desire or think it appropriate.

In response to the discussion by SCAC when it considered amendments to TRCP 226a proposed by this Committee in 2021, the Committee placed an abbreviated reference to implicit bias in the instructions that are read to the jury panel and included in the Court's Charge. The complete implicit bias instruction is read to the empaneled jurors. The Committee believes that the abbreviated reference to implicit bias will prompt potential jurors to examine their possible biases without chilling their response to questioning during *voir dire*. The Committee also believes that it is important to remind the jury of their duty to set aside any bias as they deliberate.

The proposed addition makes specific reference to characteristics protected by the Civil Rights Act of 1964, 42 U.S.C. § 1981, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, and the Age Discrimination Act of 1975, 42 U.S.C. § 6101.

The Committee spent considerable time reviewing other examples of "implicit bias" instructions from other jurisdictions including federal, state, and various Texas counties. The Committee also actively solicited, received, and considered suggestions from various stakeholders with an interest in the proposed instruction. These stakeholders included local bar associations and judges, as well as State Bar of Texas committees, sections, and members. The Committee limited the use of words or terms that might imply to a juror that they could not use their personal judgment or common sense.

The proposed addition is based on efforts by the Travis County Bar Association and members of the Dallas Bar Association to implement such instructions in civil cases. The Dallas Civil District Courts engaged in a pilot program where an implicit bias instruction was given in smaller civil matters by agreement of the parties. Ninety-four percent of the jurors surveyed following the trials in which an implicit bias instruction was used indicated that they considered the instruction in their deliberations. Fifty-four percent of the jurors surveyed reported that the instruction influenced the way in which they processed evidence and deliberated. Strong evidence, through this Dallas pilot program, shows that an instruction on implicit bias, such as the one the Committee now proposes, increases juror self-awareness during trial about how they processed the evidence and motived them to be fair in their deliberations.

Adopting an implicit bias instruction is consistent with the September 2020 charge from the Public Trust & Confidence Committee of the Texas Judicial Council (chaired by Chief Justice Hecht) that "implicit bias" be addressed in the Texas legal system, including through annual training for judges on that topic.

This proposed implicit bias instruction closely tracks the Connecticut Judicial Branch Criminal Jury Instructions. In addition to Connecticut, other jurisdictions across the United States have already adopted implicit bias instructions, including the United States District Court for the Northern District of the State of Iowa, the United States District Court for the Northern District of the State of California, the State of Missouri, the State of Washington, and the United States Court of Appeals for the Ninth Circuit.

The proposed instruction is consistent with the 2019 ABA resolution calling on all states to implement an "implicit bias" instruction in their jury instructions.

The proposed instruction is calculated to be impartial and applicable to all cases without comment on the evidence.

Tab 7

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **February 13, 2023**

In response to HB 7, passed by the 85th Legislature, the Texas Supreme 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 HB 7 Phase II Report recommends a rule standardizing procedures for frivolous appeals in this context and opinion templates for use in parental termination cases. The Court's referral letter asks the Appellate Rules Subcommittee to review these HB 7 Task Force recommendations.

The HB 7 Task Force proposed the addition of new subparts to Rule 28.4. At the May 27, 2022 meeting, the Appellate Rules Subcommittee submitted to the full Committee comments and proposed revisions to the proposed rule. The following votes were taken.

	Question	Result	Vote Count
1.	Do we want a rule on briefs in frivolous appeals?	Yes	17-1
2.	Should it apply to parental termination and child custody cases or should it be limited to suits filed by a governmental entity in which terminate the parent-child relationship or appointment of conservatorship for the child is requested?	Narrow	10-4
3.	Should it apply only to appointed counsel or to all counsel?	Appointed	consensus
4.	Should the term frivolous be further defined?	No	consensus
5.	Do we want a parental termination brief checklist?	No	consensus
6a.	Do we want the CA, if the parent identifies a colorable issue, to have discretion to make existing attorney brief that issue or decide to have new counsel appointed?	Yes	17-1
6b.	Should RJA 6.2 be tolled for any abatement?	No	14-1
7.	Do we want opinion templates?	No	21-1

Based on these votes, the Appellate Rules Subcommittee recommended adoption of a revised version of the rule to address frivolous appeals in this context. The redline changes below reflect comments and votes on the revised rule taken during the October 1, 2022 meeting of the full committee.

28.4 ACCELERATED APPEALS IN PARENTAL TERMINATION AND CHILD PROTECTION CASES

(__) *Appeal Deemed Frivolous.* In an appeal from a final order 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, an attorney appointed to represent a party appealing from a final order should not move to withdraw based upon a determination that the appeal is frivolous. Instead, the attorney must:

(1) certify that the attorney has determined the appeal to be frivolous; and

(2) contemporaneously file a brief that:

(A) demonstrates the attorney has adequately reviewed the record and researched the case; and

(B) explains the basis for the attorney's determination that the appeal is frivolous; and

(C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and

(3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and

(4) contemporaneously file a copy of the written notice provided to the client.

(__) *Pro Se Response to Certification of Appeal Deemed Frivolous*. A party appealing from a final order 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 whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b).

(__) *Abatement for Additional Briefing.* An appellate court may abate the appeal for either existing counsel or newly appointed counsel to provide additional briefing ~~for appointment of a new lawyer~~ to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

(__) *Court of Appeals Disposition of Appeal Deemed Frivolous*. In addition to the requirements of Rule 47, upon determination that an appeal 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 is frivolous, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:

(1) within five days after the opinion is issued, send the client a copy of the opinion and judgment and a notification that:

(A) the attorney and the court of appeals both determined the appeal is frivolous;

(B) the attorney cannot recommend that further review of a frivolous appeal;

(C) the client has the right to file a petition for review under Rule 53; and

(2) if requested by the client, file a petition for review following the notifications required under subsection (1).

Comment

Comment to 20[ ] change: Appointed counsel can satisfy the obligation owed to the client by filing a brief meeting the standards set forth in *Anders v. California*, 386 U.S. 738 (1967), and its progeny. *In re P.M.* 520 S.W.3d 24, 27 (Tex. 2016) (per curiam). The reviewing court must conduct an independent evaluation of the record to determine whether appointed counsel is correct in determining that the appeal is frivolous. *See In re P.M.*, 520 S.W.3d at 28 & n.14.

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The HB 7 Task Force also proposed the addition of Rule 53.2(m). To conform Rule 53.2(m) to the revised Rule 28.4, the Subcommittee recommends adoption of the following revised Rule 53.2(m).

53.2. CONTENTS OF PETITION

(__) *Review of Appeal Deemed Frivolous by the Court of Appeals 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*. If counsel filed the certification under Rule 28.4(__)(1), and the court of appeals determined the appeal was frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.