SCAC MEETING AGENDA
Friday, April 5, 2024
In Person at SBOT
1414 Colorado St.
Austin, TX 78701

FRIDAY, April 5, 2024:

I. WELCOME FROM CHIP 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 1, 2023 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. CIVIL RULES IN MUNICIPAL COURTS

500-510 Subcommittee:
Hon. Ana Estevez – Chair
Hon. Nicholas Chu – Vice Chair
Prof. Elaine Carlson

A. April 2, 2024 Memo from 500-510 Subcommittee
B. May 31, 2019 Referral Letter
C. March 18, 2019 Email from Hon. Ryan Henry
D. TRCP 2
E. Gov't Code § 30.00005
F. Local Gov't Code Ch. 54(B)
G. Executive Summary
H. Proposed Civil Rules for Municipal Courts
I. Civil Rules Comparison

V. TEXAS RULE OF CIVIL PROCEDURE 42

15 – 165a Subcommittee:
Richard Orsinger – Chair
Hon. Ana Estevez – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
John Kim
Hon. Emily Miskel
Giana Ortiz
Pete Schenkkan
Hon. John Warren

J. April 2, 2024 Subcommittee Report

K. September 12, 2002 TAJC Letter re Rule 42
L. March 13, 2024 Letter from TAJC re Cy Pres Funds
M. December 7, 2023 Email from P. Schenkkan

VI. UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

167-206 Subcommittee:
Hon. Tracy Christopher – Chair
Hon. Ana Estevez – Vice-Chair
Hon. Harvey Brown
Jack Carroll
Alistair Dawson
Quentin Smith

N. March 26, 2024 Memo from 167-206 Subcommittee
O. TX General Rules and Procedures for Obtaining Documents & Testimony
P. CPRC § 20.002 Testimony Required by Foreign Jurisdiction
Q. O'Connor's How to Require Deposition Attendance
R. Subpoenaing Out of State Non-Parties
S. Uniform Interstate Depositions and Discovery Act

VII. COURT INTERPRETER COST

167-206 Subcommittee:
Hon. Tracy Christopher – Chair
Hon. Ana Estevez – Vice-Chair
Hon. Harvey Brown
Jack Carroll
Alistair Dawson
Quentin Smith

T. March 28, 2024 Memo from 167-206 Subcommittee
U. Gov't Code § 57.002 Appointment of Interpreter or CART Provider

VIII. FIFTEENTH COURT OF APPEALS

Fifteenth Court of Appeals Subcommittee:
Marcy Greer – Chair
Hon. R.H. Wallace – Vice Chair
Hon. Harvey Brown
Rusty Hardin
Hon. Peter Kelly
Hon. Emily Miskel
Chris Porter
Hon. John Warren
Robert Levy

V. 24-9005 – Preliminary Approval of Amendments to the TRAP Related to the 15th COA
W. Public Comments re 15th Court of Appeals Rules

IX. BUSINESS COURT

Business Court Subcommittee:
Marcy Greer – Chair
Hon. R.H. Wallace – Vice Chair
Hon. Harvey Brown
Rusty Hardin
Hon. Peter Kelly
Hon. Emily Miskel
Chris Porter
Hon. John Warren
Robert Levy

X. 24-9004 – Preliminary Approval of Rules for the Business Court
Y. Public Comment re Business Courts Rules

Tab A

Memorandum

TO: **Supreme Court Advisory Committee**

FROM: **Subcommittee on Rules 500-510**

RE: **Proposed Civil Rules in Municipal Courts**

DATE: **April 2, 2024**

I. Matter Referred to Subcommittee:

On May 31, 2019, Chief Justice Nathan Hecht sent a letter to SCAC Chairman Chip Babcock referring the following matter to this subcommittee:

> **Civil Rules in Municipal Courts.** Municipal Court Judge Ryan Henry has proposed that procedural rules be adopted for civil cases in municipal courts. The Committee should set up a process for considering Judge Henry's proposals and making recommendations.

II. Background

This topic was referred to the Subcommittee on Rules 500-510 on May 31, 2019. Per this subcommittee's request, the Court assembled a working group to draft proposed rules for civil cases in municipal courts. The working group included Justice Bonnie Goldstein, Regan Metteauer, Judge Michael Acuna, Ross Fischer, and Judge Ryan Henry. The proposed rules from the working group were submitted to this subcommittee on October 11, 2022. Since that time, the subcommittee members have met several times via zoom to discuss the proposed civil rules for municipal courts. In addition, the subcommittee members have also discussed the adoption of these rules with several stake holders including municipal judges, former city prosecutors, and directors with the TMCEC. It should be noted that there are large disparities between municipal courts throughout Texas as some courts have greater resources and would be financially able to implement the proposed rules, while other smaller cities would have a harder time. An Executive Summary has been included in the materials in which the working group identified the barriers in requiring use of the civil rules in all municipal cases.

III. Issues for Discussion/Proposed Changes

The subcommittee (and others) identified the following areas that should be discussed:

A. Whether there should be uniform rules of civil procedure in municipal courts;

B. If there should be uniform rules of civil procedure in municipal courts, whether the Court should adopt the Proposed Municipal Court Rules or amend TRCP 2 to include municipal courts; and

C. If the Court adopts the Proposed Municipal Court Rules, whether those rules should apply to all civil municipal cases or should there be some exceptions.

IV. Recommendations:

The subcommittee recommends the following:

A. The Court should adopt uniform rules of civil procedure in municipal courts rather than just amend TRCP 2.

B. Rule 563.2 (Summary Disposition) of the Proposed Municipal Court Rules should be eliminated in its entirety; and

C. Rule 560.3(a) of the Proposed Municipal Court Rules should be amended to read: “These rules must apply to cases under Chapter 54 when a municipal court exercises concurrent jurisdiction with a district court and may apply when a municipal court exercises jurisdiction under any other section.”

Tab B

May 31, 2019

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

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters. Some require immediate attention, while others are longer-range initiatives. I have provided a complete list for the Committee's information.

Several matters arise from legislation passed by the 86th Legislature, which, if signed by the Governor, takes effect immediately or on September 1, 2019. The Committee should conclude its work on them by its June 21, 2019 meeting. Many of the changes may be simple and straightforward. They are:

Joint Judicial Campaign Activity. The State Commission on Judicial Conduct has disciplined judges for joint campaign activities based on Canons 2B and 5(2) of the Code of Judicial Conduct. Canon 2B states in part: "A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." Canon 5(2) states in part: "A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party." HB 3233, passed by the 86th Legislature, adds Election Code § 253.1612, which states that the "Code of Judicial Conduct may not prohibit, and a judicial candidate may not be penalized for, a joint campaign activity conducted by two or more judicial candidates." The Committee should consider whether the text of the rules should be changed or a comment added to reference or restate the statute.

MDL Applicability. Government Code §§ 74.161-.201 create the Judicial Panel on Multidistrict Litigation, and Rule of Judicial Administration 13 governs its operation. SB 827, § 2 adds § 74.1625 to prohibit the MDL panel from transferring two types of actions: (1) DTPA actions (unless specifically allowed under the DTPA) and (2) Texas Medicaid Fraud Prevention Act actions. The amendment does not direct that Rule 13 be changed, but the Committee should consider whether the text of Rule 13.1 should be changed and a comment added to reference or restate the statute.

Expedited Actions. Rule of Civil Procedure 169 implements Government Code § 22.004(h). SB 2342 adds § 22.004(h-1), which calls for rules, "[i]n addition to the rules adopted under [s]ubsection (h), . . . to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000 . . . balanc[ing] the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." Rules necessary to implement this change must be adopted by January 1, 2021. But the statute makes various other changes that take effect September 1, 2019. The Committee should consider whether other rules should be changed, such as Rules of Civil Procedure 47, 224, and 500.3, or comments added to reference or restate the statute by that date.

Dismissal. Rule of Civil Procedure 91a provides for the dismissal of baseless causes of action, implementing Government Code § 22.004(g). Civil Practice and Remedies Code § 30.021 mandates an award of costs and attorney fees to the prevailing party. HB 3300 amends § 30.021 to make an award discretionary and applies to cases commenced on or after September 1, 2019. The Committee should consider whether other rules should be changed or comments added to reference or restate the statute by that date.

Notice of Appeal. SB 891, § 7.02, adds Civil Practice and Remedies Code § 51.017 to require service of notice of appeal on court reporters. The Committee has already considered this change. The statute is effective September 1, 2019.

One other matter arising from legislation passed by the 86th Legislature requires rule-making by January 1, 2020:

Public Guardians. Section 24 of SB 667, passed by the 86th Legislature, adds Subchapter G-1 to Chapter 1104 of the Estates Code, which governs public guardians and directs the Court "in consultation with the Office of Court Administration . . . and the presiding judge of the statutory probate courts . . . [to] adopt rules necessary to implement this subchapter." Section 67 of the bill provides that the Court "shall adopt rules necessary to implement Subchapter G-1, . . . including rules governing the transfer of the guardianship of the person or of the estate of a ward, or both, if appropriate, to an office of public guardian established under that subchapter or a public guardian contracted under that subchapter." OCA and Judge Guy Herman will draft these rules, and the Committee should review them.

Other matters arising from legislation passed this Session set extended deadlines for rule-making:

Citation. SB 891, passed by the 86th Legislature, amends several state statutes to address citation. The bill adds Government Code § 72.034 directing the Court "by rule [to] establish procedures for the submission of public information to the public information Internet website by a person who is required to publish the information" by June 1, 2020. The bill also adds Civil Practice and Remedies Code § 17.033 requiring the Court to "adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence" by December 31, 2020. The Committee should make recommendations.

Protective Order Registry Forms. SB 325 requires the Office of Court Administration to create an online registry for family violence protective orders and applications and to permit public access to certain information about the protective orders by June 1, 2020. The bill also adds Government Code § 72.158 directing the Court to "prescribe a form for use by a person requesting a grant or removal of public access" to the information and permits the Court to prescribe related procedures. The bill does not specify a deadline for the forms. The Committee should recommend appropriate forms.

Criminal Forms. HB 51 adds Government Code § 72.0245 requiring the Office of Court Administration to create a number of forms for use in criminal actions, such as forms to waive a jury trial and enter a plea of guilty or nolo contendere, and forms for a trial court to admonish a defendant before accepting a guilty or nolo contendere plea. It also requires the Supreme Court to "by rule . . . set the date by which all courts with jurisdiction over criminal actions must adopt and use the forms created . . . ." OCA will work with Holly Taylor, the Court of Criminal Appeals' Rules Attorney, to formulate a plan to develop the forms. The Committee should review the forms when drafted. The statutory deadline is September 1, 2020.

Procedures Related to Mental Health. SB 362 directs the Supreme Court to "adopt rules to streamline and promote the efficiency of court processes under Chapter 573, Health and Safety Code" and "adopt rules or implement other measures to create consistency and increase access to the judicial branch for mental health issues." The Judicial Commission on Mental Health will draft these rules, and the Committee should review them.

CPS and Juvenile Cases. HB 2737 requires the Court and its Children's Commission to "annually . . . provide guidance to judges who preside over child protective services cases or juvenile cases," and requires the Court to "adopt the rules necessary to accomplish the purpose of this section." The statute sets no deadline. The Children's Commission is developing an implementation plan. The Committee should review any rules proposed by the Commission.

Transfer on Death Deed Forms. SB 874 requires the Court to promulgate "a form for use to create a transfer on death deed and a form for use to create an instrument for revocation of a transfer on death deed." The statute sets no deadline. The Probate Forms Task Force will develop these and other forms for the Committee's review.

Finally, there are several matters unrelated to recent legislation on which the Court requests the Committee's recommendations.

Suits Affecting the Parent-Child Relationship. In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

Out-of-Time Appeals in Parental Rights Termination Cases. A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:

- a narrow late-appeal procedure;
- an abate-and-remand procedure like the one proposed in the Phase II Report;
- a habeas- or bill-of-review-style procedure; and
- prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.

Registration of In-House Counsel. A majority of states require that an attorney employed as in-house counsel and residing in one state but licensed in another either register, obtain a limited license, or be fully licensed to practice in the state of residence. The Board of Law Examiners has approved new Rule 23 of the Rules Governing Admission to the Bar, requiring only registration of in-house counsel. The proposed rule is attached. The Committee should review the rule and make recommendations.

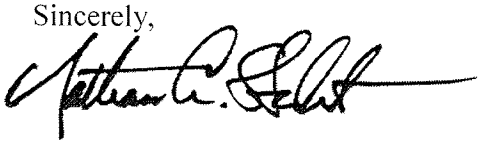
Civil Rules in Municipal Courts. Municipal Court Judge Ryan Henry has proposed that procedural rules be adopted for civil cases in municipal courts. The Committee should set up a process for considering Judge Henry's proposals and making recommendations.

Motions for Rehearing in the Courts of Appeals. Justice Christopher and the State Bar Court Rules Committee have each proposed amendments to Rule of Appellate Procedure 49.3, which are attached. The Committee should consider both and make recommendations.

Parental Leave Continuance Rule. In the attached memorandum, the State Bar Court Rules Committee proposes a parental leave continuance rule. The State of Florida has studied such a procedure in depth. The Committee should consider that work and the proposal and make recommendations.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

Tab C

Jaclyn Daumerie

From: Ryan Henry [redacted]
Sent: Monday, March 18, 2019 3:05 PM
To: Jaclyn Daumerie
Cc: Pauline Easley; Erin Barnett; Elizabeth Parra-Cox
Subject: RE: Municipal Court Civil Rules

Follow Up Flag: Follow up
Flag Status: Completed

Dear Ms. Daumerie

Sorry it has taken me a few weeks to get this to the Court, but I've been trying to figure out how to effectively distill the reason some rules should be passed to help address problems in municipal courts of record. Below is probably more information than you wanted to know, but I believe it proper encapsulates some of the confusion and why a few minor rule changes could be extremely helpful. This is the executive summary version and a slightly more detailed explanation is attached.

I. **Initial Confusion**

The Texas Legislature has granted municipal courts (all municipal courts) a certain level of civil jurisdiction. It has also granted municipal courts of record even greater civil and administrative jurisdiction under Texas Government Code § 30.00005. Essentially, municipal courts of record have concurrent jurisdiction with district courts for certain code enforcement/subject matters. This includes injunctive and declaratory relief along with civil penalties. It is when municipal courts utilize these jurisdictions that judges and parties have difficulty knowing the proper protocol.

II. **Summary of Non-Application**

Texas Rule of Civil Procedure 2 excludes municipal courts from its application. And while a Frankenstein piecemeal of interconnections can provide support for a minimal of procedures, numerous gaps exist causing enforcement and control of the docket to be sacrificed.

III. **Suggestions**

- Add "municipal courts" to the application of Rule 2.
- Create some specialized rules, similar to Rule 500 for JP courts, applicable to municipal courts.
- Create a rule stating, essentially, "When a municipal court of record exercises its concurrent civil jurisdiction pursuant to Texas Government Code § 30.00005, the Texas Rules of Civil Procedure apply in municipal court to the same extent they would apply in district court."
- Areas where the general application will still have problems and need tweaking include: Truancy, dangerous dog cases, dangerous structures under chapter 214 of the Texas Local Government Code, zoning under chapter 211 of the Texas Local Government Code, junked vehicles and sanitation.

I hope this executive summary and the attached legal briefing help explain why some minimal but extremely important additions to the rules would be helpful to municipal judges. I am here to help and will put in the time and effort to assist the Court with analyzing this issue. Please let me know what I can do or if you have any questions. I look forward to hearing from you.

IV. Initial Confusion

Most practitioners and many judges think of municipal court as a "traffic" court and, to be fair, traffic violations and Class C misdemeanors make up most of what occurs in municipal court. However, the Texas Legislature has granted municipal courts (all municipal courts) a certain level of civil jurisdiction. It has also granted municipal courts of record even greater civil and administrative jurisdiction. It is when municipal courts utilize these jurisdictions that judges and parties have difficulty knowing the proper protocol.

V. Municipal Court Civil Jurisdiction

All municipal courts have specific minor civil jurisdiction – examples:

i. Dangerous dog determinations under Tex. Health & Safety Code Ann. § 822.047 (West 2017);
ii. Civil truancy under Tex. Fam. Code § 65.001 *et. seq*,
iii. Bond forfeitures under Tex. Gov't Code §29.003(e) [not civil by default, but must be conducted the same as a civil process],
iv. Appeals from red light camera determinations under Chapter 707 of the Texas Transportation Code.
v. Civil enforcement of criminal fines. Tex. Crim. Proc. Code Ann. §45.047 and § 45.203.
vi. Administrative support. Municipalities may elect to provide for quasi-judicial proceedings in enforcement of health and safety ordinances. Tex. Loc. Gov't Code Ann. § 54.031.

Further, a municipality court of record has concurrent jurisdiction with a district court or a county court at law under Subchapter B of Chapter 54. Tex. Gov't Code Ann. § 30.00005 (West 2017). Many municipalities have situations when a property or person who, despite being given numerous criminal citations, fails to come into compliance with the municipality's ordinances. Since criminal penalties only allow fines the city may be left with little choice but to force compliance through injunctive relief.

The default option for the municipality is to seek enforcement through Tex. Loc. Gov't Code Ann. § 54.001, *et. seq.* (West 2017). If the City has adopted the proper ordinances, it can seek injunctive relief and civil penalties. Tex. Loc. Gov't Code Ann. §§ 54.017, 54.018. Penalties can be assessed against the real property as well, depending on the type of ordinance violation existing on the property. Tex. Loc. Gov't Code Ann. § 54.018(b) (West 2017). Jurisdiction is permitted in district court or the county court at law of the county in which the municipality bringing the action is located. Tex. Loc. Gov't Code Ann. § 54.013 (West 2017).

Texas Government Code § 30.00005 grants municipal courts of record concurrent jurisdiction over the exact same enforcement actions. This includes injunctive relief, declaratory relief, and civil penalties. However, the Texas Rules of Civil Procedure which aide district and county-courts-at-law are not available to municipal courts in the same context.

Utilizing the plain meaning of a similar statute and the cannons of statutory construction, the Texarkana Court of Appeals, in *Miller v. Gregg County*, 546 S.W.3d 410 (Tex. App.—Texarkana 2018, no pet.), held that the term "concurrent jurisdiction" found in Tex. Gov't Code §25.0003 meant the county court at law could hear claims brought under the Texas Public Information Act since it has concurrent jurisdiction with district court for all claims under a certain dollar threshold. The same analysis applied to the statutory language in §30.00005 equates to the municipal court of record having full jurisdiction over Chapter 54 suits, including all relief.

A municipality may bring a Chapter 54 civil action:

- for the preservation of public safety, relating to the materials or methods used to construct a building or other structure or improvement, including the foundation, structural elements, electrical wiring or apparatus, plumbing and fixtures, entrances, or exits;
- for the preservation of public health or to the fire safety of a building or other structure or improvement;
- for zoning violations.
- subdivision regulations including street width and design, lot size, building width or elevation, setback requirements, or utility regulations;
- implementing civil penalties under its general authority for conduct classified by statute as a Class C misdemeanor;

• relating to dangerously damaged or deteriorated structures or improvements;
• relating to conditions caused by accumulations of refuse, vegetation, or other matter that creates breeding and living places for insects and rodents;
• relating to the interior configuration, design, illumination, or visibility of certain sexually oriented businesses;
• relating to point source effluent regulations;
• relating to animal care and control;
• relating to floodplain control; and
• relating to water conservation measures.

Tex. Loc. Gov't Code Ann. § 54.012 (West 2017)

Additionally, municipal courts of record have express jurisdiction for certain civil subject matters including:

1. Civil power over junked vehicles. Tex. Gov't Code Ann. § 30.00005; Tex. Transp. Code Chapter 683.
2. Power over dangerous structures. Tex. Gov't Code Ann. § 30.00005; Tex. Loc. Gov't Code Chapter 214.
3. Civil penalties for violations of a city's red-light camera program. Tex. Gov't Code Ann. § 29.003(g); Tex. Transp. Code Chapter 707.
4. Certain Dangerous Dog orders under Tex. Health & Safety Code Ann. § 822.0421(d) or §822.0423 (West 2017).

While not as clearly delineated, the way Chapter 30 of the Government Code works with other statutory authority, the language equates to various additional authorities being conferred upon a municipal court of record.

A. **Nuisance:** A municipality, by ordinance, may adopt regulations to control nuisances, but must, by either separate ordinance or incorporated within the nuisance ordinance, vest its municipal court with the jurisdiction over enforcement. Tex. Gov't Code Ann. § 30.00005; *In re Pixler*, 2018 WL 3580637, at *5, reh'g denied (Aug. 23, 2018), reh'g denied (Aug. 23, 2018). Generalized nuisance authority can be found in Chapter 217 of the Texas Local Government Code.

B. **Zoning:** Section 54.012 does not interconnect the specific statutory references, but does expressly list "zoning" as a regulation subject to enforcement under Chapter 54. *City of Dallas v. TCI W. End, Inc.*, 463 S.W.3d 53, 56 (Tex. 2015)(statutes authorizing municipalities to bring civil actions for violations of ordinances provided City authority to bring action against developer for demolishing a historic building in violation of city zoning ordinances).

   Tex. Loc. Gov't Code Chapter 211 controls municipal zoning issues. Specifically, §211.012 authorizes a city to "institute appropriate action" to enforce its zoning ordinances including prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use; restrain, correct, or abate a violation; prevent the occupancy of the building, structure, or land; or prevent an authorized use.

C. **Subdivision Regulations**: Subdivision regulations are primarily controlled by Tex. Loc. Gov't Code Chapter 212. Chapter 54, specifically §54.012(4) authorizes suit to enforce subdivision ordinances. Under §212.018, a municipal attorney may bring a civil action in a "court of competent jurisdiction" to enjoin and enforce the municipalities subdivision ordinances. Tex. Loc. Gov't Code §212.018 (a). Further, §212.003 then provides that the "governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002." § 212.003(a). This expressly gives all municipalities authority to enforce rules and ordinances within their ETJs. See Tex. Loc. Gov't Code Ann. §§ 212.002 and 212.003(a).

D. **Sanitation:** A municipality can regulate the sanitation conditions of the city, including refuse, vegetation, and other unsanitary conditions of both commercial and non-commercial properties. The governing body of a municipality may require the inspection of all premises and the regulation of filling, draining, and preventing unwholesome accumulations of stagnant water. Tex. Health & Safety Code Ann. § 342.001 (West 2017). It can impose fines and fees in order to enforce its regulations. *Id.*

The governing body can regulate sewers and privies (Tex. Health & Safety Code Ann. § 342.002); trash, rubbish, filth, carrion, or other impure or unwholesome matter (Tex. Health & Safety Code Ann. § 342.003); weeds, brush, and nuisance level vegetation (Tex. Health & Safety Code Ann. § 342.004). It can adopt criminal (Tex. Health & Safety Code Ann. § 342.005) penalties and can bring a civil suit (potentially in municipal court) to enforce such ordinances. Tex. Loc. Gov't Code §§54.012 & 54.017.

A municipality may adopt rules for regulating solid waste collection, handling, transportation, storage, processing, and disposal as long as such rules are not inconsistent with the Solid Waste Disposal Act found in Chapter 361 of the Health and Safety Code. Tex. Health & Safety Code Ann. § 363.111 (West 2017).

If the owner of property in the municipality does not comply with a municipal ordinance on sanitation, the municipality may abate any sanitation issues and charge the cost of the abatement to the property and the property owner. Tex. Health & Safety Code Ann. § 342.006 (West 2017). The city must follow the procedures set forth in Chapter 342 in order to secure a lien against the property for such costs. Tex. Health & Safety Code Ann. § 342.007.

E. **Animals:** Animal control is not limited to simply dangerous dogs under Tex. Health & Safety Code Ann. § 822.047. A municipality may regulate any aspects regarding animals which is necessary for the health and safety of the community. Tex. Loc. Gov't Code Ann. § 54.001. It can impose a Class C misdemeanor penalty. Tex. Loc. Gov't Code Ann. § 54.001(b). A city may also bring a civil suit to enforce its general animal care and control ordinances. Tex. Loc. Gov't Code Ann. § 54.012(aa).

VI. What Rules Do Not Apply

Texas Rule of Civil Procedure 2 states "[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated." Tex. R. Civ. P. 2. This means the basic rules which procedurally assist lawyers in district and county court are not expressly authorized for use when a municipality is brining a Chapter 54 suit to enforce an ordinance.
This means Rule 11, Rule 13, the rules on service or process, the rules on discovery (somewhat) and the rules designed to assist protecting the due process rights of all parties cannot be enforced by a municipal court judge. I believe to the extent the rules of procedure overlap with a jurisdictional element, the court can utilize the rules for establishing jurisdictional questions. But mere procedural questions are not addressed at all.
The initial answer may be to add the term "municipal court" to the list under Rule 2. And I believe that is the first place to start. However, municipal courts also have specialized areas of practice, similar to JP courts, which require some tweaks for individual subject matters. Different civil subject matters have different statutory deadlines ranging from five days, to seven days, to ten days, to twenty days, etc.

VII. What Rules Do Apply

Pursuant to Texas Government Code § 30.00023, except as modified by Chapter 30, the Code of Criminal Procedure and the Texas Rules of Appellate Procedure govern the trial of cases before the municipal courts of

record. The courts may make and enforce all rules of practice and procedure necessary to expedite the trial of cases before the courts that are not inconsistent with law.

For the criminal matters, this direction is all that is required to assist with criminal trials. However, for civil jurisdiction, it becomes problematic. I've previously interpreted the second sentence stating that courts "may make and enforce all rules of practice and procedure necessary" to include the fact the municipal court can impose the Texas Rules of Civil Procedure when needed. However, unless a municipal judge signs a local standing order or specific municipal ordinances impose the rules for administrative or civil claims, parties do not know if the rules apply or not.

The Texas Code of Criminal Procedure actually incorporates certain civil rules by default. So, the municipal court is not without any direction.

1. The Code of Criminal Procedure requires that "all process" from a municipal court be served by a "policeman or marshal" of the city under the same rules applicable to sheriffs and constables serving JP court. Tex. Crim. Proc. Code art. 45.04 and 45.202. Since JP courts are covered by the TRCP, the rules regarding "process" are also applicable;
2. The Code of Criminal Procedure art. 39.04 states the civil rules applicable to "how" a deposition occurs apply to a criminal case as long as the court has granted permission for the depositions.
3. The Code of Criminal Procedure Chapter 45, specifically articles 45.025 through 45.039 have portions which apply to the set-up of all types of jury trials.
4. The Code of Criminal Procedure Chapter art. 45.047 states that collections on judgments incorporate the TRCP.

However, various gaps exists which can cause blind spots or loopholes. For example, the Texas Code of Criminal Procedure Chapter 27 applies to pleadings initiating a case, but expressly apply only to criminal matters. Pursuant to art. 39.02, depositions can only be taken by filing an application with the court to take such depositions. While that may work for criminal matters, the application of art. 39.02 to a civil case can result in the inability for the parties to conduct discovery the same way had the city initiated suit in county court at law or district court. Now, art. 39.04 does help some by stating "the rules prescribed in civil cases for issuance of commissions, subpoenaing witnesses, taking the depositions of witnesses and all other formalities governing depositions shall, as to the manner and form of taking and returning the same and other formalities to the taking of the same, govern in criminal actions, when not in conflict with this Code." However, the language seems to indicate it is contingent upon art. 39.02 permission to conduct the depositions. Article 39.14 controls criminal discovery, but is inapplicable when trying to conduct civil discovery.

Article 42.01 states a "judgement" is a written declaration of a record showing a conviction or acquittal. Article 45.041 states a judgment and sentence apply in the case of conviction. However, recently, the intermediary courts of appeal have had difficulty explaining the authority to appeal civil matters from a municipal court. In *Wrencher v. State*, 03-15-00438-CV, 2017 WL 2628068, at *1 (Tex. App.—Austin June 16, 2017, no pet.) and *In re Pool*, 03-18-00299-CV, 2019 WL 287940, at *3 (Tex. App.—Austin Jan. 23, 2019, no pet. h.) the courts attempted to make sense of the statutory language apply a civil judgment under the dangerous dog jurisdiction and noting references to the word "judgment" applies only to civil judgments, while appeals of "convictions" apply to criminal appeals.

The Code of Criminal Procedure art. 45.011 states the rules of evidence that govern trial so criminal actions in the district court apply to criminal proceedings in justice or municipal court. However, the rules of evidence are not referenced in relation to any civil or administrative matters.

VIII. Type of Corrections

In the case of *In re Loban*, 243 S.W.3d 827, 829 (Tex. App.—Fort Worth 2008, no pet.), the court struggled with the ability to appeal a dangerous dog determination (under the prior statutory language) when no county court at law with civil jurisdiction existed within the county controlled by the animal control authority.

The Fort Worth Court of Appeals ultimately held the right to appeal a dangerous dog determination did not exist in Tarrant County. The court, in dicta, noted :

> This gap in the statutory right of appeal is apparently attributable to the fact that municipal courts previously had only criminal jurisdiction. See *City of Lubbock v. Green*, 312 S.W.2d 279, 282 (Tex.Civ.App.-Amarillo 1958, no writ) (stating that an appeal from municipal court "would lie only if the proceedings constituted a criminal case"); see also 23 David Brooks, Texas Practice: Municipal Law and Practice § 15.19 (1999) (same). When municipal courts became capable of exercising limited civil jurisdiction, the statutes authorizing appeals from a municipal court's decision were not correspondingly amended to address appeals generated via this exercise of limited civil jurisdiction. Tex. Gov't Code Ann. § 30.00005(d) (Vernon 2004) (stating that governing body of municipality may provide that municipal court of record may have specified civil jurisdiction); see generally Tex. Att'y Gen. Op. No. GA–0316 (2005) (espousing this conclusion).
>
> *In re Loban*, 243 S.W.3d 827, 831 (Tex. App.—Fort Worth 2008, no pet.).

While the statutory problem in *In re Loban* has been corrected by the Texas Legislature, the underlying premise remains that certain jurisdictional gaps (which can only be corrected by legislative decree) and certain procedural gaps (which can only be corrected by adoption of civil procedures) remain. To the extent the Texas Supreme Court can help alleviate confusion on the procedures and provide municipal judges with the abilities to support their rulings on procedural grounds, I humbly request it attempt to do so.

Corrections can be as simply as adding the term "municipal court" to the application of Rule 2. It can could also be corrected by adopting some specialized rules, such as those found in Rule 500 relating to justice courts. However, those specialized rules would simply need to address the extent of any application to the individual areas of subject matter jurisdiction. A specialized rule which simply stated "When a municipal court of record exercises its concurrent civil jurisdiction pursuant to Texas Government Code § 30.00005, the Texas Rules of Civil Procedure apply in municipal court to the same extent they would apply in district court."

Please let me know if I can do anything to help.

Very Truly Yours,
Ryan Henry
Law Offices of Ryan Henry, PLLC.
1380 Pantheon Way, Suite 110
San Antonio, Texas 78232
210-257-6357 (phone)
210-569-6494 (fax)
[redacted]
www.rshlawfirm.com

Tab D

TEXAS RULES OF CIVIL PROCEDURE

PART I - GENERAL RULES

RULE 1. OBJECTIVE OF RULES

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

RULE 2. SCOPE OF RULES

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.

RULE 3. CONSTRUCTION OF RULES

Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other; and the singular and plural number shall each include the other.

RULE 3a. LOCAL RULES

Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these

Tab E

GOVERNMENT CODE

TITLE 2. JUDICIAL BRANCH

SUBTITLE A. COURTS

CHAPTER 30. MUNICIPAL COURTS OF RECORD

SUBCHAPTER A. GENERAL LAW FOR MUNICIPAL COURTS OF RECORD

. . .

Sec. 30.00005. JURISDICTION. (a) A municipal court of record has the jurisdiction provided by general law for municipal courts.

(b) The court has jurisdiction over criminal cases arising under ordinances authorized by Sections 215.072, 217.042, 341.903, and 551.002, Local Government Code.

(c) The governing body may by ordinance provide that the court has concurrent jurisdiction with a justice court in any precinct in which the municipality is located in criminal cases that arise within the territorial limits of the municipality and are punishable only by fine.

(d) The governing body of a municipality by ordinance may provide that the court has:

(1) civil jurisdiction for the purpose of enforcing municipal ordinances enacted under Subchapter A, Chapter 214, Local Government Code, or Subchapter E, Chapter 683, Transportation Code;

(2) concurrent jurisdiction with a district court or a county court at law under Subchapter B, Chapter 54, Local Government Code, within the municipality's territorial limits and property owned by the municipality located in the municipality's extraterritorial jurisdiction for the purpose of enforcing health and safety and nuisance abatement ordinances; and

(3) authority to issue:

(A) search warrants for the purpose of investigating a health and safety or nuisance abatement ordinance violation; and

(B) seizure warrants for the purpose of securing, removing, or demolishing the offending property and removing the debris from the premises.

(e) The court has concurrent jurisdiction with a district court and a justice court over expunction proceedings relating to the arrest of a person for an offense punishable by fine only.

Added by Acts 1987, 70th Leg., ch. 811, Sec. 1, eff. Aug. 31, 1987. Renumbered from Government Code Sec. 30.485 by Acts 1997, 75th Leg., ch. 165, Sec. 8.02, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 691, Sec. 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1093, Sec. 1, eff. Sept. 1, 2001.
Amended by:

Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 3.77(1), eff. April 1, 2009.

Acts 2017, 85th Leg., R.S., Ch. 1149 (H.B. 557), Sec. 7, eff. September 1, 2017.

Sec. 30.00006. JUDGE. (a) A municipal court of record is presided over by one or more municipal judges.

(b) The governing body shall by ordinance appoint its municipal judges.

(c) A municipal judge must:

(1) be a resident of this state;

(2) be a citizen of the United States;

(3) be a licensed attorney in good standing; and

(4) have two or more years of experience in the practice of law in this state.

(d) The governing body shall provide by ordinance for the term of office of its municipal judges. The term must be for a definite term of two or four years.

Tab F

LOCAL GOVERNMENT CODE
TITLE 2. ORGANIZATION OF MUNICIPAL GOVERNMENT
SUBTITLE D. GENERAL POWERS OF MUNICIPALITIES
CHAPTER 54. ENFORCEMENT OF MUNICIPAL ORDINANCES
SUBCHAPTER B. MUNICIPAL HEALTH AND SAFETY ORDINANCES

Sec. 54.012. CIVIL ACTION. A municipality may bring a civil action for the enforcement of an ordinance:

(1) for the preservation of public safety, relating to the materials or methods used to construct a building or other structure or improvement, including the foundation, structural elements, electrical wiring or apparatus, plumbing and fixtures, entrances, or exits;

(2) relating to the preservation of public health or to the fire safety of a building or other structure or improvement, including provisions relating to materials, types of construction or design, interior configuration, illumination, warning devices, sprinklers or other fire suppression devices, availability of water supply for extinguishing fires, or location, design, or width of entrances or exits;

(3) for zoning that provides for the use of land or classifies a parcel of land according to the municipality's district classification scheme;

(4) establishing criteria for land subdivision or construction of buildings, including provisions relating to street width and design, lot size, building width or elevation, setback requirements, or utility service specifications or requirements;

(5) implementing civil penalties under this subchapter for conduct classified by statute as a Class C misdemeanor;

(6) relating to dangerously damaged or deteriorated structures or improvements;

(7) relating to conditions caused by accumulations of refuse, vegetation, or other matter that creates breeding and living places for insects and rodents;

(8) relating to the interior configuration, design, illumination, or visibility of business premises exhibiting for viewing by customers while on the premises live or mechanically or electronically displayed entertainment intended to provide sexual stimulation or sexual gratification;

(9) relating to point source effluent limitations or the discharge of a pollutant, other than from a non-point source, into a sewer system, including a sanitary or storm water sewer system, owned or controlled by the municipality;

(10) relating to floodplain control and administration, including an ordinance regulating the placement of a structure, fill, or other materials in a designated floodplain;

(11) relating to animal care and control; or

(12) relating to water conservation measures, including watering restrictions.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 343, Sec. 1, eff. June 14, 1989; Acts 1991, 72nd Leg., ch. 753, Sec. 3, eff. June 16, 1991; Acts 1993, 73rd Leg., ch. 472, Sec. 1, eff. Sept. 1, 1993.
Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 135 (S.B. 654), Sec. 1, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1396 (H.B. 1554), Sec. 1, eff. September 1, 2013.
Reenacted and amended by Acts 2015, 84th Leg., R.S., Ch. 1236 (S.B. 1296), Sec. 12.001, eff. September 1, 2015.

Sec. 54.013. JURISDICTION; VENUE. Jurisdiction and venue of an action under this subchapter are in the district court or the county court at law of the county in which the municipality bringing the action is located.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 54.014. PREFERENTIAL SETTING. If the municipality submits to the court a verified motion that includes facts that demonstrate that a delay will unreasonably endanger persons or property, the court shall give a preference to the action brought by the municipality when setting cases filed under this subchapter.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 54.015. PROCEDURE. (a) The only allegations required to be pleaded in an action brought under this subchapter are:

(1) the identification of the real property involved in the violation;

(2) the relationship of the defendant to the real property or activity involved in the violation;

(3) a citation to the applicable ordinance;

(4) a description of the violation; and

(5) a statement that this subchapter applies to the ordinance.

(b) The standard of proof is the same as for other suits for extraordinary relief.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 54.0155. EXPEDITED PROCEEDINGS FOR CERTAIN CIVIL ACTIONS. (a) A court shall expedite any proceeding, including an appeal in accordance with Subsection (b), related to a suit brought under this subchapter for the enforcement of an ordinance adopted by a municipality with a population of 500,000 or more relating to dangerously damaged or deteriorated structures or improvements as described by Section 54.012(6).

(b) An appeal of a suit described by Subsection (a) is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure. The appellate court shall render its final order or judgment with the least possible delay.

Added by Acts 2019, 86th Leg., R.S., Ch. 1273 (H.B. 36), Sec. 2, eff. June 14, 2019.

Sec. 54.016. INJUNCTION. (a) On a showing of substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant, the municipality may obtain against the owner or owner's representative with control over the premises an injunction that:

(1) prohibits specific conduct that violates the ordinance; and

(2) requires specific conduct that is necessary for compliance with the ordinance.

(b) It is not necessary for the municipality to prove that another adequate remedy or penalty for a violation does not exist or to show that prosecution in a criminal action has occurred or has been attempted.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 54.017. CIVIL PENALTY. (a) In a suit against the owner or the owner's representative with control over the premises, the municipality may recover a civil penalty if it proves that:

(1) the defendant was actually notified of the provisions of the ordinance; and

(2) after the defendant received notice of the ordinance provisions, the defendant committed acts in violation of the ordinance or failed to take action necessary for compliance with the ordinance.

(b) A civil penalty under this section may not exceed $1,000 a day for a violation of an ordinance, except that a civil penalty under this section may not exceed $5,000 a day for a

violation of an ordinance relating to point source effluent limitations or the discharge of a pollutant, other than from a non-point source, into a sewer system, including a sanitary or storm water sewer system, owned or controlled by the municipality.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 472, Sec. 2, eff. Sept. 1, 1993.

Sec. 54.018. ACTION FOR REPAIR OR DEMOLITION OF STRUCTURE. (a) The municipality may bring an action to compel the repair or demolition of a structure or to obtain approval to remove the structure and recover removal costs.

(b) In an action under this section, the municipality may also bring:

(1) a claim for civil penalties under Section 54.017; and

(2) an action in rem against the structure that may result in a judgment against the structure as well as a judgment against the defendant.

(c) The municipality may file a notice of lis pendens in the office of the county clerk. If the municipality files the notice, a subsequent purchaser or mortgagee who acquires an interest in the property takes the property subject to the enforcement proceeding and subsequent orders of the court.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.
Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1054 (S.B. 173), Sec. 1, eff. September 1, 2011.

Sec. 54.019. IMPRISONMENT; CONTEMPT. (a) A person is not subject to personal attachment or imprisonment for the failure to pay a civil penalty assessed under this subchapter.

(b) This subchapter does not affect the power of a court to imprison a person for contempt of valid court orders or the availability of remedies or procedures for the collection of a judgment assessing civil penalties. The remedies under Section 31.002, Civil Practice and Remedies Code, are preserved.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 54.020. ABATEMENT OF FLOODPLAIN VIOLATION IN MUNICIPALITIES; LIEN. (a) In addition to any necessary and reasonable actions authorized by law, a municipality may abate a violation of a floodplain management ordinance by causing the work necessary to

bring real property into compliance with the ordinance, including the repair, removal, or demolition of a structure, fill, or other material illegally placed in the area designated as a floodplain, if:

(1) the municipality gives the owner reasonable notice and opportunity to comply with the ordinance; and

(2) the owner of the property fails to comply with the ordinance.

(b) The municipality may assess the costs incurred by the municipality under Subsection (a) against the property. The municipality has a lien on the property for the costs incurred and for interest accruing at the annual rate of 10 percent on the amount due until the municipality is paid.

(c) The municipality may perfect the lien by filing written notice of the lien with the county clerk of the county in which the property is located. The notice of lien must be in recordable form and must state the name of each property owner, if known, the legal description of the property, and the amount due.

(d) The municipality's lien is inferior to any previously recorded bona fide mortgage lien attached to the real property to which the municipality's lien attaches, if the mortgage lien was filed for record before the date the municipality files the notice of lien with the county clerk. The municipality's lien is superior to all other previously recorded judgment liens.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1396 (H.B. 1554), Sec. 2, eff. September 1, 2013.

Tab G

MUNICIPAL COURT CIVIL RULES OF PROCEDURE WORKGROUP

EXECUTIVE SUMMARY[1]

Overview

The Municipal Court Civil Rules of Procedure Workgroup was tasked with utilizing the rules of civil procedure applicable to justice courts (Part V of the Texas Rules of Civil Procedure: Rules of Practice in Justice Courts) as a base for the development of similar rules for municipal courts. This presented certain challenges for the Workgroup with potential negative consequences if the distinctions between the two jurisdictions was not considered. In developing these rules, we had at the forefront the logistical differences in technology, infrastructure, and resources; the vast disparity in the nature and scope of civil and administrative jurisdiction created by ordinance for large or small, rural or urban municipalities that may have been operating under long standing adopted local rules; and tangential uniformity issues that will likely surface. We also recognize that these proposed civil rules of procedure will require concomitant training to address proceedings that will likely be unfamiliar, such as discovery disputes, motions to compel, protective orders, motions to quash and indirect contempt. The acknowledgement of concurrent jurisdiction with district courts presents another level of consideration as the developed jurisprudence associated with such proceedings may or may not be applied equally to municipal court proceedings, significantly without reference to the applicable rules.

Therefore, the purpose of this document is to give the Supreme Court of Texas and the Supreme Court Advisory Committee (and interested parties) a general understanding of the reasoning behind modifications to and streamlining of the Rules of Practice in Justice Courts in order to provide municipal judges the necessary procedures and discretion to address the civil disputes that may come before the court. We appreciate the opportunity to help facilitate the development of these proposed rules and welcome any comments/questions or additional insight to provide the municipal courts of record with civil jurisdiction, and all that come before them, the best procedural mechanisms to ensure the orderly, efficient, and judicious disposition of civil cases.

Civil Jurisdiction: Municipal Courts

The Texas Constitution Art. V. Section 1 states; “the legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof. . .” The “other” courts (meaning those that are not Justice, District, or County Courts) are municipal courts.

There are two general statutes that establish municipal courts: Texas Government Code, Chapter 29, Section 29.002 has created municipal courts in each of the incorporated cities of the State of Texas.

[1] In anticipation of submitting the proposed Rules of Practice in Municipal Court to the Supreme Court Advisory Committee, TMCEC submitted the proposed rules to its database for comment to judges and prosecutors. The Texas City Attorneys Association (TCAA) sent out the proposed rules to City Attorneys for comment. In addition, TMCEC sent out a survey on whether a court was a court of record that exercised civil jurisdiction

Chapter 30 of the Texas Government Code regulates municipal courts of record. Under the authority of Sec. 30.00005 of the Texas Government Code, the governing body of a municipality may by ordinance confer civil jurisdiction upon its municipal court of record, within its city limits and extraterritorial jurisdiction, for purposes of enforcing code violations for dangerous structures and junked vehicles. Chapter 214 and Chapter 54 of the Texas Local Government Code provides that a municipal court has concurrent jurisdiction with either a district or county court to enforce health and safety or nuisances.

The OCA Summary of Cases captures civil and administrative cases in one category.[2] The annual statistical report acknowledges that civil cases are those involving all complaints, citations, or suits within the civil or administrative jurisdiction of the municipal court, including vehicle parking and stopping (Transportation Code, Ch. 682), dangerous dogs, cruelly treated animals, substandard buildings, and abandoned motor vehicle cases, as well as any other cases involving the enforcement of health and safety and nuisance abatement ordinances. Bond forfeiture (nisi) proceedings are conducted pursuant to Code of Criminal Procedure, Article 22.02.

There are 945 municipal courts, of which 188 are courts of record. Of the municipal courts of record, we estimate that less than 100 courts have had civil jurisdiction provided by ordinance. However, it is unclear whether such courts are exercising statutorily authorized administrative functions or actual civil jurisdiction as contemplated by statute and ordinance.

Summary of Differences Between Municipal Courts and Justice Courts

Some of the challenges faced by the Workgroup in developing rules tailored to the municipal courts while adhering to the basic rules implemented for justice courts was the acknowledged and readily identified disparities between justice courts and municipal courts of record. We have outlined in summary fashion some of the most notable distinctions and logistical obstacles relative to implementing new civil rules.

1. Civil Jurisdiction
    a. Municipal Courts
        i. Civil municipal courts are created by City Council for statutorily authorized cases, such as under Chapter 214 or Chapter 54 of the Texas Local Government Code.
        ii. The municipality initiates and is the plaintiff in all cases.
        iii. Ordinances among municipalities may have some uniformity because professional organizations such as the Texas Municipal League and Texas City Attorneys Association share proposed ordinances and best practices, which are available online.

[2] The Office of Court Administration collects monthly data from municipal courts on enumerated court activity, including civil and administrative functions. For 2021, almost three-quarters of the more than 1,281,000 new civil cases were filed in the municipal courts and justice courts. The number of civil case filings in justice courts surpassed filings in municipal courts in 2019. Municipal courts had 34% of all civil cases (across all courts) and justice courts had 39%. Civil/administrative cases in the municipal courts accounted for 34% of new civil cases filed statewide in 2021, identical to the previous year. In 2019, three-quarters of the more than 1,618,000 new civil cases were filed in the municipal courts and justice courts. In 2019, the majority of civil/admin cases were decided by uncontested civil penalties (59%), 25% decided by default judgment, 12% by bench trial, 0.2% by agreed judgment, and 0% by jury trial.

iv. Municipal courts of record have been exercising jurisdiction under applicable ordinances with procedural guidance based upon established local rules.

b. Justice Courts
    i. The Legislature created civil jurisdiction for justice courts, such as eviction and small claims court.
    ii. There is a well-established uniform statutory scheme.

2. Court Functions
    a. Municipal Courts
        i. There is a wide disparity in technological infrastructure and logistical differences in processing civil proceedings. Specifically, relative to computer/database availability, knowledgeable personnel, requisite training, physical facilities, and funding.
        ii. The municipal court docketing system is predominantly, if not exclusively, created for criminal proceedings. Modules have not been created for civil proceedings.
    b. Justice courts
        i. Justice Courts are part of the county court system and have access to the county docket management system, which has a component for civil forms and processes.

3. Proceedings
    a. Municipal Court
        i. Proceedings are always initiated by the municipality, represented by an attorney hired and designated by the municipality, with a judge who is appointed to office by City Council for a term of two years or more. The plaintiff will always be the municipality.
        ii. There are no private, individual causes of action available.
        iii. There are no statutory defenses but there may be constitutional challenges.
        iv. There may be a self-represented litigant as the defendant.
    b. Justice Courts
        i. Have self-represented litigants (SRL) on one or both sides in most cases and proceedings may be initiated by a SRL.
        ii. A party may be represented by a privately retained attorney.
        iii. The judge is elected to office for a term of four years.

4. Appellate Process: This was not addressed specifically by the Workgroup because it necessitates legislative action and is beyond the scope of the civil rules.
    a. Municipal Courts
        i. There is no clear appellate process, especially when exercising concurrent jurisdiction with district courts, such as Ch. 214 and Ch. 54.
        ii. Appeals from municipal courts of record must be based upon an error of law, preserved on the record.

b. Justice Courts
    i. Clear appellate process, to County Court at Law.
    ii. Appeals are de novo.

5. Standard of Review
    a. Appeals from municipal courts of record must be upon an error of law. (Appeals from non-record municipal courts are de novo.)
    b. Appeals from justice courts, as courts of non-record, are de novo.

6. Hosting and Implementation Challenges
    a. Municipal Courts
        i. All municipal courts are hosted by their respective municipalities. Most municipal courts do not have the infrastructure to comply with the full implementation of the civil rules of procedure, especially the electronic filing system.
        ii. Some municipalities have already invested significant resources into adopting local rules which allow for operations within their infrastructure. The committee does not wish to negatively impact these adopted systems.
        iii. Civil and administrative jurisdiction can be created by a variety of ordinances and numerous other ways. Plus, some cities have courts of record and some have courts of non-record. Further, the geographic jurisdiction of municipal courts changes as the city expands or by agreements by property owners to be within the extraterritorial jurisdiction. Strict uniformity across all courts is therefore not possible.
        iv. These rules are intended to be self-contained to the extent possible and provide municipal judges as much discretion as reasonably possible.
        v. Appeals, jury fees, and other filing charges are not provided for in these rules as it would require legislative action to allow for them.
    b. Justice Courts
        i. Justice courts are hosted by their precincts and are provided the infrastructure and access to county systems.
        ii. Justice courts, from their creation, are tied into the specific rules for justice courts. The connection is very clear and starts from inception.
        iii. The jurisdiction of justice courts does not change by passage of ordinances and has much more uniformity across the state.
        iv. All justice courts are courts of non-record and cannot be altered to be courts of record by local officials.
        v. Justice courts already have the authority to impose statutory filing fees.

Tab H

TMCEC CIVIL RULES WORKGROUP PROPOSAL

PART V-A - RULES OF PRACTICE IN MUNICIPAL COURTS

RULE 560. GENERAL RULES

RULE 560.1. CONSTRUCTION OF RULES

Unless otherwise expressly provided, in Part V-A of these Rules of Civil Procedure:

(a) the past, present, and future tense each includes the other;

(b) the term "it" includes a person of either gender or an entity; and

(c) the singular and plural each includes the other.

RULE 560.2. DEFINITIONS

In Part V-A of these Rules of Civil Procedure:

(a) "Answer" is the written response that a party who is sued must file with the court after being served with a citation.

(b) "Citation" is the court-issued document required to be served upon a party to inform the party that it has been sued.

(c) "Claim" is the legal theory and alleged facts that, if proven, entitle a party to relief against another party in court.

(d) "Clerk" is the municipal court clerk, deputy court clerk, court administrator, or deputy court administrator.

(e) "County court" is the county court, statutory county court, or district court in a particular county with jurisdiction over appeals of civil cases from municipal court.

(f) "Default judgment" is a judgment awarded to a plaintiff when the defendant fails to answer and dispute the plaintiff's claims in the lawsuit.

(g) "Defendant" is a party who is sued, including a plaintiff against whom a counterclaim is filed.

(h) "Defense" is an assertion by a defendant that the plaintiff is not entitled to relief from the court.

(i) "Discovery" is the process through which parties obtain information from each other in order to prepare for trial or enforce a judgment. The term does not refer to any information that a party is entitled to under applicable law.

(j) "Judge" is a municipal court judge.

(k) “Judgment” is a final order by the court that states the relief, if any, a party is entitled to or must provide, and that disposes of all parties and all claims.

(l) “Jurisdiction” is the authority of the court to hear and decide a case.

(m) “Motion” is a request that the court make a specified ruling or order.

(n) “Notice” is a document prepared and delivered by the court or a party stating that something is required of the party receiving the notice.

(o) “Officer” is anyone who is authorized to execute service of process.

(p) “Party” is a person or entity involved in the case that is either suing or being sued, including all plaintiffs, defendants, and third parties that have been joined in the case.

(q) “Petition” is a formal written application stating a party’s claims and requesting relief from the court. It is the first document filed with the court to begin a lawsuit.

(r) “Plaintiff” is a party who sues, including a defendant who files a counterclaim.

(s) “Pleading” is a written document filed by a party, including a petition and an answer, that states a claim or defense and outlines the relief sought.

(t) “Relief” is the remedy a party requests from the court, such as the repair or demolition of property.

(u) “Side” means one or more litigants who have common interests on the matters with which the court or the jury is concerned.

(v) “Serve” and “service” are delivery of citation as required by Rule 561.2, or of a document as required by Rule 561.4.

(w) “Sworn” means signed in front of someone authorized to take oaths, such as a notary, or signed under penalty of perjury. Filing a false sworn document can result in criminal prosecution.

RULE 560.3. APPLICATION OF RULES IN MUNICIPAL COURT CASES

(a) *Application of These Rules*. These rules apply to enforcement actions by municipalities commenced by petition in all civil cases over which the municipal court has jurisdiction. These rules do not apply to administrative procedures enacted by a municipality where the judge is serving as an administrative hearing officer. Where a municipality enacts local procedural rules published under Rule 3a of the Texas Rules of Civil Procedure, said local rules shall have full force and effect in that municipality.

(b) *Application of Other Rules*. The other Texas Rules of Civil Procedure outside PART V-A do not apply except:

(1) when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties; or

(2) when otherwise specifically provided by law or these rules;

(3) Rules 1, 5-6, and 8-13 of the Texas Rules of Civil Procedure apply.

(c) *Examination of Rules*. The court must make these Rules, the Texas Rules of Civil Procedure and the Texas Rules of Evidence available for examination, both in paper form and electronically, during the court's business hours.

Comment 1 to Proposed Rule 560.3:

Subsection (a) of the Rule states that these rules apply to enforcement actions by municipalities which are commenced by petition. These cases include civil actions filed by municipalities in municipal court regarding substandard buildings pursuant to section 214.001(p) of the Texas Local Government Code and to enforce ordinances (including those related to dangerously damaged or deteriorated structures) pursuant to section 54.012 *et seq.* of the Texas Local Government Code. The 75th Legislature gave municipal courts jurisdiction over the procedure described in Section 214.001 of the Texas Local Government Code relating to substandard buildings effective September 1, 1997. Section 30.00005(d)(2) of the Texas Government Code giving municipal courts jurisdiction of cases filed pursuant to Section 54.012 of the Texas Local Government Code if the municipality passes the appropriate ordinance was enacted by the 77th Legislature and took effect September 1, 2001.

Due in part to this piecemeal development of civil jurisdiction, some municipalities have developed administrative processes whereby a municipal judge acts as an administrative hearing officer. These rules do not apply in such instances and are applicable only in judicial proceedings.

Some cities have published ordinances which provide their municipal courts with jurisdiction to hear these cases and established long-standing procedures and deadlines which have been in effect for more than 20 years for these enforcement actions.

There are over 900 municipal courts in Texas. Unlike district, county, and justice courts which each have the same jurisdiction, municipal courts have different types of jurisdiction. Given the differences in jurisdiction, the sheer number of municipal courts, and the length of time some cities have employed these local procedures, preserving the continued validity of these local enactments is important, provided the ordinances meet certain requirements as stated in the Rule. Such ordinances will not conflict with the Rule if they meet the requirements for local rules. Ordinances meeting the Rule's requirements can be adopted as local rules under Rule 3a of the Texas Rules of Civil Procedure. Pursuant to Rule 3a(c) of the Texas Rules of Civil Procedure, local rules become effective when published on the Office of Court Administration's website.

Comment 2 to Proposed Rule 560.3:

There was a general concern with the preservation of local procedural rules that have developed over the last few decades to address civil jurisdiction in municipal courts. For municipalities that may wish to preserve local rules, the Workgroup thought it prudent to reference Rule 3a of the Texas Rules of Civil Procedure relative to local rules, as it exists and may be amended based upon the most recent proposed revisions.

RULE 560.4. REPRESENTATION IN MUNICIPAL COURT CASES

(a) *Representation of an Individual*. An individual may:

(1) represent himself or herself; or

(2) be represented by an attorney.

(b) *Representation of a Corporation or Other Entity*. A corporation or other legal entity must be represented by an attorney.

(c) R*epresentation of the Municipality.* A Municipality is represented by its City/Town Attorney or authorized legal counsel.

RULE 560.5. COMPUTATION OF TIME; TIMELY FILING

(a) *Computation of Time*. Unless otherwise provided by statute or ordinance, to compute a time period in these rules:

(1) exclude the day of the event that triggers the period;

(2) count every day, including Saturdays, Sundays, and legal holidays; and

(3) include the last day of the period, but

(A) if the last day is a Saturday, Sunday, or legal holiday, the time period is extended to the next day that is not a Saturday, Sunday, or legal holiday; and

(B) if the last day for filing falls on a day during which the court is closed before 5:00 p.m., the time period is extended to the court's next business day.

(b) *Timely Filing by Mail*. Any document required to be filed by a given date is considered timely filed if deposited in the U.S. mail on or before that date and received within 10 days of the due date. A legible postmark affixed by the United States Postal Service is evidence of the date of mailing.

RULE 560.6. EXCLUSION OF WITNESSES

The court must, on a party's request, or may, on its own initiative, order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize the exclusion of:

(1) a party who is a natural person, or the spouse of such natural person;

(2) an officer or employee designated as a representative of a party who is not a natural person; and

(3) a person whose presence is shown by a party to be essential to the presentation of the party's case.

RULE 560.7. SUBPOENAS

(a) *Use*. A subpoena may be used by a party, a clerk of the court, or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in a county that is more than 150 miles from where the person resides or is served.

(b) *Who Can Issue*. A subpoena may be issued by the clerk of the municipal court or an attorney authorized to practice in the State of Texas, as an officer of the court.

(c) *Form*. Every subpoena must be issued in the name of the "State of Texas" and must:

(1) state the style of the suit and its case number;

(2) state the court in which the suit is pending;

(3) state the date on which the subpoena is issued;

(4) identify the person to whom the subpoena is directed;

(5) state the date, time, place, and nature of the action required by the person to whom the subpoena is directed;

(6) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;

(7) state that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed contempt of court from which the subpoena is issued and may be punished by fine or confinement, or both"; and

(8) be signed by the person issuing the subpoena.

(d) *Service: Where, By Whom, How*. A subpoena may be served at any place within the State of Texas by any officer or by any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the party's attorney of record. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

(e) *Compliance Required*. A person commanded by subpoena to appear and give testimony must remain at the hearing or trial from day to day until discharged by the court or by the party summoning the witness. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(f) *Objection*. A person commanded to attend and give testimony at a hearing or trial may object or move for a protective order before the court at or before the time and place specified for compliance. A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

(g) *Enforcement*. Upon notice and opportunity to be heard to show cause, the failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court from which the subpoena is issued or of a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof of service and proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

Comment to Proposed Rule 560.7:

Municipal judges may be more familiar with direct contempt procedures than indirect contempt, which requires notice and an opportunity to be heard and show cause before imposition of contempt. The Workgroup recommends additional education be provided on contempt procedures in civil proceedings.

RULE 560.8. DISCOVERY

(a) *Pretrial Discovery*. Pretrial discovery is limited to that which the judge considers reasonable and necessary. Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. Unless a hearing is requested, the judge may rule on the motion without a hearing. The discovery request must not be served on the responding party unless the judge issues a signed order approving the request. Failure to comply with a discovery order can result in sanctions.

(b) *Post-judgment Discovery*. Post-judgment discovery is not required to be filed with the court. The party requesting discovery must give the responding party at least 30 days to

respond to a post-judgment discovery request. The responding party may file a written objection with the court within 30 days of receiving the request. If an objection is filed, the judge must hold a hearing to determine if the request is valid. If the objection is denied, the judge must order the party to respond to the request. If the objection is upheld, the judge may reform the request or dismiss it entirely.

Comment to Proposed Rule 560.8:

Civil discovery procedures can be onerous and for this reason the discretion was left to the judge. However, the Workgroup recognizes that unfamiliar procedural tools such as motions to compel, motions to quash, for protective order and the like, will be presented for consideration and determination. Sanctions for non-compliance, and indirect contempt procedures may be implicated that necessitate education to avoid potential judicial misconduct for failure to adhere to strict procedural guidelines that are not found in these abbreviated rules.

RULE 561. CITATION AND SERVICE

RULE 561.1. CITATION

(a) *Issuance*. When a petition is filed with a municipal court to initiate a suit, the clerk must promptly issue a citation. The plaintiff is responsible for obtaining service on the defendant of the citation in accordance with applicable rules or statutes and a copy of the petition with any documents filed with the petition. Upon request, separate or additional citations must be issued by the clerk. The clerk must retain a copy of the citation in the court's file.

(b) *Form*. The citation must:

(1) be styled "The City of [where the action in pending],Texas";

(2) be signed by the clerk under seal of court or by the judge;

(3) contain the name, location, and address of the court;

(4) show the date of filing of the petition;

(5) show the date of issuance of the citation;

(6) show the cause number and names of the parties;

(7) be directed to the defendant;

(8) show the name and address of the attorney for the plaintiff, or if the plaintiff does not have an attorney, the address of the plaintiff; and

(9) notify the defendant that if the defendant fails to file an answer, judgment by default may be rendered for the relief demanded in the petition.

(c) *Notice*. The citation must include the following notice to the defendant in boldface type: "You have been sued. You may employ an attorney to help you in defending against this lawsuit. But you are not required to employ an attorney. You or your attorney must file an answer with the court. Your answer is due by the end of the 14th day after the day you were served with these papers. If the 14th day is a Saturday, Sunday, or legal holiday, your answer is due by the end of the first day following the 14th day that is not a Saturday, Sunday, or legal holiday. Do not ignore these papers. If you do not file an answer by the due date, a default judgment may be taken against you. For further information, consult Part V-A of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation."

(d) *Copies*. The plaintiff must provide enough copies to be served on each defendant. If the plaintiff fails to do so, the clerk may make copies and charge the plaintiff the allowable copying cost.

RULE 561.2. SERVICE OF CITATION

(a) *Who May Serve*. No person who is a party to or interested in the outcome of the suit may serve citation in that suit, Other citations may be served by:

(1) an officer;

(2) a process server certified under order of the Supreme Court;

(3) the clerk of the court, if the citation is served by registered or certified mail; or

(4) a person authorized by court order who is 18 years of age or older.

(b) *Method of Service*. Citation must be served by:

(1) delivering a copy of the citation with a copy of the petition attached to the defendant in person, after endorsing the date of delivery on the citation; or

(2) mailing a copy of the citation with a copy of the petition attached to the defendant by registered or certified mail, restricted delivery, with return receipt or electronic return receipt requested.

(c) *Service Fees*. A plaintiff must pay all fees for service unless the plaintiff has filed a sworn statement of inability to pay the fees with the court. If the plaintiff has filed a sworn statement of inability to pay, the plaintiff must arrange for the citation to be served by an officer or court clerk.

(d) *Service on Sunday*. A citation cannot be served on a Sunday.

(e) *Alternative Service of Citation*. If the methods under (b) are insufficient to serve the defendant, the plaintiff, an officer or process server certified under order of the Supreme Court, or other person authorized to serve process, may make a request for alternative service. This request must include a sworn statement describing the methods attempted under (b) and stating the defendant's usual place of business or residence, or other place where the defendant can probably be found. The court may authorize by written order the following types of alternative service:

(1) mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also leaving a copy of the citation with petition attached at the defendant's residence or other place where the defendant can probably be found with any person found there who is at least 16 years of age;

(2) mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also serving by any other method that the court finds is reasonably likely to provide the defendant with notice of the suit; or

(3) any other manner directed by the court in accordance with Rules 106, 109, 109a, 111, or 112 of the Texas Rules of Civil Procedure.

(f) *Service by Publication*. In the event that service of citation by publication is necessary, the process is governed by the rules in county and district court.

RULE 561.3. DUTIES OF OFFICER OR PERSON RECEIVING CITATION; RETURN OF SERVICE

(a) *Endorsement; Execution; Return*. The officer or authorized person to whom process is delivered must:

(1) endorse on the process the date and hour on which he or she received it;

(2) execute and return the same without delay; and

(3) complete a return of service, which may, but need not, be endorsed on or attached to the citation.

(b) *Contents of Return*. The return, together with any document to which it is attached, must include the following information:

(1) the case number and case name;

(2) the court in which the case is filed;

(3) a description of what was served;

(4) the date and time the process was received for service;

(5) the person or entity served;

(6) the address served;

(7) the date of service or attempted service;

(8) the manner of delivery of service or attempted service;

(9) the name of the person who served or attempted service;

(10) if the person named in (9) is a process server certified under Supreme Court Order, his or her identification number and the expiration date of his or her certification; and

(11) any other information required by rule or law.

(c) *Citation by Mail*. When the citation is served by registered or certified mail as authorized by Rule 561.2(b)(2), the return by the officer or authorized person must also contain the receipt with the addressee's signature.

(d) *Failure to Serve*. When the officer or authorized person has not served the citation, the return must show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable.

(e) *Signature*. The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a city marshal, sheriff, constable, or clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is (First) (Middle) (Last) , my date of birth is (Month) (Day), (Year), and my address is (Street), (City), (State) (Zip Code), (Country) . I declare under penalty of perjury that the foregoing is true and correct.

Executed in _____County, State of_____, on the _____day of (Month) , (Year).

_____

Declarant"

(f) *Alternative Service*. Where citation is executed by an alternative method as authorized by 561.2(e), proof of service must be made in the manner ordered by the court.

(g) *Filing Return*. The return and any document to which it is attached must be filed with the court and may be filed electronically or by fax if those methods of filing are available.

(h) *Prerequisite for Default Judgment*. No default judgment may be granted in any case until proof of service as provided by this rule, or as ordered by the court in the event citation

is executed by an alternative method under 561.2(e), has been on file with the clerk of the court 10 days, exclusive of the day of filing and the day of judgment.

RULE 561.4. SERVICE OF PAPERS OTHER THAN CITATION

(a) *Method of Service*. Other than a citation or oral motions made during trial or when all parties are present, every notice required by these rules, and every pleading, plea, motion, application to the court for an order, or other form of request, must be served on all other parties in one of the following ways:

(1) In person. A copy may be delivered to the party to be served, or the party's duly authorized agent or attorney of record, in person or by agent.

(2) Mail or courier. A copy may be sent by courier-receipted delivery or by certified or registered mail, to the party's last known address. Service by certified or registered mail is complete when the document is properly addressed and deposited in the United States mail, postage prepaid.

(3) Fax. A copy may be faxed to the recipient's current fax number. Service by fax after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day.

(4) Email. A copy may be sent to an email address expressly provided by the receiving party, if the party has consented to email service in writing. Service by email after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day.

(5) Other. A copy may be delivered in any other manner directed by the court.

(b) *Timing*. If a document is served by mail, 3 days will be added to the length of time a party has to respond to the document. Notice of any hearing requested by a party must be served on all other parties not less than 10 days before the time specified for the hearing.

(c) *Who May Serve*. Documents other than a citation may be served by a party to the suit, an attorney of record, an officer, or by any other person competent to testify.

(d) *Certificate of Service*. The party or the party's attorney of record must include in writing on all documents filed a signed statement describing the manner in which the document was served on the other party or parties and the date of service. A certificate by a party or the party's attorney of record, or the return of the officer, or the sworn statement of any other person showing service of a notice is rebuttable proof of service.

(e) *Failure to Serve*. A party may offer evidence or testimony that a notice or document was not received, or, if service was by mail, that it was not received within 10 days from the

date of mailing, and upon so finding, the court may extend the time for taking the action required of the party or grant other relief as it deems just.

RULE 562. INSTITUTION OF SUIT

RULE 562.1. PLEADINGS AND MOTIONS MUST BE WRITTEN, SIGNED, AND FILED

Except for oral motions made during trial or when all parties are present, every pleading, plea, motion, application to the court for an order, or other form of request must be written, signed by the party or its attorney and must be filed with the court. A document may be filed with the court by personal or commercial delivery, by mail, or electronically, if the court allows electronic filing.

RULE 562.2. PETITION

Contents. To initiate a lawsuit, a petition must be filed with the court. A petition must contain:

(1) the name of the plaintiff;

(2) the name, address, telephone number, email address, and fax number, if any, of the plaintiff's attorney,

(3) the name, address, email address, telephone number and fax number, if known, of the defendant;

(4) the amount of civil penalties, if any, the plaintiff seeks;

(5) a description of any other relief requested;

(6) the basis for the plaintiff's claim against the defendant; and

(7) if the plaintiff consents to email service of the answer and any other motions or pleadings, a statement consenting to email service and email contact information.

RULE 562.3. VENUE — WHERE A LAWSUIT MAY BE BROUGHT

Venue is proper in the municipal court of the municipality where the controversy occurred or the property which is the subject of the lawsuit is located or the applicable extraterritorial jurisdiction. If the relevant controversy occurred or property is located in multiple municipalities, the lawsuit may be filed in any municipal court of the municipality where the controversy occurred or the property is located.

Comment to Proposed Rule 562.3:

The Workgroup discussed but did not specifically address the potential for a motion to transfer venue to a court with concurrent jurisdiction.

RULE 562.4. ANSWER

(a) *Requirements*. A defendant must file with the court a written answer to a lawsuit as directed by the citation and must also serve a copy of the answer on the plaintiff. The answer must contain:

(1) the name of the defendant;

(2) the name, address, telephone number, email address, and fax number, if any, of the defendant's attorney, if applicable, or the address, telephone number, email address, and fax number, if any, of the defendant; and

(3) if the defendant consents to email service, a statement consenting to email service and email contact information.

(b) *General Denial*. An answer that denies all of the plaintiff's allegations without specifying the reasons is sufficient to constitute an answer or appearance,

(c) *Answer Docketed*. The defendant's appearance must be noted on the court's docket.

(d) *Due Date*. Unless the defendant is served by publication, the defendant's answer is due by the end of the 14th day after the day the defendant was served with the citation and petition, but

(1) if the 14th day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; and

(2) if the 14th day falls on a day during which the court is closed before 5:00 p.m., the answer is due on the court's next business day.

(e) *Due Date When Defendant Served by Publication*. If a defendant is served by publication, the defendant's answer is due by the end of the 30th day after the day the citation was issued, but

(1) if the 30th day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; and

(2) if the 30th day falls on a day during which the court is closed before 5:00 p.m., the answer is due on the court's next business day.

Comment to Proposed Rule 562.4:

Subsection (e) of the Rule states that the defendant's answer is due by the end of the 30th day after the day the citation issued if the defendant is served by publication. The deadline differs from the 42-day deadline stated in Rule 502.5(e) for justice courts. These Rules apply to cases including civil actions filed

in municipal courts by municipalities regarding substandard buildings pursuant to Section 214.001 of the Texas Local Government Code and to enforce ordinances pursuant to Section 54.012 *et seq.* of the Texas Local Government Code. Justice courts do not have jurisdiction of cases filed under these provisions. Because Sections 54.014, 54.0155, and 214.001(s) evidence a legislative intent for an expedited process in cases involving dangerously damaged or deteriorated structures and the hazard to the public health, safety, and welfare such structures can present, the deadline has been shortened.

RULE 562.5. AMENDED, SUPPLEMENTAL, AND INSUFFICIENT PLEADINGS

(a) *Amended or Supplemental Pleadings*. A party may withdraw something from or add something to a pleading, as long as the amended or supplemental pleading is filed and served as provided by Rule 561.4 not less than 7 days before trial. The court may allow a pleading to be amended or supplemented less than 7 days before trial if the amendment or supplement will not operate as a surprise to the opposing party.

(b) *Insufficient Pleadings*. A party may file a motion with the court asking that another party be required to clarify a pleading. The court must determine if the pleading is sufficient to place all parties on notice of the issues in the lawsuit, and may hold a hearing to make that determination. If the court determines a pleading is insufficient, the court must order the party to amend the pleading and set a date by which the party must amend. If a party fails to comply with the court's order, the pleading may be stricken.

Comment to Proposed Rule 562.5

The Workgroup did not address but recognizes there is a distinction between an amended pleading, a supplemental pleading, and a special exception procedure for clarification of pleadings. The Workgroup left that to current jurisprudence and recognizes additional education will be required.

RULE 563. DEFAULT JUDGMENT; PRE-TRIAL MATTERS; TRIAL

RULE 563.1. IF DEFENDANT FAILS TO ANSWER

(a) *Default Judgment*. If the defendant fails to file an answer by the date stated in Rule 562.4, the judge must ensure that service was proper, and may hold a hearing for this purpose. If it is determined that service was proper, the judge must render a default judgment in the following manner: a plaintiff who seeks a default judgment against a defendant must request a hearing, orally or in writing. The plaintiff must appear at the hearing and provide evidence of the claims stated in the petition. If the plaintiff provides evidence of the claims stated in the petition, the judge may render judgment for the plaintiff and grant the relief sought. If the plaintiff is unable to provide evidence of the claims in the petition, the judge may render judgment in favor of the defendant. With the permission of the court, a party may appear at a hearing by means of telephone or an electronic communication system.

(b) *Appearance*. If a defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not enter a default judgment and the case must be set for trial as described in Rule 563.3.

(c) *Post-Answer Default*. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and render judgment accordingly.

(d) *Notice*. The plaintiff requesting a default judgment must provide to the clerk in writing the last known mailing address of the defendant at or before the time the judgment is signed. When a default judgment is signed, the clerk or plaintiff under the court's direction must immediately mail written notice of the judgment to the defendant at the address provided by the plaintiff. The notice must state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date the judgment was signed. Failure to comply with the provisions of this rule does not affect the finality of the judgment.

Comment to Proposed Rule 563.1:

Default judgments are generally unfamiliar to municipal judges. We recognize that additional education will be required relative to the strict compliance with rules for service, notice, and evidence. We did not include the requirement for certificate of last known address and Soldier Sailor's Relief Act declaration that the person not in military service although we recognize that both may be implicated in municipal civil disputes.

RULE 563.2. SUMMARY DISPOSITION

(a) *Motion*. A party may file a sworn motion for summary disposition of all or part of a claim or defense without a trial. The motion must set out all supporting facts. All documents on which the motion relies must be attached. The motion must be granted if it shows that:

(1) there are no genuinely disputed facts that would prevent a judgment in favor of the party;

(2) there is no evidence of one or more essential elements of a defense which the defendant must prove to defeat the plaintiff's claim; or

(3) there is no evidence of one or more essential elements of the plaintiff's claim.

(b) *Response*. The party opposing the motion may file a sworn written response to the motion, identifying all agreed upon or disputed facts, including supporting evidence, not later than 7 days before the hearing. A party may file a reply not later than 3 days before the hearing, limited to facts and issues raised in the response.

(c) *Hearing*. The court must not consider a motion for summary disposition until it has been on file for at least 14 days. The judge may not consider evidence offered by the parties other than is submitted through motion, response, and reply. By agreement of the

parties, the judge may decide the matter on the briefs (motion, response, reply) without a hearing.

(d) *Order*. The judge may enter judgment as to the entire case or may specify the facts that are established and direct such further proceedings in the case as are just.

Comment 1 to Proposed Rule 563.2:

The purpose of this Rule is to provide the parties and the court the opportunity to resolve a case without the necessity of trial under the proper circumstances. Because of the wide disparity of resources available to municipal courts, the differences in jurisdiction (non-record courts, courts of record without concurrent jurisdiction with district courts, and courts of record with concurrent jurisdiction with district and county courts), and the lack of the necessary infrastructure to comply with the full implementation of the rules of civil procedure in district courts, the Rule is based on the procedural rule in justice courts and not Rule 166a utilized in district and county courts.

This rule is based on Rule 503.2. The wording of subsection (a) is identical to Rule 503.2(a). Subsection (b) begins with language identical to Rule 503.2(b) but adds deadlines for the filing and response. Subsection (c) provides for the same required waiting period as Rule 503.2(c). To provide fair notice to both parties and to prevent unfair surprise, Subsection (c) requires parties to adhere to their pleadings and prohibits parties from offering evidence not submitted through pleadings. The last sentence of subsection (c) is virtually identical to the last sentence of Rule 503.2(c) but authorizes consideration of a reply and briefs. The sentence contained in subsection (d) tracks the language of the first sentence of Rule 503.2(d).

Comment 2 to Proposed Rule 563.2:

As with the Justice Court Task Force, there was much debate over the role of summary judgment in these Rules. Ultimately, due to legitimate concerns with summary judgment rules and jurisprudence, the decision to provide a procedural mechanism to summarily dispose of cases where there is no material factual dispute, was determined to be critical to judicial efficiency.

This system is fraught with peril, not only for the unfamiliar, but due to the distinction between summary disposition for justice court cases, courts of no record, with de novo appellate review, and municipal courts of record with points of error required. We recognize that the use of summary disposition in municipal courts of record, creates a two-tiered system for similar proceedings in district courts with concurrent jurisdiction where Rule 166a and other dispositive motions are used with great regularity and subject to a plethora of jurisprudence not available with the summary disposition proceedings.

Of primary concern is that without the legal precedent associated with Rule 166a, which admittedly would bog down and already taxed judicial system, there is no guidance to establish points of error on appeal.

RULE 563.3. SETTINGS AND NOTICE; POSTPONING TRIAL; REQUESTING A JURY TRIAL

(a) *Settings and Notice*. After the defendant answers, the case will be set on a trial docket at the discretion of the judge. The court must, or, under its direction cause the plaintiff to send a notice of the date, time, and place of this setting to all parties at their addresses of record no less than 30 days before the setting date, unless the judge determines that an earlier setting is required in the interest of justice. Said notice reflecting service shall

be filed among the papers of the court. Reasonable notice of all subsequent settings must be sent to all parties at their addresses of record.

(b) *Postponing Trial*. A party may file a motion requesting that the trial be postponed. The motion must state why a postponement is necessary. The judge, for good cause, may postpone any trial for a reasonable time.

(c) *Requesting a Jury Trial.* Any party requesting a jury trial must demonstrate by written submission the specific factual questions to be decided by a jury and make a written request for a jury no later than 30 days before a trial is first scheduled to begin. Jury trials are permitted when required by law. Absent a proper and timely request, trial may be had before the judge. After a trial has concluded, the judge must announce the decision in open court and render judgment accordingly.

Comment to Proposed Rule 563.3:

We recognize that there are no specific pattern jury charges associated with the causes of action that may be raised in civil municipal proceedings. While civil jury trials are a well-established feature in district courts, the specific factual jury question will likely need to be submitted in advance. In addition, with a trial before the court, findings of fact and conclusions of law are the standard in civil district court proceedings and generally unfamiliar to civil municipal courts of record.

RULE 563.4. PRETRIAL CONFERENCE

Conference Set; Issues. If all parties have appeared in a lawsuit, the court, at any party's request or on its own, may set a case for a pretrial conference. Reasonable notice must be sent to all parties at their addresses of record. Appropriate issues for the pretrial conference include:

(1) discovery disputes, exchange of trial exhibits, identification of documents intended to be used at trial and objections thereto;

(2) the amendment or clarification of pleadings;

(3) the admission of facts and documents to streamline the trial process;

(4) a limitation on the number of witnesses at trial;

(5) the identification of facts, if any, which are not in dispute between the parties;

(6) the possibility of settlement;

(7) trial setting dates that are amenable to the court and all parties;

(8) the appointment of interpreters, if needed;

(9) the application of a Rule of Civil Procedure not in Part V-A or a Rule of Evidence; and

(10) any other issue that the court deems appropriate.

RULE 563.5. EXPEDITED ACTIONS IN MUNICIPAL COURT

(a) *Docket Control*. The judge, in the interest of efficiency, may set appropriate parameters for the conduct of trial.

(b) Application. Subject to Rule 560.3, the court on its own, or upon a party's motion, may designate or de-designate a cause as an expedited action.

(c) *Expedited Actions Process*.

(1) Discovery. Discovery is governed by Rule 560.8.

(2) Trial Setting; Continuances. On any party's request, the court must set the case for a trial date after the discovery period ends. The court may continue the case twice.

(3) Time Limits for Trial. Each side is allowed no more than 3 hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments. On motion and a showing of good cause by any party, the court may extend the time limit to no more than 6 hours per side. Time spent on objections, bench conferences, and offers of proof are not included in the time limit.

(4) Expert Testimony. Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary disposition evidence under Rule 563.2 or during the trial on the merits. This paragraph does not apply to a motion to strike for late designation.

Comment to Proposed Rule 563.5:

Rule 563.5 is based on Rule 169 (Expedited Actions). The language in Rule 563.5 that differs from Rule 169 (for example, language in Subsection 563.5(c)(2) relating to timelines) provides more flexibility for municipal judges. Municipal courts, based on varying case volume and complexity, move at different speeds. Not all courts are equipped to resolve a case in 60 days. Conversely, a civil suit involving a dangerously damaged or deteriorated structure may need to move quickly because of the danger presented to the public. Section 54.0155 of the Local Government Code requires municipal courts to expedite those cases. Other types of civil cases such as those involving dangerous dogs or junked vehicles have varying timelines. Rule 563.5 provides the necessary flexibility for municipal courts.

RULE 563.6. TRIAL

(a) *Docket Called*. On the day of the trial setting, the judge must call all of the cases set for trial that day.

(b) *If Plaintiff Fails to Appear*. If the plaintiff fails to appear when the case is called for trial, the judge may postpone or dismiss the suit.

(c) *If Defendant Fails to Appear*. If the defendant fails to appear when the case is called for trial, the judge may postpone the case or may proceed to take evidence. If the plaintiff

proves its case, judgment may be awarded for the relief proven. If the plaintiff fails to prove its case, judgment may be rendered against the plaintiff.

RULE 564. JUDGMENT; NEW TRIAL

RULE 564.1. JUDGMENT

A judgment must:

(1) clearly state the determination of the rights of the parties and their relief in the case;

(2) state who must pay any civil penalties, if applicable;

(3) be signed by the judge; and

(4) be dated the date of the judge's signature.

RULE 564.2. ENFORCEMENT OF JUDGMENT

Municipal court judgments are enforceable in the same method as in county and district court, except as provided by law.

RULE 564.3. MOTION TO SET ASIDE; MOTION TO REINSTATE; MOTION FOR NEW TRIAL

(a) *Motion to Reinstate after Dismissal*. A plaintiff whose case is dismissed may file a verified motion to reinstate the case no later than 10 days after the dismissal order is signed. The plaintiff must serve the defendant with a copy of the motion no later than the next business day using a method approved under Rule 561.4. The court may reinstate the case for good cause shown.

(b) *Motion to Set Aside Default*. A defendant against whom a default judgment is granted may file a verified motion to set aside the judgment no later than 10 days after the judgment is signed. The defendant must serve the plaintiff with a copy of the motion no later than the next business day using a method approved under Rule 561.4. The court may set aside the judgment and set the case for trial for good cause shown.

(c) *Motion for New Trial*. A party may file a motion for a new trial no later than 10 days after the judgment is signed. The party must serve all other parties with a copy of the motion no later than the next business day using a method approved under Rule 561.4. The judge may grant a new trial upon a showing that justice was not done in the trial of the case. Only one new trial may be granted to either party. If the municipal court is a court of record, a motion for new trial alleging points of error must be filed to perfect appeal.

(d) *Motion Denied as a Matter of Law*. If the judge has not ruled on a motion to set aside, motion to reinstate, or motion for new trial, the motion is automatically denied at 5:00 p.m. on the 30th day after the day the judgment was signed.

Comment to Proposed Rule 564.3:

We have not included the rules or potentially applicable jurisprudence associated with motions to set aside, to reinstate, and for new trial. Once more, we anticipate the need for additional judicial education.

Tab I

Civil Rules Comparison: Proposed Municipal Court Rules and Justice Court Rules

Proposed Municipal Court Rule	Corresponding Justice Court Rule	Comparison to Justice Court Rule
RULE 560 General Rules	**RULE 500 General Rules**	
560.1 Construction of Rules	500.1 Construction of Rules	Identical
560.2 Definitions	500.2 Definitions	References Part V-A instead of Part V; definition of "Clerk" differs based on applicability; definition of "county court" references appeals from municipal court; definition of "judge" differs based on applicability; definition of "relief" differs; includes definitions of "officer" and "side;" definition of " judgment" includes additional language ("and that disposes of all parties and all claims"); definition of "serve" and "service" references different rules based on applicability; does not include the definitions for counterclaim, cross-claim, dismissed with prejudice, dismissed without prejudice, or third party claim.
560.3 Application of Rules in Municipal Court Cases	500.3 Application of Rules in Justice Court Cases	Includes a different Subsection (a) (Application of These Rules), which addresses general applicability and conflicts between the Rules and local procedural rules; does not include subsections on small claims cases, debt claims cases, repair and remedy cases, or eviction cases because of the difference in jurisdiction; differs in the section on Application of

		Other Rules (i.e., the Rules of Evidence will apply). See comment for proposed Rule 560.3.
560.4 Representation in Municipal Court Cases	500.4 Representation in Justice Court Cases	Differs based on jurisdiction and requiring representation by an attorney for corporations and other legal entities. Adds Subsection (c) providing that a municipality is represented by its City/Town Attorney or authorized legal counsel.
560.5 Computation of Time; Timely Filing	500.5 Computation of Time; Timely Filing	Includes in Subsection (a) "Unless otherwise provided by statute or ordinance."
No comparable rule	500.6 Judge to Develop the Case	**Commentary:** The Workgroup decided not to include a comparable rule to 500.6 as municipal courts with civil jurisdiction are courts of record with appointed judges (either appointed by city council or elected under city charter, with the initial plaintiff generally being the municipality) and appeals based upon points of error. Justice courts are courts of non-record with elected justices of the peace and de novo appeals. Also, there is no similar rule for district or county courts which are also courts of record. The Workgroup also sought to avoid the appearance of impropriety by the judge and potential judicial canon violations.
560.6 Exclusion of Witnesses	500.7 Exclusion of Witnesses	Identical
560.7 Subpoenas	500.8 Subpoenas	**Subsection (a):** includes "a clerk of the court;" Subsection (b) references municipal court instead of justice court;

		Subsection (d) substitutes "officer" for "sheriff or constable of the State of Texas." **Subsection (g):** adds "Upon notice, and opportunity to be heard to show cause." The reason for this addition is that municipal judges are more familiar with direct contempt procedures than indirect contempt, which requires notice and an opportunity to be heard and show cause before imposition of contempt. The Workgroup recommends additional education be provided on contempt procedures in civil proceedings.
560.8 Discovery	500.9 Discovery	Does not include the following in Subsection (a) regarding possible results for failure to comply with a discovery order: "including dismissal of the case or an order to pay the other party's discovery expenses."
RULE 561 Citation and Service	**RULE 501 Citation and Service**	
561.1 Citation	501.1 Citation	**Subsection (a):** references a municipal court instead of a justice court; removes the requirement that the clerk "deliver the citation as directed by the plaintiff;" adds "in accordance with applicable rules or statutes" to the service requirements. **Subsection (b)(1):** requires the citation to be styled in the name of the City instead of the State of Texas. **Subsection (c):** references Part V-A instead of Part V of the Texas Rules of Civil Procedure.
561.2 Service of Citation	501.2 Service of Citation	**Subsection (a):** does not include "a citation in an eviction case;" Subsection (a)(1) references an

		officer instead of a sheriff or constable; omits the requirement that "only a sheriff or constable may serve a citation in an eviction case, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action be physically enforced by the person delivering the process." **Subsection (c):** references an officer instead of a sheriff or constable; **Subsection (d):** does not reference attachment, garnishment, sequestration, or distress proceedings; **Subsection (e):** references an officer instead of the constable or sheriff and adds the phrase "by written order" to how the court may authorize alternative service; adds Subsection (e)(3) providing for alternative service of citation by any other manner directed by the court in accordance with Rules 106, 109, 109a, 111, or 112 of the Civil Rules of Procedure.
Rule 561.3 Duties of Officer or Person Receiving Citation; Return of Service	Rule 501.3 Duties of Officer or Person Receiving Citation; Return of Service	**Subsection (c):** references Rule 561.2(b)(2) instead of Rule 501.2(b)(2). **Subsection (e):** includes a city marshal. **Subsection (f):** references Rule 561.2(e) instead of Rule 501.2(e); Subsection (h) references Rule 561.2(e) instead of Rule 501.2(e). **Subsection (h):** lengthens the timeline for the prerequisite for a default judgment to 10 days (instead of 3).
Rule 561.4 Service of Papers other than Citation	Rule 501.4 Service of Papers other than Citation	**Subsection (b):** lengthens the timeline for notice of any

		hearing requested by a party to be served on all other parties to not less than 10 days (instead of 3 days). **Subsection (c):** references an officer instead of a sheriff or constable. **Subsection (d):** makes the certificate by a party or the party's attorney of record, or the return of the officer, or the sworn statement of any other person showing service of a notice "rebuttable" proof of service. **Subsection (e):** lengthens the timeline that a party has to offer evidence or testimony that a notice or document was not received, or, if service was by mail, that it was not received to 10 days (instead of 3) from the date of mailing.
RULE 562 Institution of Suit	**RULE 562** Institution of Suit	
Rule 562.1 Pleadings and Motions Must Be Written, Signed, and Filed	Rule 501.2 Pleadings and Motions Must Be Written, Signed, and Filed	Replaces the word "and" after "written" with a comma for clarity; does not provide that electronic filing is governed by Rule 21.
Rule 562.2 Petition	Rule 502.2 Petition	Adds "email address" to the list of required petition information about the plaintiff's attorney in Subsection (2) and removes the phrase "if applicable, or the address, telephone number, and fax number, if any, of the plaintiff" (because the plaintiff will always be the city and represented by an attorney); adds "email address" and "fax number" to the required petition information about the defendant in Subsection (3); replaces "money" with "civil penalties" in Subsection (4) based on

		appropriate relief; removes 502.2(5) (a description and claimed value of any personal property the plaintiff seeks;)
No comparable rule	Rule 502.3 Fees; Inability to Afford Fees	**Commentary:** There is no statutory authority for a municipal court to collect such a fee.
Rule 562.3 Venue—Where a Lawsuit May Be Brought	Rule 502.4 Venue—Where a Lawsuit May Be Brought	Differs based on where venue is proper in a municipal court instead of a justice court
Rule 562.4 Answer	Rule 502.5 Answer	Adds "email address" to the list in Subsection (a)(2) of required information in the Answer related to the Defendant; strikes "and does not bar the defendant from raising any defense at trial" in Subsection (b) related to a General Denial; shortens the timeline in Subsection (e) when the answer is due if the defendant is served by publication (end of 30th day instead of 42nd day)
No comparable rule	Rule 502.6 Counterclaim; Cross-claim; Third Party Claim	The Workgroup did not address counterclaims, cross-claims, or third party claims due to the recognized limitation generally found in ordinances or other causes of action. The Workgroup anticipates legal theories of dominant jurisdiction, collateral estoppel, res judicata, and judicial efficiency will necessitate refiling in district court.
Rule 562.5 Amended, Supplemental, and Insufficient Pleadings	Rule 502.7 Amending and Clarifying Pleadings	References Rule 561.4 instead of 501.4 as applicable; adds a reference to supplemental pleadings in addition to amended pleadings and makes Subsection (a) applicable to supplemental pleadings
RULE 563 Default Judgment; Pre-trial Matters; Trial	**RULE 503** Default Judgment; Pre-trial Matters; Trial	

Rule 563.1 If Defendant Fails to Answer	Rule 503.1 If Defendant Fails to Answer	References Rule 562.4 instead of 502.5 as applicable; omits the requirement in 503.1(e) that a default judgment must comply with Rule 505.1; **Subsection (a):** omits the language in 503.1(a)(1) and does not break down Subsection (a) into Subsections (1) and (2) because it makes no distinction between a claim based on a written document and other cases; replaces "its damages" with "the claims stated in the petition;" replaces "proves its damages" with "provide evidence of the claims in the petition;" permits but does not require a judge to render judgment in favor of the defendant ("may" instead of "must"). **Commentary:** The workgroup used "may" versus "must" to recognize and afford the judge discretion on how to handle the disposition of the case. **Subsection (b):** references Rule 563.3 instead of 503.3 as applicable **Subsection (c):** makes no mention of damages (only liability) **Subsection (d):** permits the plaintiff (under the court's direction) in addition to the clerk to mail notice of the default judgment to the defendant; omits the requirement to note the fact of such mailing on the docket
Rule 563.2 Summary Disposition	Rule 503.2 Summary Disposition	**Subsection (b):** Similarly provides that a party opposing the motion for summary disposition may file a sworn written response to the motion,

		but adds the following: "identifying all agreed upon or disputed facts, including supporting evidence, not later than 7 days before the hearing. A party may file a reply not later than 3 days before the hearing, limited to facts and issues raised in the response." **Subsection (c):** Similarly provides that the judge may not consider evidence offered by the parties but adds the exception: "other than is submitted through motion, response, and reply;" clarifies that the judge may decide the matter on the briefs (motion, response, reply) without a hearing (the justice court rule only mentions the motion and response). **Subsection (d):** omits the requirement that the judgment must comply with Rule 505.1. See comment for proposed Rule 563.2.
Rule 563.3 Settings and Notice; Postponing Trial; Requesting a Jury Trial	Rule 503.3 Settings and Notice; Postponing Trial	**Subsection (a):** permits the court to cause the plaintiff under direction of the court to send the required notice; shortens the timeline for sending notice (no less than 30 days before the setting instead of no less than 45 days); requires notice reflecting service to be filed among the papers of the court. **Adds Subsection (c):** provides requirements for requesting a jury trial
Rule 563.4 Pretrial Conference	Rule 503.4 Pretrial Conference	In the list of appropriate issues for the pretrial conference, instead of just "discovery," Rule 563.4 states "discovery disputes, exchange of trial exhibits, identification of documents

		intended to be used at trial and objections thereto." The rule omits "mediation or other alternative dispute resolution services" from the list. The reference to Part V is replaced with Part V-A as applicable.
Rule 563.5 Expedited Actions in Municipal Court	No comparable rule	See comment for proposed Rule 563.5.
No comparable rule	Rule 503.5 Alternative Dispute Resolution	**Commentary:** The Workgroup did not include a comparable ADR requirement due to the procedural requirements of notice and the general approach to nuisance abatement to encourage compliance before legal action.
Rule 563.6 Trial		**Subsection (b):** permits ("may") instead of requires ("must") the judge to postpone or dismiss a suit if the plaintiff fails to appear when the case is called for trial. **Subsection (c):** permits ("may) instead of requires ("must") the judgment to be awarded for the relief proven if the plaintiff proves its case.
No comparable rule	**RULE 504** Jury	**Commentary:** The Workgroup did not include a rule identical to Rule 504 relative to jury trials as it is subsumed in part with Rule 563.3 and there is no authority for assessment of jury fees upon demand of jury trial. The Workgroup discussed but came to no conclusions about payment of jury fees for civil cases.
RULE 564 Judgment; New Trial	**RULE 505** Judgment; New Trial	
Rule 564.1 Judgment	Rule 505.1 Judgment	Omits 505.1(a) and (b) relating to announcing the verdict in open court; adds a requirement to clearly state the determination of the relief in the case; omits any mention of monetary

		damages, costs, or judgment for specific articles (see 505.1(c)(5), (d), and (e) respectively).
Rule 564.2 Enforcement of Judgment	Rule 505.2 Enforcement of Judgment	Omits reference to judgments for personal property.
Rule 564.3 Motion to Set Aside; Motion to Reinstate; Motion for New Trial	Rule 505.3 Motion to Set Aside; Motion to Reinstate; Motion for New Trial	**Subsection (a):** requires the motion to be verified; shortens the timeline to file a motion to reinstate the case from no later than 14 days after the dismissal order is signed to no later than 10 days; references Rule 561.4 as applicable. **Subsection (b):** requires the motion to be verified; shortens the timeline to file a motion to set aside default to no later than 10 days (instead of 14 days) after the judgment is signed. **Subsection (c):** shortens the timeline to file a motion for new trial to no later than 10 days (instead of 14 days) after the judgment is signed; adds the following: "If the municipal court is a court of record, a motion for new trial alleging points of error must be filed to perfect appeal." **Subsection (d):** lengthens the time when a motion is automatically denied to 5:00 p.m. on the 30th day (instead of 21st day) after the day the judgment was signed.
No comparable rules	**RULES 506-510**	Based on the scope of the charge and limitations of the Workgroup (i.e., rules related to appeals require legislative action) and jurisdiction of municipal courts (i.e., no jurisdiction over eviction cases, repair and remedy cases, and debt claim cases).

Tab J

To: The Texas Supreme Court Advisory Committee
From: Richard R. Orsinger
Chair, Subcommittee of Rules 15-165a
April 2, 2024

Memorandum on Disposition of Undistributable or Unclaimed Funds in Class Action Under TRCP 42

1. As the previous Committee debate demonstrated, and as the many articles and many Federal court cases attest, the disposition of residual (undistributable and unclaimed) funds in class action settlements is a controversial topic. The article below offer different perspectives on the issue. In order to avoid retreading the same ground as before, this Memo quotes a few articles discussing policy issues, then quotes an article listing jurisdictions that have enacted laws or rules governing the disposition of residual funds in class actions.

   Next there is a sample ballot that helps to clarify how we might vote on different choices. Our Committee Chair Chip Babcock may not conduct a vote along these exact lines, but at the least this ballot helps to clarify the choices that can be made.

   Next there is a Table setting out brief descriptions of the parameters for the distribution of residual funds in different American jurisdictions. This Table shows the similarities and differences between approaches. After the Table is an Appendix, setting out verbatim the language used by various jurisdictions in their statutes or rules that govern the disposition of residual class action funds. The Appendix begins with the language of the American Law Institute's Principles of the Law of Aggregate Litigation.

   Also accompanying this Memorandum are the Texas Access to Justice Commission letters of September 12, 2002 and March 13, 2024, and Pete Shenkkan's email of December 7, 2023.

2. At the SCAC meeting on 8-18-2023, the full committee voted:

   > CHAIRMAN BABCOCK: So who thinks that the Supreme Court should have the authority to designate who gets the unclaimed money?
   >
   > MR. ORSINGER: Exercise the authority.
   >
   > CHAIRMAN BABCOCK: Whatever. Supreme Court. Okay. How many people think the parties and the judge? Okay. Supreme Court wins that one, 12 to 7 with the chair not voting.

   You can see that a 63% majority preferred for the Supreme Court to specify who could receive unclaimed class action funds, but 37% of the vote was for the Supreme Court not to prescribe who could receive unclaimed funds. In the vote, there is no indication of whom the Supreme Court should specify. Options include overpaying class members who filed claims, returning

residual funds to the defendant(s), allowing the lawyers to pick donees with the court's approval, generically listing third parties with interests closely aligned to the class, promulgating a list of approved donees, mandating a minimum (which could be 100% or less) to be paid to access to justice entities. An option that does not seem to have been adopted anywhere is to let the funds escheat to the state, either for use for a specific purpose or for general use.

Our task now is to settle on language reflecting various alternatives for the Supreme Court to review and perhaps choose from.

3. The Subcommittee proposes that any portion of Rule 42 regarding the disposition of residual (undistributable or unclaimed) funds be added to Rule 42(e), as follows:

e) Settlement, Dismissal or Compromise.

(1)

(A) The court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) Notice of the material terms of the proposed settlement, dismissal or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs.

(C) The court may approve a settlement, dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, dismissal, or compromise is fair, reasonable, and adequate.

(D) Any "Residual Funds" that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted may (or shall) be distributed to _____.

(2) The parties seeking approval of a settlement, dismissal, or compromise under Rule 42(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 42(b)(3), the court may not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)

(A) Any class member may object to a proposed settlement, dismissal, or compromise that requires court approval under Rule 42(e)(1)(A).

(B) An objection made under Rule 42(e)(4)(A) may be withdrawn only with the court's approval.

4. Here is a summary from a Committee Report on the Fairness in Class Action Litigation Act of 2017 that passed the U.S. House of Representatives, but was not passed in the U.S. Senate:

> Class actions include large numbers of consumers who were satisfied with the product or service at issue and therefore have zero motivation to obtain compensation. In response to this growing reality in consumer class actions, many courts have resorted to cy pres, the practice of distributing money in class actions that is not claimed by real people to third-party charities that supposedly work in the interest of the public in the abstract. While the use of cy pres in class action settlements has benefited numerous organizations, the practice is troubling because it raises serious questions about the purpose of the class action device. As one court put it, ''[t]here is no indirect benefit to the class from the defendant's giving the money to someone else.''[37] And as the Third Circuit Court of Appeals stated in another case, ''inclusion of a cy pres distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class.'' [38] And cy pres diminishes any incentive to identify class members since the lawyer will receive the same amount of fees even if hardly anyone gets any compensation.
>
> In sum, consumers in many class action lawsuits are not receiving any benefits. Rather, the bulk of the money ends up going to lawyers and uninjured third-party organizations, or both. Given this troubling trend, Congress should help at least expose the extent of this abuse by requiring transparency in the allocation of class action settlement funds, including cy pres awards.
>
> [House of Representatives Committee on the Judiciary Report on the Fairness in Class Action Litigation Act of 2017, p. 24]
>
> FN 37: *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).
>
> FN 38: In re Baby Prods. Antitrust Litig., Nos. 12–1165, et al., 708 F.3d 163, 173 (3d Cir. 2013), available at http://www2.ca3.uscourts.gov/opinarch/121165p.pdf.

5. Here is a comment by Chief Justice Roberts, in *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Chief Justice Roberts' statement regarding denial of certiorari):

> I agree with this Court's decision to deny the petition for certiorari. Marek's challenge is focused on the particular features of the specific cy pres settlement at issue. Granting review of this case might not have afforded the Court an opportunity to

address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. Cy pres remedies, however, are a growing feature of class action settlements. See Redish, Julian, & Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L.Rev. 617, 653–656 (2010). In a suitable case, this Court may need to clarify the limits on the use of such remedies.

6. Prof. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 163 (2014), wrote:

> "Unclaimed or non-distributable funds are a common feature of class action settlements. The settling parties and courts often prefer cy pres distributions to reversion and escheat because they are more likely to achieve the deterrent and compensatory objectives of the law underlying the class claims. But cy pres distributions are overused today because defendants prefer them and class counsel do not fight hard enough to maximize cash payments to class members. Too often the courts acquiesce in the parties' cy pres proposal.
>
> This Article makes four pragmatic recommendations to minimize cy pres distributions and to tailor them to better serve the interests of the class. First, to align the interests of class counsel and the represented class, courts should presumptively reduce attorneys' fees in cases in which cy pres distributions are made. Second, to ensure that class members, potential objectors, and courts have the information they need to assess the fairness of a settlement that contemplates a cy pres distribution and to enable class members to make intelligent decisions regarding the right to opt out, class counsel should be required to make a series of disclosures when it presents a proposed settlement for judicial approval. Third, to inject an element of adversarial conflict into the fairness hearing and to further ensure that the court receives the information needed to scrutinize the proposed cy pres distribution, the court should appoint a devil's advocate to oppose the settlement in general, the cy pres distribution in particular, and the request for attorneys' fees by class counsel. Finally, the court should make written findings in connection with its review of any class action settlement that contemplates a cy pres distribution."

7. Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 768-69 (2013-2014)

> What should happen to the unclaimed excess?[2]

Four answers are possible. One is to return unclaimed funds to the defendant.[3] This solution suffers from a significant downside: it is a windfall to the alleged wrongdoer.[4] A second option is to increase payments to those who file claims (perhaps doubling awards to $60 apiece, with $20 of that amount going toward attorneys' fees). This approach may result in overcompensation for some victims. A third option is to escheat the unclaimed funds to the government. This solution prevents both a windfall to defendants and overcompensation to plaintiffs, but the government's entitlement to the funds is weak at best. Thus, the final option: give the unclaimed funds to a group of people similarly situated to the victims or to an organization with a mission that is generally in line with the purpose of the lawsuit—perhaps a consumer-advocacy group or an educational institution that will work on issues of indirect benefit to class members. This final approach is the first use of cy pres relief.[5] It enjoys the advantage of neither providing a windfall to the defendant nor overcompensating some victims, while also ensuring that the unclaimed funds will be turned toward some purpose generally advantageous to the victims' litigation interests (which an escheat cannot do).[6]

8. Bill Boies and Rebecca Finkel, *The Battle Over Cy Pres Awards*, The Chicago Bar Foundation <https://chicagobarfoundation.org/blog/the-battle-over-cy-pres-awards>:

> Dozens of amicus briefs were filed in the Google case, opposing and in support of cy pres awards. The amicus brief by the CBF and other legal aid organizations suggested that the Supreme Court should recognize and endorse the reasonable restrictions already in place for cy pres awards and, importantly, that the Court should recognize cy pres awards for legal aid as an appropriate use of residual settlement funds.
>
> At a time when the selection of organizations to receive cy pres awards is under increased scrutiny, cy pres awards to legal aid and access to justice organizations provide a recognized and appropriate solution for counsel and the courts when selecting recipients and approving settlements. Legal aid organizations like the class action device itself exist to provide broad access to justice. Because of that access to justice connection, this one category of cy pres recipients always has interests that reasonably approximate the interests of class members. While many legal aid services do work that parallels particular class action lawsuits, legal aid will always reasonably approximate class actions relief by providing access to justice for those in need of legal help. As a result, federal and state courts throughout the country have long recognized legal aid organizations as appropriate beneficiaries of cy pres distributions from class action settlements.
>
> This principle is the underlying basis for the statute in Illinois, which is one of 24 states that have adopted statutes or Supreme Court rules providing for cy pres distributions to legal aid and access to justice organizations like the CBF. More information about the Illinois statute and cy pres awards to support legal aid and access to justice on the CBF website.

9. *Hawes v. Macy's Inc.*, Case No. 1:17-cv-754 (United States District Court, S.D. Ohio, Western Division, December 20, 2023) (Cole, Dist. J.):

> Finally, the Court considers an aspect of the Settlement Agreement that does not fit neatly within any of the factors under Rule 23(e)(2), but that the Court nonetheless concludes is fatal to the request for approval. Specifically, the Settlement Agreement provides that, after a second distribution to the class claimants, or, if a second distribution is not economically feasible, after a single distribution, the rest of the settlement fund will be awarded to the Public Interest Research Group (PIRG), a nonprofit that purportedly "has as its purpose the advancement of consumer protections and rights." (Doc. 143-2, #4109). PIRG is not a party and is not a class member. It has not, so far as the Court knows, purchased any Macy's sheets. So it is not receiving part of the common fund because of any injury it sustained at Macy's hands. Rather, PIRG will receive a portion of the class fund under what is termed the cy pres doctrine.
>
> Cy pres—"as near as possible"—developed in the charitable trust context. *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). It arose out of the need to distribute the assets of a trust in accordance with the trust's purpose when no beneficiaries had claimed the assets and they would otherwise lie dormant. *Id*. As applied to class actions, the doctrine provides a mechanism for parties to distribute proceeds of a common fund that, because of administrative difficulties, cannot be distributed to the class. See *Id*.
>
> The validity and scope of cy pres awards in class actions is a subject of debate. Some jurists decry cy pres awards as a form of civil fine, extracting more from a defendant than a lawsuit could justify under a compensatory framework. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481-82 (5th Cir. 2011) (Jones, C.J., concurring). Others view the doctrine as a useful tool to indirectly benefit the class. *In re Google Inc. Street View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1116 (9th Cir. 2021). Two amici filed briefs with the Court to discuss the award here, one arguing that the cy pres award is unlawful, the other seeking its approval in the settlement. (Doc. 158; Doc. 165).
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> * * *
>
> In sum, contrary to the parties' argument, the cy pres doctrine does not provide the Court with freewheeling authority to dole out class funds to unrelated parties, merely because they happen to be charitable organizations. Article III courts resolve cases and controversies; they are not a legislature that appropriates funds in pursuit of the public good. Consistent with that, the Court's role is to adjudicate the legal rights of the parties before it. In the class setting, that means the Court has an obligation to ensure that settlement proceeds benefit the class. The cy pres doctrine simply allows for a distribution that achieves those benefits indirectly. The question, then, is not what may be a good use of funds, or even the best use of funds, in some generic sense. Rather the sole question is the next best use from the class's perspective as measured against

a direct distribution to absent class members. To clear that threshold, the cy pres award must at least benefit the class indirectly by either (1) remedying the underlying harm, or (2) reducing similar harms in the future. The thrust of PIRG's work—which runs the gamut from climate change to product safety, but does not seem to have a meaningful consumer education or mislabeling component—is far too attenuated or remote from the interests underlying this suit. Compare PIRG's work with, for example, the National Advertising Division of the Better Business Bureau. The latter exists entirely to address false advertising, which it does by conducting its own investigations into advertising campaigns and referring certain practices to the FTC. See https://perma.cc/5WAK-BZ8D. While not a perfect fit, programs such as that one seem, at least at first glance, far more narrowly tailored to the class's interests here.

The bottom line is that the cy pres award included in the Settlement Agreement diverts class funds to an unrelated third party, whose use of the funds will not benefit the class's interests here, directly or indirectly. Thus, the Court concludes it must reject the settlement.

10. Andrew Rodheim, Notes, *Class Action Settlements, Cy Pres Awards, And The* Erie *Doctrine,* 111 NORTHWESTERN UNIV. L. REV. 1097 (2017). The footnotes in this article give a short summary of the prescribed allocation of residual funds:

> Twenty-one states have codified specific rules regarding cy pres awards.[67] These state laws have varying levels of restrictiveness.[68] The states of Colorado, Illinois, Indiana, Kentucky, Montana, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, and Wisconsin require that settlement funds be disbursed to legal aid organizations.[69] On the other hand, California, Hawaii, Louisiana, Massachusetts, New Mexico, and Tennessee have codified cy pres awards but do not specify a particular charitable organization to receive the funds; these states expressly allow—but do not mandate—legal aid organizations to be the recipient.[70] Finally, Connecticut, Maine, and Nebraska have codified class action cy pres awards by specifying particular legal aid charities to receive the award, but provide the court and litigants discretion to choose a different charitable organization that may do a better job of representing the interests of the plaintiff class and may better serve as a second-best alternative to compensating the class members directly.[71]
>
> [Note 67] The states with codified cy pres rules are: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, and Wisconsin. See MEREDITH MCBURNEY, AM. BAR ASS'N, LEGISLATION AND COURT RULES PROVIDING FOR LEGAL AID TO RECEIVE CLASS ACTION RESIDUALS (2017), htp://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_cypres.authcheckdam.pdf [https://perma.cc/GS7K-6XX3].

[Note 68] See Emily C. Baker & Lynsey M. Barron, Cy Pres . . . Say What? State Laws Governing Disbursement of Residual Class-Action Funds, http://www.jonesday.com/files/Publication/d5da170fe20d- 4f96-aec1-12cf62115d70/ resentation/PublicationAttachment/fbbc24cf-ffcd-43ed-98babe026d39ef17/cypres2 .pdf [https://perma.cc/3EG3-GEZ9] ("There is wide variation . . . in terms of whether the cy pres statutes are mandatory, the default, or merely suggested.").

[Note 69] See COLO. R. CIV. P. 23(g) ("[N]ot less than fifty percent (50%) of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado); 735 ILL. COMP. STAT. 5/2-807 (2017) (requiring that at least 50% of residual funds be disbursed to "eligible organizations," which must "promot[e] or provid[e] services that would be eligible for funding under the Illinois Equal Justice Act"); IND. R. TRIAL P. 23(F)(2) ("[N]ot less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts."); KY. R. CIV. P. 23.05(6)(b) ("[N]ot less than twenty-five percent (25%) of the residual funds shall be disbursed to the Civil Rule 23 Account . . . to be allocated to the Kentucky Civil Legal Aid Organizations . . . to support activities and programs that promote access to the civil justice system for low-income residents of Kentucky."); MONT. R. CIV. P. 23(i)(3) ("[N]ot less than fifty percent (50%) of the residual funds shall be disbursed to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system."); N.C. GEN. STAT. § 1-267.10(b) (2016) ("[T]he court . . . shall direct the defendant to pay the sum of the unpaid residue . . . to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents."); OR. R. CIV. P. 32(O) ("At least 50 percent of the amount not paid to class members [shall] be paid or delivered to the Oregon State Bar for the funding of legal services provided through [Oregon's] Legal Services Program . . . ."); PA. R. CIV. P. 1716 ("Not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by nonprofit corporations . . . ."); S.C. R. CIV. P. 23(e)(2) ("[N]ot less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina."); S.D. CODIFIED LAWS § 16-2-57 (2017) (requiring that at least 50% of residual funds be disbursed "to the Commission on Equal Access to Our Courts"); WIS. STAT. § 803.08(2) (2017) ("[N]ot less than fifty percent of the residual funds shall be disbursed to [the Wisconsin Trust Account Foundation] to support direct delivery of legal services to persons of limited means in non-criminal matters."); WASH. SUPER. CT. CIV. R. 23(f)(2) ("[N]ot less than twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of

Washington State.").

[Note 70] See CAL. CODE CIV. P. § 384(b) (providing that residual funds should be distributed "to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent"); HAW. R. CIV. P. 23(f) (providing that residual funds can be distributed to various nonprofit organizations, including legal aid organizations); LA. SUP. CT. R. XLIII(2) (providing that cy pres funds "may be disbursed . . . to one or more non-profit or governmental entities . . . including the Louisiana Bar Foundation"); MASS. R. CIV. P. 23(e)(2) (providing that "residual funds . . . shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons)"); N.M. R. CIV. P. DIST. CT. 1-023(G)(2) (providing that residual funds can be disbursed to, amongst other options, "nonprofit organizations that provide legal services to low income persons"); TENN. R. CIV. P. 23.08 (providing that the "[d]istribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans . . . is permissable [sic] but not required").

[Note 71] See CONN. R. SUPER. CT. CIV. R. 9-9(g)(2) (providing that residual funds should be disbursed "for the purpose of funding those organizations that provide legal services for the poor in Connecticut" absent a designation by the parties); ME. R. CIV. P. 23(f)(2) (providing that residual funds should be disbursed to the Maine Bar Foundation unless the parties agree on another entity to receive the funds); NEB. REV. STAT. § 25-319.01 (2017) (providing that residual funds should be paid to the Legal Aid and Services Fund "unless [the court] orders otherwise to further the purposes of the underlying cause of action").

TRCP 42 Class Actions

Sample Ballot
Disposition of Residual Class Action Funds
Reflecting Preferences of Supreme Court
Advisory Committee Members

OPTIONS	1st choice	2nd choice	3rd choice
1. Leave Rule 42 unchanged (no constraints)			
2. Distribute to class members who file claims			
3. Return excess funds to Defendants			
4. Distribute to an entity serving interests "as near as possible to that of the class," chosen by lawyers/judge subject to appellate review			
5. Lawyers pick any donee(s), subject to trial court approval & appellate review			
6. Lawyers pick donee(s) from list, subject to trial court approval & appellate review			
7. 100% to Tx Access to Justice Foundation			
8. 50% to TAJF, rest to cy pres or donee selected under 5 above subject to court approval & appellate review			
9. 50% to TAJF, rest to cy pres or donee selected under 6 above subject to court approval & appellate review			
10. Escheat funds to state for specific purposes			
11. Escheat funds to state for unrestricted use			
12. Other			

APPROACHES TO CLASS ACTION RESIDUAL FUNDS

1. ALI Principles of the Law of Aggregate Litigation	When feasible, identify recipients with interests reasonably approximate to interests of class; if none can be identified, court may approve recipient who does not reasonably approximate the interests being pursued by the class.
2. California Code	To nonprofits or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.
3. Colorado Rule	At least 50% shall be disbursed to the Colorado Lawyer Trust Account Foundation to support activities and programs that promote access to the civil justice system for low income residents. Balance distributed to CLTAF or other entity for purposes having a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class
4. Connecticut Rule	Judgment or settlement may designate recipients. Absent designation, disburse to IOLTA administrator to fund organizations that provide legal services for the poor.
5. D.C. Comment to Rule	First consider distribution closely related to original purpose of class. If not possible, consider other public interest purposes by educational, charitable, and other public service organizations, including charitable donations ... to support non-profit provision of pro bono legal services. Court may solicit applications. Court may allocate some or all of the residual funds to an organization such as the D.C. Bar Foundation or other local bar associations that have already implemented procedures for the distribution of funds to public service organizations.
6. Hawaii Rule	Court's discretion on timing and method of distribution of residual funds and to approve the recipient(s), as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund.
7. Illinois Statute	Distribute to eligible organizations, except that up to 50% of the residual funds may be distributed to nonprofits or charitable organizations or other organizations that serve the public good if the court finds good cause. Eligible Organization: existed and tax exempt for 3 or more years, with a "principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act."

8. Indiana Rule	At least 50% to Indiana Bar Foundation to support Coalition for Court Access. Remainder to the IBF or other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.
9. Kentucky Rule	At least 25% to Kentucky IOLTA Fund Board of Trustees to allocate to Civil Legal Aid Organizations who support access to the civil justice system for low-income residents.
10. Louisiana Rule	Non-profit or governmental entities that support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action, including the Louisiana Bar Foundation to support activities that promote direct access to the justice system.
11. Maine Rule	Parties may agree to distribute to an entity whose interests reasonably approximate those being pursued by the class. When such a recipient is not clear, pay to Maine Bar Foundation to distribute in the same manner as IOLTA funds.
12. Massachusetts Rule	Disburse to nonprofits or foundations that support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action, or to the Massachusetts IOLTA Committee.
13. Montana Statute	At least 50% to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system. Court may disburse the rest to an Access to Justice Organization or to another non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class
14. Nebraska Rule	Ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed to promote justice for all citizens of this state. The court, unless it orders otherwise to further the purposes of the underlying cause of action, shall direct the defendant to pay the sum of the unpaid residue to the Legal Aid and Services Fund.
15. New Mexico Rule	Disburse to: nonprofits that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based; educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based; nonprofits that provide legal services to low income persons; entity administering the IOLTA fund; the entity administering the pro hac vice fund.

16. North Carolina Rule	Distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. Unless the court rules otherwise, the court shall direct the defendant to pay the sum of the unpaid residue, to be divided equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents
17. Oregon Rule	At least 50%to the Oregon State Bar for the funding of legal services provided through the Legal Services Program, and the rest to any entity for purposes that the court determines are directly related to the class action or directly beneficial to the interests of class members.
18. Pennsylvania Statute	At least 50% to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by non-profit corporations described in Section 501(c)(3); rest to entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.
19. South Carolina Rule	At least 50% to South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina; rest to the South Carolina Bar Foundation to other entity for purposes having a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class
20. South Dakota Statute	Residual funds after agreed-upon reversions to the defendant that are approved by the court, shall distribute to the Commission on Equal Access to Our Courts; however, up to 50% may be distributed to nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement.
21. Tennessee Rule	Court’s discretion to approve recipient of residual funds. Distribution to a program or fund serving the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation, is permissible but not required.
22. Washington Rule	At least 50% to Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents. The remainder to the Legal Foundation of Washington or any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

23. Wisconsin Statute	At least 50% to WisTAF to support direct delivery of legal services to persons of limited means in non-criminal matters. Court may disburse the remainder beyond the minimum % to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

APPENDIX

1. The American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010)

Section 3.07

A court may approve a settlement that proposes a cy pres remedy.... The court must apply the following criteria in determining whether a cy pres award is appropriate:

(a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should 1064 be distributed directly to individual class members.

(b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

(c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach. The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient whose interest reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

2. California Code of Civil Procedure § 384:

(a) It is the policy of the State of California to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed, to the fullest extent possible, in a manner designed either to further the purposes of the underlying class action or causes of action, or to promote justice for all Californians. The Legislature finds that the use of funds for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Except as provided in subdivision (c), before the entry of a judgment in a class action established pursuant to Section 382 that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable

to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent. The court shall ensure that the distribution of any unpaid residue or unclaimed or abandoned class member funds derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers. For purposes of this subdivision, "judgment" includes a consent judgment, decree, or settlement agreement that has been approved by the court.

(c) This section shall not apply to any class action brought against any public entity, as defined in Section 811.2 of the Government Code, or against any public employee, as defined in Section 811.4 of the Government Code. However, this section shall not be construed to abrogate any equitable cy pres remedy that may be available in any class action with regard to all or part of the cash residue or unclaimed or abandoned class member funds.

3. Colorado Rule of Civil Procedure 23(g) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment, or approved settlement in a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, if any. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado. The court may disburse the balance of any residual funds beyond the minimum percentage to COLTAF or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

4. Connecticut Ch. 9, Sec. 9-9 – Procedure for Class Certification and Management of Class

(g) (1) ‘‘Residual funds’’ are funds that remain after the payment of approved class member claims, expenses, litigation costs, attorney’s fees, and other court-approved disbursements made to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from recommending, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved settlement in a class action that establishes a process for identifying and compensating members of the class may designate the recipient or recipients of any such residual funds that may remain after the claims payment process has been completed. In the absence of such designation, the residual funds shall be disbursed to the organization administering the program for the use of interest on lawyers’ client funds pursuant to General Statutes § 51-81c for the purpose of funding those organizations that provide legal services for the poor in Connecticut.

Comments to 2017 Rule Amendments.

If a class action is settled and residual funds remain after all identified members of the class have received their proper distribution, the court may turn to conventional principles of equity to resolve the case. Traditionally, there are four ways by which a court may distribute the residual funds: 1) pro rata distribution to the class members; 2) reversion to the defendant; 3) escheat to the government; and 4) cy pres distribution. *See*, *e.g.*, *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997). It is generally understood that “neither party has a legal right to the unclaimed funds.” *Id*. *See also Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007) . When determining which method of distribution is most appropriate, the court’s choice “should be guided by the objectives of the underlying statute and the interests of the silent class members.” *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

In the case of a cy pres distribution of the residual funds, the court should first consider whether the funds can be distributed in a manner that is closely related to the original purpose. *See Superior Beverage Co. v. Owens-Illinois*, Inc., 827 F. Supp. 477, 477-80 (N.D. Ill. 1993) . If no such distribution is possible, the court may use its equitable powers to consider “other public interest purposes by educational, charitable, and other public service organizations,” including “charitable donations... to support non-profit provision of pro bono legal services.” *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (citing *Superior Beverage Co.*, 827 F. Supp. at 478-79) (internal quotation marks omitted). The court may solicit applications for cy pres grants by public notice and, if necessary, hold hearings to give the applicants a chance to be heard. Alternatively, the court may allocate some or all of the residual funds to an organization such as the D.C. Bar Foundation or other local bar associations that have already implemented procedures for the distribution of funds to public service organizations.

5. District of Colombia

COMMENT TO 2017 AMENDMENTS

If a class action is settled and residual funds remain after all identified members of the class have received their proper distribution, the court may turn to conventional principles of equity to resolve the case. Traditionally, there are four ways by which a court may distribute the residual funds: 1) pro rata distribution to the class members; 2) reversion to the defendant; 3) escheat to the government; and 4) cy pres distribution. *See*, *e.g.*, *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997). It is generally understood that "neither party has a legal right to the unclaimed funds." Id. *See also Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007). When determining which method of distribution is most appropriate, the court's choice "should be guided by the objectives of the underlying statute and the interests of the silent class members." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

In the case of a cy pres distribution of the residual funds, the court should first consider whether the funds can be distributed in a manner that is closely related to the original purpose. *See Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 477-80 (N.D. Ill. 1993). If no such distribution is possible, the court may use its equitable powers to consider "other public interest purposes by educational, charitable, and other public service organizations," including "charitable donations . . . to support non-profit provision of pro bono legal services." *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (citing *Superior Beverage Co.*, 827 F. Supp. at 478-79) (internal quotation marks omitted). The court may solicit applications for cy pres grants by public notice and, if necessary, hold hearings to give the applicants a chance to be heard. Alternatively, the court may allocate some or all of the residual funds to an organization such as the D.C. Bar Foundation or other local bar associations that have already implemented procedures for the distribution of funds to public service organizations.

6. Hawaii R. Civ. P. 23(f).

(f) Distribution. Prior to the entry of any judgment under subdivision (c)(3) or the approval of any compromise under subdivision (e), the court shall determine the total amount payable to each class member. The court shall set a date when the parties shall report to the court the total amount actually paid to class members. After the report is received, the court shall direct the defendant, by order entered on the record, to distribute the sum of any unpaid residue after the payment of approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements. Unless otherwise required by governing law, it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties,

including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawai'‘ Justice Foundation, for distribution to one or more of such organizations.

7. Illinois Sec. 2-807. Residual funds in a common fund created in a class action.

(a) Definitions. As used in this Section:

"Eligible organization" means a not-for-profit organization that:

(i) has been in existence for no less than 3 years;
(ii) has been tax exempt for no less than 3 years from the payment of federal taxes under Section 501(c)(3) of the Internal Revenue Code;
(iii) is in compliance with registration and filing requirements applicable pursuant to the Charitable Trust Act and the Solicitation for Charity Act; and
(iv) has a principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act.

"Residual funds" means all unclaimed funds, including uncashed checks or other unclaimed payments, that remain in a common fund created in a class action after court-approved payments are made for the following:

(i) class member claims;
(ii) attorney's fees and costs; and
(iii) any reversions to a defendant agreed upon by the parties.

(b) Settlement. An order approving a proposed settlement of a class action that results in the creation of a common fund for the benefit of the class shall, consistent with the other Sections of this Part, establish a process for the administration of the settlement and shall provide for the distribution of any residual funds to one or more eligible organizations, except that up to 50% of the residual funds may be distributed to one or more other nonprofit charitable organizations or other organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of a settlement.

(c) Judgment. A judgment in favor of the plaintiff in a class action that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to one or more eligible organizations.

(d) State and its political subdivisions. This Section does not apply to any class action lawsuit against the State of Illinois or any of its political subdivisions.

(e) Application. This Section applies to all actions commenced on or after the effective

date of this amendatory Act of the 95th General Assembly and to all actions pending on the effective date of this amendatory Act of the 95th General Assembly for which no court order has been entered preliminarily approving a proposed settlement for a class of plaintiffs.

8. Indiana Trial Rule 23-F (effective January 1, 2011).

(F) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the trial court from approving a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, unless otherwise agreed. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Coalition for Court Access. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

9. Kentucky Rule of Civil Procedure 23.05 - Dismissal or compromise.

(6) Disposition of Residual Funds

(a) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney's fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from agreeing to, or the trial court from approving, a settlement that does not creat residual funds.

(b) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20). Such funds are to

be allocated to the Kentucky Civil Legal Aid Organizations based upon the current poverty formula established by the Legal Services Corporation to support activities and programs that support access to the civil justice system for low-income residents of Kentucky.

10. Louisiana, Rule XLIII, Cy Pres Awards [Enacted effective September 27, 2012]

Section 1. For purposes of this rule, "Cy Pres Funds" shall refer to all funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees and other court-approved disbursements to implement the relief granted. It shall not refer to any such remaining funds that are otherwise distributed by the parties through class settlement, including funds to be returned to one or more parties.

Section 2. In matters where the claims process has been exhausted and Cy Pres Funds remain, such funds may be disbursed by the trial court to one or more non-profit or governmental entities which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, including the Louisiana Bar Foundation for use in its mission to support activities and programs that promote direct access to the justice system.

Section 3. All disbursements of Cy Pres Funds made pursuant to this Rule shall be reported to the Office of the Judicial Administrator of the Louisiana Supreme Court.

11. Maine Rule of Civil Procedure 23

(f) Payment of Residual Funds.

(1) "Residual funds" are those funds, if any, that remain after reasonable efforts to pay approved class member claims and make other approved disbursements, including any return of funds to the settling defendant, called for by a settlement agreement approved under subdivision (e) of this Rule.

(2) The parties may agree that residual funds be paid to an entity whose interests reasonably approximate those being pursued by the class. When it is not clear that there is such a recipient, unless otherwise required by governing law, the settlement agreement should provide that residual fees, if any, be paid to the Maine Bar Foundation to be distributed in the same manner as funds received from interest on lawyers trust accounts pursuant to M. Bar R. 6(a)(2)-(5).

Advisory Notes – January 2013

When settlements of class actions result in payments to class members, especially by

mail, often some payments will not be claimed, leaving "residual" funds that are not allocated to class members because the cost of distribution will equal or exceed the amounts involved. Anticipating such a possibility, the parties to a class action settlement often seek court approval to distribute residual funds to a third party in what is sometimes analogized to cy pres distributions under trust law. *See generally* 2 J. McLaughlin, McLaughlin on Class Actions, Law and Practice § 8:15 (7th ed. 2011). Practice and reason counsel that, when possible, the parties choose a third party whose interests reasonably approximate those being pursued by the class members. See Principles of the Law of Aggregate Litigation § 3.07(c) (2010). Often, though, the nature of the suit or the class members will be such that there is not an obvious third party recipient whose interests reasonably approximate those of the class members.

Against this background, this new Rule 23(f) accomplishes two aims. First, it confirms the appropriateness of the generally recognized practice of providing for distributions of residual funds to third parties. Second, it specifies that when it is not clear that there is a third party whose interests reasonably approximate those being pursued by the class, the Maine Bar Foundation, which manages and distributes IOLTA funds, should be the recipient.

Specifying the selection of the Maine Bar Foundation in such circumstances has two advantages. First, it eliminates any possibility that a recipient is being chosen to benefit or garner credit for the defendant, for plaintiffs' counsel, or for the court. Second, the principal aim of the Maine Bar Foundation—to support efforts to widen access to justice for those who cannot afford it—aligns with a basic aim of Rule 23 itself. See *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 345-46 (S.D. Ga. 1996), *aff'd without op.*, 117 F.3d 1433 (11th Cir. 1997) (stating that one of the purposes of class action lawsuits is "to provide a feasible means for asserting the rights of those who 'would have no realistic day in court if a class action were not available'" (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985))). As the Supreme Court has observed, in adopting Rule 23 of the federal rules, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)).

12. Massachusetts Rule 23, Class Actions

(c) Dismissal or compromise

A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs. The court shall require notice to the Massachusetts IOLTA Committee for the purpose set forth in subdivision (e)(3) of this rule.

* * *

(e) Disposition of residual funds

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved compromise in a class action certified under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.

(3) Where residual funds may remain, no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA Committee for the limited purpose of allowing the committee to be heard on whether it ought to be a recipient of any or all residual funds. The plaintiff shall provide such notice no later than 30 days prior to the entry of judgment or any hearing approving any compromise that creates residual funds. If no later than 10 days prior to the entry of judgment or such hearing, the court does not receive a certification by the plaintiff that the required notice has been provided to the Massachusetts IOLTA Committee, no judgment shall enter and any such hearing shall be continued to a date at least 30 days after the required notice has been provided and certification of such is submitted to the court.

Reporter's Notes--2023

This amendment deals with the notice required before residual funds in class action proceedings may be distributed.

Since 2009, residual funds were required to be disbursed to nonprofit groups "which

support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based" or to the Massachusetts IOLTA Committee for the purpose of promoting access for low-income persons to the civil justice system. Rule 23(e)(2). A 2015 amendment to Rule 23 required the plaintiff to provide notice to the Massachusetts IOLTA Committee so that it may be heard on whether it should receive "any or all" residual funds that may remain in a class action after all payments have been made. Rule 23(e)(3). See also, Rule 23(c), as amended in 2015.

Subsequently, the Massachusetts IOLTA Committee informed the Standing Advisory Committee on the Rules of Civil Procedure that it believed that the 2015 amendment was not working because the Massachusetts IOLTA Committee was not receiving regular notices of class action settlements and judgments, notwithstanding the requirement of notice in Rule 23(c). The Massachusetts IOLTA Committee requested that Rule 23 be further amended to set up a more efficient procedure that would ensure that it receives notices.

As amended, Rule 23(e)(3) requires that prior to entry of judgment or prior to any hearing approving a compromise that creates residual funds, the plaintiff is required to provide notice to the Massachusetts IOLTA Committee at least 30 days before the entry of judgment or the hearing. If, no later than 10 days prior to entry of judgment or prior to a hearing approving a compromise, the court has not received a certification from the plaintiff that the notice has been sent to the Massachusetts IOLTA Committee, a judgment shall not enter and any hearing regarding approval of a compromise shall be continued until at least 30 days after notice has been provided and the plaintiff so certifies to the court. The language requiring notice to be given to the IOLTA Committee at least 30 days before a hearing approving a compromise is intended also to include any hearing preliminarily approving any compromise that creates residual funds.

The purpose of the certification procedure is to provide the Massachusetts IOLTA Committee with sufficient notice so that it has an opportunity to be heard on the issue of disposition of residual funds.

13. Montana Code Annot. 2023; Rule 23, Class Actions.

(i) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees and other court-approved disbursements. This rule does not prohibit the trial court from approving a settlement that does not create residual funds.

(2) "Access to Justice Organization" means a Montana non-profit entity whose purpose is to support activities and programs that promote access to the Montana

civil justice system.

(3) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to an Access to Justice Organization or to another non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

14. Nebraska Revised Statute 25-319.01.

Class action litigation; unpaid residue; payment by defendant.

(1) It is the intent of the Legislature to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed to promote justice for all citizens of this state. The Legislature finds that the use of funds collected by state courts pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(2) Prior to the entry of any judgment or order approving settlement in a class action described in section 25-319, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise to further the purposes of the underlying cause of action, shall direct the defendant to pay the sum of the unpaid residue to the Legal Aid and Services Fund.

15. New Mexico Rule of Civil Procedure Dist. Ct. 1-023

G. Residual funds to named organization.

(1) For purposes of Paragraph (G)(2) of this rule, "residual funds" are

(a) unclaimed funds, including uncashed checks and other unclaimed payments, that remain after payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements or

dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor's own funds; or

(b) if it is impossible or economically impractical to distribute the common fund to the class at all, the entire common fund after payment of all approved expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor's own funds.

(2) Either in its order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class or by a subsequent order entered when residual funds are determined to exist, the court shall provide for the disbursement of residual funds, if any, to one or more of the following entities:

(a) nonprofit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based;

(b) educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based;

(c) nonprofit organizations that provide legal services to low income persons;

(d) the entity administering the IOLTA fund under Rule 24-109 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico; and

(e) the entity administering the pro hac vice fund under Rule 24-106 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico.

(3) Nothing in this paragraph is intended to prevent the parties to a class action from proposing, or the trial court from approving, a settlement that does not create residual funds.

16. North Carolina Art. 26B, §1.267.10. Distribution of unpaid residuals in class action litigation.

(a) It is the intent of the General Assembly to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. The General Assembly finds that the use of funds collected by the State courts pursuant to this section for these purposes is in the public interest, is

a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents.

17. Oregon R. Civ. P. 32(O), Payment of Damages.

(O) Payment of damages. As part of the settlement or judgment in a class action, the court may approve a process for the payment of damages. The process may include the use of claim forms. If any amount awarded as damages is not claimed within the time specified by the court, or if the court finds that payment of all or part of the damages to class members is not practicable, the court shall order that:

(1) At least 50 percent of the amount not paid to class members be paid or delivered to the Oregon State Bar for the funding of legal services provided through the Legal Services Program established under ORS 9.572; and

(2) The remainder of the amount not paid to class members be paid to any entity for purposes that the court determines are directly related to the class action or directly beneficial to the interests of class members.

18. Pennsylvania – 231 Pa. Code § 1716, Residual Funds.

a) Any order entering a judgment or approving a proposed compromise or settlement of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.

(b) Not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by non-profit corporations described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The order may provide for disbursement of the balance of any residual funds in excess of those payable to the Pennsylvania Interest on Lawyers Trust Account Board to the Pennsylvania Interest on Lawyers Trust Account Board, or to another entity for purposes that have a direct

or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

19. South Carolina Rule Civil Procedure 23(e)

(e) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment, or approved compromise in a class action under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina. The court may disburse the balance of any residual funds beyond the minimum percentage to the South Carolina Bar Foundation to any other entity or entities for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class.

Note to 2016 Amendment:

This amendment directs that a portion of any residual funds in a class action matter be distributed to the South Carolina Bar Foundation to promote access to the civil justice system for low income residents of South Carolina. However, the rule does not require that parties create residual funds as part of any class action settlement

20. South Dakota Codified Laws § 16-2-57, Settlement of class action lawsuit.

Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement. For the purposes of this section, residual funds are any funds left over after payment of class member claims, attorney fees and costs, and any reversions to a defendant agreed upon by the parties and approved by the court. This section does not apply to any class action lawsuit against the State of South Dakota or any of its political subdivisions.

21. Tennessee Rule of Civil Procedure 23.08

Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

It shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds. A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court's own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this rule.

22. Washington Superior Court Civil Rule 23, Class Actions

(f) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

23. Wisconsin Statues §803.08, Class Actions

(10) Disposition of residual funds.

(a) In this subsection:

1. “Residual funds" means funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney fees, and other court-approved disbursements in an action under this section.

2. “WisTAF" means the Wisconsin Trust Account Foundation, Inc.

(b)

1. Any order entering a judgment or approving a proposed compromise of a class action that establishes a process for identifying and compensating members of the class shall provide for disbursement of any residual funds. In class actions in which residual funds remain, not less than 50 percent of the residual funds shall be disbursed to WisTAF to support direct delivery of legal services to persons of limited means in non-criminal matters. The circuit court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

2. This subsection does not prohibit the trial court from approving a settlement that does not create residual funds.

Tab K

TEXAS ACCESS TO JUSTICE COMMISSION

1414 Colorado Street, Suite 604
Austin, Texas 78701
(512) 463-1463, ext. 2155
(800) 204-2222, ext. 2155
(512) 477-8302 Fax
www.TexasATJ.org

MEMORANDUM

TO: **Supreme Court Rules Advisory Committee**

FROM: John R. Jones, Chair, Texas Access to Justice Commission

DATE: September 12, 2002

RE: **Texas Access to Justice Commission Recommendations on Rule 42**

Enclosed please find a proposed amendment to Rule 42 designed to improve access to justice for the 3.1 million Texans who fall below federal poverty guidelines.

The rule change would affect the settlement process in class action lawsuits so as to encourage the parties and the courts to consider whether funds that cannot be distributed directly to class members may be instead used to expand access to the courts. While the rule requires the *consideration* of such awards when *cy pres* funds may be available, it does not obligate the parties nor the court to ultimately order that funds be awarded to civil justice programs.

The Joint Texas Access to Justice Commission/Texas Equal Access to Justice Foundation Resource Committee, working with the staff of Texas Legal Services Center, developed the draft rule and supporting materials. Several other state planning commissions have developed similar recommendations, although Texas is now in the lead in formally requesting the Court to implement the rule change. As noted in background materials, a statutory requirement already exists in California that is similar in scope.

Texas is facing a crises situation with recent drops in interest rates that have heavily impacted IOLTA revenue. Staff at the Texas Equal Access to Justice Foundation are now expecting a total revenue drop in excess of $1.2 million that will likely result in sharp grant reductions to legal aid and pro bono organizations. In addition, federal funding for Texas programs will be reduced as a result of census adjustments. On behalf of the members of the Texas Access to Justice Commission, I respectfully request that your Committee assist us on an expedited basis in placing this rule change before the Court for their consideration early this fall.

Please contact me if you have any questions about the proposed rule change or the supporting materials. Thank you for your assistance and courtesy.

TEXAS ACCESS TO JUSTICE COMMISSION

1414 Colorado Street, Suite 604
Austin, Texas 78701
(512) 463-1463, ext. 2155
(800) 204-2222, ext. 2155
(512) 477-8302 Fax
www.TexasATJ.org

September 12, 2002

Honorable Andrew Weber
Clerk of the Supreme Court of Texas
201 W. 14th, Room 104
Austin, Texas 78701

Re: TATJC Policy Recommendation No. 3: Amendment to Texas Rules of Civil Procedure 42

Dear Mr. Weber:

The purpose of this letter is to file with and forward to the Supreme Court of Texas Policy Recommendations No. 3 of the Texas Access to Justice Commission ("TATJC") proposing an amendment to Rule 42 of the Texas Rules of Civil Procedure governing class actions. In cases involving class action settlements, there may be funds available for which there is no primary designated beneficiary. Using the *cy pres* doctrine, the parties, subject to court approval, normally designate a substitute beneficiary for funds that may not be economically distributed to class members. This amendment establishes a standard procedure whereby courts will consider whether or not orders approving settlements will provide for the distribution of funds to assist in the delivery of civil legal services to the poor.

Background

1. ***Why is such an amendment needed?*** Without such an amendment, trial courts may not realize that such distribution is permissible, and they may believe that undistributable funds should revert back to the party(ies) found liable in the class action. Such an amendment would be another step toward meeting the civil legal needs of poor persons in Texas. On January 27, 2000, the State Bar of Texas presented to the Texas Supreme Court a Status Report on Civil Legal Services to the

Poor (Appendix A to this letter). In that report, the State Bar made clear that existing resources are vastly inadequate to meet the needs for civil legal services for low-income Texans. Current resources include funds from the Legal Services Corporation (LSC), the Interest on Lawyers Trust Accounts (IOLTA), a civil court filing fee add-on (which generates the Basic Civil Legal Services fund, known as BCLS), state funding for crime victims assistance, and even license plates ("And Justice for All"). Despite these multiple resources, the State Bar informed the Supreme Court, in its report, that "[F]or approximately 70% [of identified legal problems of low-income Texans] no legal advice or assistance was available." Status Report on Civil Legal Services to the Poor in Texas, p. 6, submitted by the State Bar of Texas to the Supreme Court of Texas on January 27, 2000 (Appendix A). More recently, the IOLTA funds available for civil legal services have been cut from record levels of approximately $10 million to the 2003 projected level of $4.9 million due to interest rate cuts and increases in bank service charges. Voluntary contributions, and other Bar sponsored measures have helped to somewhat ameliorate the revenue drops, but the fact remains that large shortfalls remain and applicants for civil legal assistance continue to be denied help on a daily basis.

2. ***How has this matter been dealt with up to now?*** Court after court has had to grapple with the problem of distributing funds recovered in class actions, when it has not been feasible and economical to make distribution to each absent class member. They have had to answer the question: What can a Court do with Leftover Class Action Funds? As one expert has responded: "Almost Anything!" Article by Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, The Judges' Journal, Summer, 1996, pp. 19 - 22, 44-45 (Appendix B). (With extensive citations to court cases.) In the *federal* court system, there is precedent for distributing otherwise undistributable class action awards to law-related entities. For instance, in *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust & Trade Regulation Reports, 711 (S.D. Tex. Oct. 6, 1987), six Texas law schools shared in a distribution of over $1 million. In *In re Folding Carton Antitrust Litigation*, 687 F.Supp. 1223 (N.D.Ill. 1988), aff'd in part, rev'd in part 881 F.2d. 494 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990), undistributable funds were used to establish a fellowship fund to support lawyers serving low-income persons. Appendix C has pertinent excerpts from the Orders of the Hon. Ann Claire Williams, then a District Court Judge, and now a Judge on the U.S. Court of Appeals for the 7th Circuit. California has dealt with the matter of undistributed class recoveries by means of its Code of Civil Procedure. Section 384 of the California Code of Civil Procedure, Appendix D, provides for the "Distribution of unpaid residuals in class action litigation." Nonprofit organizations providing civil legal services to the indigent are included among the permissible distributees. Section 384 (b), California Code of Civil Procedure (Appendix D).

The proposed amendment is a recognition that in many duly certified class actions, the monetary recovery cannot be feasibly and economically distributed to the absent class members. Likewise, in some instances, known as "entrepreneurial class actions," the relief provided to class members who can be located is limited to a discount coupon while the cash portion of the

settlement ends up elsewhere or is not distributed. This is unfortunate and thwarts the courageous efforts of trial judges who have properly determined that a recovery is due from the defendant(s), but cannot feasibly distribute that recovery in cash to the absent class members.

Class actions require the use of the legal system for resolution and often involve substantial amounts of judicial resources for which the general public receives no benefits. When these class actions generate monetary recoveries that cannot be distributed economically to absent class members, it is equitable for the legal system to receive recognition for its role in creating the recoveries. Thus, the TATJC believes it would be appropriate, in cases where distribution to absent class members is not feasible and economical, for the trial court to determine whether undistributable funds should be used to support and/or expand access to civil legal services for the poor. To this end, we propose that the Supreme Court of Texas enter an order amending the class action rule, T.R.C.P. 42, adding to present paragraph (c) a new subparagraph (4), namely:

Proposed Texas Rule of Civil Procedure 42 (c) (4):

> In any action certified pursuant to T.R.C.P. 42 in which the settlement or judgment includes a monetary award (by way of damages, equitable restitution, or other payment due from the defendant(s) to the class(es)), each party must serve on the Texas Equal Access to Justice Foundation notice of any hearing for preliminary approval of the settlement or judgment and notice of any final hearing to approve the settlement or judgment, and such notice must be served concurrent with notice to any other party of any such hearing. In any such action in which actual distribution to each affected class member is not reasonably and economically feasible, or in which there may be unclaimed funds by virtue checks that are not cashed or proofs of claim not submitted, the court shall have the discretion to issue a finding of fact as to whether those funds should be used to support access to civil legal services to the poor. If the court makes a finding of fact that those funds should be used to support access to civil legal services for the poor, the court shall direct the appropriate party to remit such undistributable funds to the Texas Equal Access to Justice Foundation. The Foundation shall use the remitted funds to support increased access to civil legal services for the poor.

The proposed rule change only has effect *after* the trial court has certified a case as a class action, and *after* any monetary award has already been determined. Thus, the proposal does not affect whether a case should be certified as a class action, nor does it affect the amount of any recovery. The proposal does not interfere with distributions to absent class members, when such distributions are feasible and economical. Even then, the proposal does not require that the trial court make any distribution for civil legal services for the poor. Rather, the trial court would make a finding of fact as to whether such a distribution for civil legal services for the poor should occur. If and only if the trial court rules in the affirmative, are the undistributable funds remitted to the Texas Equal Access to Justice Foundation. The funds would then be administered by the Texas Equal Access to Justice Foundation pursuant to existing, time-tested standards. This would enhance resources for civil legal services for the poor and address the current and expected additional shortages in IOLTA funding.

Respectfully submitted,

John R. Jones

John R. Jones, Chair
Texas Access to Justice Commission

Hon. Thomas R. Phillips, Chief Justice
Hon. Nathan L. Hecht, Justice
Hon. Craig T. Enoch, Justice
Hon. Priscilla R. Owen, Justice
Hon. Mike Schneider, Justice
Chris Greisel, Rules Attorney

Hon. Deborah G. Hankinson, Justice
Hon. Harriet O'Neill, Justice
Hon. Wallace B. Jefferson, Justice
Hon. Xavier Rodriguez, Justice

Tab L

March 13, 2024

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

Dear Mr. Babcock and the Supreme Court Advisory Committee:

The Texas Access to Justice Commission is writing to advocate that any revisions to Texas Rule of Civil Procedure 42 provide that 100% of all unclaimed class-action funds be distributed to the Texas Access to Justice Foundation. This revision concerns only those funds remaining after distribution of class action settlement funds to class members. The Texas Access to Justice Foundation administers IOLTA and other funds to ensure access to justice on a statewide basis. The Texas Access to Justice Foundation also has a long and successful track record of administering cy pres funds to increase access to justice in our state. The expertise for evaluating and monitoring programs that receive these funds lies within the Texas Access to Justice Foundation and the Commission believes that this proposal will produce the highest and best use of these resources. The Commission urges the Supreme Court Advisory Committee to adopt this recommendation.

This recommendation is consistent with how other states have responded to the call of the Conference of Chief Justices and the Conference of State Court Administrators last year for its member states to "adopt a rule or statute regarding residual funds for legal aid and related access to justice efforts." (A copy of the Resolution is attached.)

To date, twenty-five jurisdictions have adopted rules that direct the distribution of cy pres funds:

> California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin.

According to a petition to adopt similar rules pending in the Supreme Court of Arizona, **17 of the 25 states/territories specifically list the Interest on Lawyers' Trust Account ("IOLTA") program as the designated entity for receipt of residual funds.** (A copy of the Arizona petition is attached.)

IOLTA managers are "in the unique position, having a proven track record of disbursing and administrating funds to a broad array of programs that provide legal services and access to justice to those in [each respective state]." In Texas, the Texas Access to Justice Foundation is the statewide IOLTA manager.

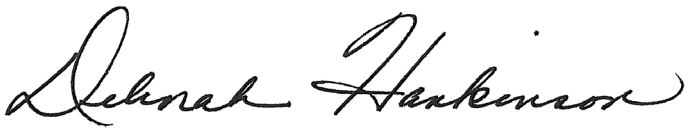
P.O. Box 12487 | Austin, Texas 78711 | T 512.427.1853 | F 512.427.4160 | www.texasatj.org

The Commission is committed to expanding access to justice in Texas and to closing the widening justice gap in our state. Too many vulnerable citizens are left out of the justice system because of inadequate funding for civil legal aid. This proposal is an opportunity to make a significant impact on the civil legal aid system in Texas. The Commission urges you to adopt its recommendation and propose to the Texas Supreme Court that it amend Texas Rule of Civil Procedure 42 to require the distribution of cy pres funds to the Texas Access to Justice Foundation.

Thank you for your continued support for access to justice in Texas.

Sincerely,

Harriet Miers
Chair, Texas Access to Justice Commission



Justice Deborah Hankinson
Chair, Texas Access to Justice Foundation

P.O. Box 12487 | Austin, Texas 78711 | T 512.427.1853 | F 512.427.4160 | www.texasatj.org

CONFERENCE OF CHIEF JUSTICES
CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 2

In Support of Efforts by State Supreme Courts to Increase Funding for Civil Legal Aid and Related Access to Justice Efforts Through Residual Funds in Class Action Cases

WHEREAS, the Conference of Chief Justices has consistently recognized the critical importance of its members' leadership in ensuring equal access to justice, including committing to work towards meaningful access to justice for all,[1] supporting State Supreme Court leadership in increasing funding for civil legal assistance,[2] and, most recently, supporting continuing efforts to meet civil legal needs[3]; and

WHEREAS, while there has been real progress towards improving access to the courts and expanding access to counsel throughout the country, studies continue to show that the great majority of low-income and middle-class Americans are unable to find affordable legal assistance when faced with significant civil legal problems[4]; and

WHEREAS, in class action cases, for a variety of reasons funds cannot always be fully distributed to all the class members who were the intended recipients, or these funds may go unclaimed[5]; and

WHEREAS, once courts conclude that reasonable efforts have been made to fully compensate the intended class action beneficiaries or that further distributions to the class are not feasible, courts are then required to determine or approve (in the case of settlements) where these residual funds should be directed; and

WHEREAS, one of the underlying goals of all class actions is to make access to justice a reality for people who could not realistically obtain the protections of the court system on their own; and

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[1] https://ccj.ncsc.org/__data/assets/pdf_file/0013/23602/07252015-reaffirming-commitment-meaningful-access-to-justice-for-all.pdf

[2] https://ccj.ncsc.org/__data/assets/pdf_file/0025/23749/07282010-in-support-of-state-supreme-court-leadership-in-increasing-funding-for-civil-legal.pdf

[3] https://ccj.ncsc.org/__data/assets/pdf_file/0016/60226/Resolution-2-In-Support-of-Continuing-Efforts-to-Meet-Civil-Legal-Needs.pdf

[4] https://lsc.gov/initiatives/justice-gap-research

[5] These situations occasionally arise in other types of cases as well, such as probate or bankruptcy matters.

WHEREAS, directing residual funds to legal aid organizations and related access to justice efforts furthers the purpose of class action lawsuits and the interests of the intended class action beneficiaries, regardless of the substantive legal issues in question, by expanding access to free and affordable legal representation, eliminating barriers that prevent litigants from using the court system to bring or defend legal claims, preparing courts to work more effectively for the self-represented litigants who comprise a growing share nationally of litigants in civil matters, and generally improving the administration of justice; and

WHEREAS, the Conference of Chief Justices previously has noted that state supreme courts have authority to promulgate rules governing residual fund awards to further their goal of increasing funding for legal assistance[6]; and

WHEREAS, at least 25 states and territories have adopted rules or statutes that require or specifically allow residual funds in class action cases to be directed to support legal aid or related access to justice efforts, including California, Colorado, Connecticut, Hawai`i, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wisconsin[7]; and

WHEREAS, these residual fund awards, often referred to as *cy pres* awards, are a significant source of funding for legal aid and related access to justice efforts throughout the country; and

WHEREAS, the American Bar Association in 2016 adopted Resolution 104 urging states "to adopt court rules or legislation authorizing the award of class action residual funds to nonprofit organizations that improve access to civil justice for persons living in poverty;" and

WHEREAS, many other national, state, and local bar and access to justice entities, including the National Association of IOLTA Programs, the National Legal Aid and Defender Association, and the Association of Pro Bono Counsel, have formally endorsed using class action residual fund awards to support legal aid and related access to justice efforts; and

---

[6] https://ccj.ncsc.org/__data/assets/pdf_file/0025/23749/07282010-in-support-of-state-supreme-court-leadership-in-increasing-funding-for-civil-legal.pdf

[7] The American Bar Association keeps a list of relevant rules and statutes on its website, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls-sclaid-atj-cypres.pdf. Vermont adopted its Court Rule after the most recent update of the list on the ABA website, https://casetext.com/rule/vermont-court-rules/vermont-rules-of-civil-procedure/iv-parties/rule-23-class-actions.

WHEREAS, by encouraging all states to adopt rules or statutes and to use their collective leadership to advance this goal, the Conference of Chief Justices would further its existing resolutions to enhance and promote meaningful access to justice and adequate funding for legal aid;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages its members to:

- Adopt a rule or statute regarding residual funds for legal aid and related access to justice efforts, if the state has not already done so;
- Publicize and promote the state's rule or statute regarding residual funds and the opportunity it creates to increase funding for civil legal aid and related access to justice efforts that will expand access to the justice system for self-represented litigants or otherwise further the goal of meaningful access to justice for all; and
- Collaborate with bar associations and bar foundations, IOLTA programs, access to justice commissions, the National Center for State Courts, and legal aid programs to plan and carry out effective strategies to implement the state's rule or statute and increase funding for legal aid and related access to justice efforts.

Adopted as proposed by the CCJ/COSCA Access and Fairness Committee at the CCJ 2023 Midyear Meeting on February 13, 2023.

Hon. Joseph Kreamer, on behalf of the
Arizona Foundation for Legal Services & Education
4201 N. 24th Street, Suite 210
Phoenix, Arizona 85016-6288
Telephone: (602) 340-7356

IN THE SUPREME COURT

STATE OF ARIZONA

	Supreme Court No.
PETITION TO AMEND RULE 23, ARIZONA RULES OF CIVIL PROCEDURE	**PETITION**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, acting on behalf of the Arizona Foundation for Legal Services & Education (the "Arizona Bar Foundation"), Hon. Joseph Kreamer, Arizona Bar Foundation Board President, petitions the Court to amend Rule 23 of the Arizona Rules of Civil Procedure to provide direction for the distribution of residual funds in class action cases where there are no statutory directives. The proposed rule amendment specifically would require any residual class action funds, without statutory directives, to be distributed to the Arizona Bar Foundation to grant to Arizona legal services nonprofit entities for use, in accordance with judicial instructions for the award, toward the provision of legal services and access to justice for low-income residents of Arizona. In support of this Petition, the Arizona Bar Foundation states the following:

I. Background and Purpose of the Proposed Amendment

This Petition arises from the Conference of Chief Justices and the Conference of State Court Administrators' Resolution 2 (Feb. 2023): *In Support of Efforts by State Supreme Courts to Increase Funding for Civil Legal Aid and Related Access to Justice Efforts Through Residual Funds in Class Action Cases*. This resolution encourages states to adopt rules that require or specifically allow residual funds in class action cases to be directed to support legal aid or related justice efforts.

In 2013 and in 2015, the Foundation submitted *cy pres* proposals, following the State Bar of Arizona's Access to Justice Task Force ("AJTF") recommendation. The AJTF was established in 2011 by the State Bar, and its members were drawn from a broad group of legal professionals. In their final report in the fall of 2011, the AJTF identified the use of *cy pres* awards distributed from class action residual funds to access to justice initiatives as a way to increase financial support for legal services. The 2013 and 2015 proposals did not clarify that the Foundation was proposing to administer the *cy pres* residual funds in accordance with the judgment in each specific case, similar to the responsibility the Arizona Supreme Court has given the Foundation with Interest on Lawyers' Trust Account ("IOLTA") revenue. This responsibility includes monitoring of compliance by the financial institutions and of the grantees

receiving funds, in addition to adherence to the uses as defined by Rule 43 of the Rules of the Supreme Court of Arizona.

This 2024 rule change proposal clarifies the intent for the Foundation to serve the Arizona Judicial Branch and the public interest in the same manner as it does with IOLTA revenue in managing the distribution of *cy pres* funds. As explained below, if the rule is adopted, Arizona would join the growing number of states that have established similar methods of disbursement for class action residual funds. Currently, there is no procedure or rule guiding Arizona trial courts on the disbursement of class action residual funds. The rule amendment proposed in this Petition would provide direction for the disbursement of these funds and is modeled after similar rules of civil procedure in Indiana, Pennsylvania, Tennessee, and Washington. The Foundation submitted a Petition to Amend Rule 23 of the Arizona Rules of Civil Procedure in December 2013, Supreme Court No. R-13-0061, which would have required that 50% of the residual funds go to the Foundation. The Court denied the petition. The Foundation submitted another Petition on the issue in January 2015, Supreme Court No. R-15-0007, proposing a more flexible provision on *cy pres* distributions to the Foundation. The Court also denied the second petition. The Foundation submits this Petition that requires disbursement of residual class action funds for all the same reasons given in the prior petitions and to assist the Arizona

Supreme Court meet the recommendations of the Conference of Chief Justices and the Conference of State Court Administrators' Resolution 2 (Feb. 2023).

II. Proposed Rule Amendment

The proposed rule amendment is a new subsection (i) in Rule 23 of the Arizona Rules of Civil Procedure. Here is the language for the proposed Rule 23(i):

> ***Rule 23(i). Disposition of Residual Funds in Class Action Cases.***
>
> ***(1) "Residual Funds" are (a) the funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted, or (b) if it is impossible or economically impractical to distribute the settlement or judgment funds to the class at all, the funds remaining after the payment of all approved expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the trial court from approving a settlement or order that does not create residual funds.***
>
> ***(2) Any order entering a judgment or approving a proposed compromise or settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class, or where such process is impossible or economically impractical, may provide for the disbursement of residual funds. In matters where residual funds remain and are not subject to statutory directives the residual funds shall be disbursed to the Arizona Foundation for Legal Services and Education to grant to Arizona legal services nonprofit entities for use, in accordance with judicial instructions for the award, toward the provision of legal services and access to the justice system for low-income residents of Arizona.***

Similar provisions have been implemented by twenty-four other states and one U.S. territory by rule or statute. The states adopting statutes include: California (1994), Illinois (2008), Nebraska (2014), North Carolina (2005), Oregon (2015), Puerto Rico (2017), South Dakota (2008), and Tennessee (2006). The states that have amended court rules/orders include: Colorado (2016), Connecticut (2015), Hawaii (2011), Indiana (2011), Kentucky (2014), Louisiana (2012), Maine (2013), Massachusetts (2009), Michigan (2020), Minnesota (2021), Montana (2015), New Mexico (2011), Pennsylvania (2012), South Carolina (2016), Washington (2006), West Virginia (2017), Wisconsin (2017), and Vermont (2023).[1]

The states that have adopted provisions for the disbursement of *cy pres* funds to legal services have varied directions for the class action residual funds distribution. However, the one constant in these rules and statutory changes is that the residual funds are designated to go toward legal services providing assistance for low-income persons and access to justice efforts. Seventeen of the 25 states/territory specifically list the Interest on Lawyers'

[1] The American Bar Association keeps a list of relevant rules and statutes on its website, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls-sclaid-atj-cypres.pdf. Vermont adopted its Court Rule after the most recent update of the list on the ABA website, https://casetext.com/rule/vermont-court-rules/vermont-rules-of-civil-procedure/iv-parties/rule-23-class-actions.

Trust Account ("IOLTA") program as the designated entity for receipt of residual funds.

III. Explanation of the Need for and Purpose of the Proposed Amendment

A. The Access to Justice Gap Continues to Grow in Arizona

The Legal Service Corporation's "The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans" (April 2022) reports that legal services agencies are forced to turn away 1 in 2 requests for legal help due to lack of available resources. The report goes onto clarify that their legal aid organizations are unable to provide any or enough legal help for an estimated 1.4 million civil legal issues brought to their doors.[2] Funding for legal services for low-income persons has never been adequate to meet the legal needs of this population. Two of the largest funding sources for legal services programs are federal funding and IOLTA funds. Both of these funding sources fluctuate with the national economic ups and downs.

Meanwhile, the public demand and community need for legal services is counter-cyclical with national economic conditions, with periods of economic stagnation or recession coinciding with increased need for legal services to protect low-income and other vulnerable people's economic security and other basic life needs. In short, history shows that while funding fluctuates, the

[2] https://justicegap.lsc.gov/ (last visited Mar. 15, 2023).

demand for legal services only increases, especially in periods of economic uncertainty. As of July 2022, over two years past the declaration of a national public health emergency, Arizona has 941,977 individuals living in poverty, 12.8% of our population. https://www.census.gov/quickfacts/fact/table/AZ/PST045222. Arizona ranks 15th among the states for persons in poverty.[3] Yet, according to the ABA Array 2021 study, Arizona ranks 33rd in the funding resources for civil legal aid. Thus, the number of Arizonans eligible for legal services is huge and the funding resources fall greatly behind. The proposed rule is a modest effort to try to close the access to justice gap in Arizona. Nothing in this proposal requires that there be residual finds. The contrary is true. The last sentence in subsection (i)(1) of the proposed rule provides that: "Nothing in this rule is intended to limit the trial court from approving a settlement or order that does not create residual funds." This rule would only be applied if there are residual funds after the normal operation of the rule in delivering relief to class members benefitting from a class action judgment.

As more fully explained below, all the proposed rule does is to recognize the premise underlying all class actions, which is to make access to justice a reality for persons who otherwise would not realistically be able to obtain the protection of the justice system. Moreover, the proposed rule

[3] https://wisevoter.com/state-rankings/poverty-rate-by-state/ (last visited Aug. 14, 2023).

recognizes that legal services programs provide access to justice for those who otherwise would have limited or no access to the justice system. The civil legal aid agencies protect people with disabilities, victims of domestic violence, veterans, the elderly, children, and other vulnerable populations in communities across Arizona. They protect the basic needs in areas of family safety and security, health care, food and sustenance, housing stability, and financial support. The civil legal aid agencies save families from discrimination, predatory business conduct and consumer exploitation. Finally, the proposal recognizes that the distribution of residual funds to legal services and access to justice programs for low-income persons serves the fundamental principle of access to justice and is a "next best use" in class action cases.

As documented by the legal services programs, many persons in Arizona have to go without needed legal representation. When the Court has the opportunity to increase access to justice, it should do so.

B. The Rule 23 Amendment Furthers the Public Policy of the Arizona Bar Foundation/IOLTA Program to Support Access to Justice

It was in the early 1970s that discussion of IOLTA programs began to be explored. The principle was simple; client funds in a lawyer's possession that are nominal or held for a short time would be pooled in an interest generating trust account and the interest would be allocated to law-related public activities through a nonprofit corporation. Some states developed their IOLTA

programs through state legislation and others through court rulemaking procedures. In March 1978, the Supreme Court of Florida issued a decision establishing the first United States IOLTA program with the interest going to the Florida Bar Foundation. Key provisions in gaining approval for the IOLTA program concept addressed the Internal Revenue Service's concerns that the funds generated would not result in inurement to the benefit of private individuals and groups, but rather that they would be used exclusively for public purposes.[4]

In 1983–1984 Arizona established an IOLTA program under court rule, and the Arizona Bar Foundation was entrusted with administrating the IOLTA funds. The purpose of the IOLTA program is to create access to legal services and access to justice by aggregating small amounts of interest earned on short-term or small deposits that would not be sufficient to generate net earnings to their owners. Thus, the parallel between the use of class action remedies and the IOLTA program supports administration of the residual funds by the Arizona Bar Foundation.

The Arizona Bar Foundation, after four decades of operation, has administrated over $49 million in IOLTA funding and continues to serve as the entity entrusted by the Arizona Supreme Court with this important function. The

[4] *Report to the Board of Governors Task Force and Advisory Board on Interest on Lawyer (sic) Trust Accounts*, Section VII, pages 13–21, American Bar Association, July 26, 1982.

Arizona Bar Foundation has a proven track record and ensures that the IOLTA interest is used exclusively for the public purposes defined under Rule 43 of the Rules of the Supreme Court of Arizona. Other Arizona state agencies have also entrusted the Arizona Bar Foundation to administer funds for the purpose of providing legal services. Two examples are:

Arizona Domestic Violence Legal Assistance Project

1998- Present (Partnership with DES)

Statewide collaborative of civil legal assistance provided by legal aid lawyers, volunteer lawyers, and lay legal advocates. Services more than 10,000 victims each year. $1 million, primarily TANF funding to 3 legal aid & 13 DV shelter/service providers. Includes online public legal education, online access to legal aid providers and training opportunities for lawyers and non-lawyers.

Arizona Foreclosure Relief Legal Services

2012-2015 (Partnership with Arizona Attorney General's Office)

Statewide foreclosure relief legal assistance and public legal education for Arizonans at risk of or experiencing foreclosure due to housing crisis. In partnership with the Arizona Attorney General, funding was from the National Mortgage Settlement.

The Arizona Bar Foundation is in the unique position, having a proven track record of disbursing and administrating funds to a broad array of programs that provide legal services and access to justice to those in Arizona.

The proposed amendment confirms that there is a procedural nexus between ability of class members to secure relief in the judicial forum under Rule 23 and the interests of others who may similarly need access to the justice system to assert or defend critical legal rights and interests. The proposed amendment does not substantially interfere with the freedom of parties or their attorneys to craft and propose class action settlement. Instead, it specifically allows for residual funds to go towards increasing access to justice.

Finally, the proposal places no additional burdens on the courts or the parties in the management of class action cases. The amendment will support access to justice for many Arizonans who otherwise would have no legal assistance.

IV. The Proposed Amendment Would Further the Public Policy of Access to Justice in Arizona

There is a growing recognition in states that the use of *cy pres* funds are appropriate funds to support the work of legal services programs. The Conference of Chief Justices and the Conference of State Court Administrators' Resolution 2 (Feb. 16, 2023): *In Support of Efforts by State Supreme Courts to Increase Funding for Civil Legal Aid and Related Access to Justice Efforts Through Residual Funds in Class Action Cases* clearly supports this recognition. This

resolution encourages states to adopt rules that specifically allow residual funds in class action cases to be directed to support legal aid or related justice efforts.

With this rule, Arizona would join the growing number of states that have established similar methods of disbursement for class action residual funds. The states that have adopted provisions for the disbursement of *cy pres* funds to legal services have varied directions for the class action residual funds distribution. However, the one constant in these rules and statutory changes is that the residual funds are designated to go toward legal services providing assistance for low-income persons and access to justice efforts. Seventeen of the 25 states/territory specifically list the IOLTA program as the designated entity for receipt of residual funds.

A. The History and Development of *Cy Pres* Awards Support the Petition

Cy pres awards are distributions of the residual funds from class action settlements or judgments that, for various reasons, are unclaimed or cannot be distributed to the class members or other intended recipients. The term *cy pre*s derives from the Norman-French phrase, *cy pres comme possible*, meaning "as near as possible." Edith L. Fisch, *Cy Pres Doctrine in the United States* (1950) ("Cy Pres Doctrine"). The *cy pres* doctrine has its roots in the laws of trust and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was

in contravention of public policy. Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:17 (4th ed. 2012). In such instances, courts transferred the funds to the next best use that would satisfy, "as nearly as possible" the trust settlor's original intent. Fisch, *Cy Pres* Doctrine at 1.

When class actions are resolved through settlement or judgment, there may be residual funds because of the inability to locate class members or class members fail or decline to file claims for settlement checks. Residual funds may also be generated when it is not economically or administratively feasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed. *Cy pres* awards preserve the deterrent effect and allow courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions. *See* Wilber H. Boies and Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, Virginia Journal of Social Policy & the Law, February 2014, Vol. 21: 2 ("Class Action Settlement Residue") found at http://www.vjspl.org. The *cy pres* doctrine has been borrowed as a device to facilitate the administration of class actions. Boies and Keith, *Class Action Settlement Residue* at 289.

Similarly, Arizona courts have approved the application of the *cy pres* doctrine to class action cases:

> 'Cy pres' is a derivative from French meaning 'as near as.' Black's Law Dictionary 415 (8th ed. 2004). . . . It is also used to distribute unclaimed portions of a class-action judgment or settlement funds to a charity that will advance the interests of the class. Id. In the context of a class action settlement agreement, when it is not feasible to distribute the class recovery or when there is a balance that remains after distribution, the court may direct 'undistributed funds to be applied prospectively to the indirect benefit of the class.' Alba Conte & Herbert Newberg, Newberg on Class Actions § 10.17 (4th ed. 2005) ('Newburg'). These funds are usually distributed to a third party for a specified purpose. *Id.*

Charles I. Friedman v. Microsoft Corp., 213 Ariz. 344, 348, n.7, 141 P.3d 824, 828 (App. 2006).

B. Organizations that Provide Access to Justice are Appropriate Beneficiaries of *Cy Pres* Awards

Courts throughout the country have long recognized that organizations that provide access to justice for low-income persons are appropriate beneficiaries of *cy pres* awards from class action cases. *See, e.g.*, *Lessard v. City of Allen Park*, 470 F.Supp.2d 781, 783–84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (citations omitted)); *Jones v. Nat'l Distillers*, 56 22 F.Supp.2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution designed to improve access to legal aid was appropriate); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at *7–8 (N.D. Ill. Mar. 5, 1991)

(approving *cy pres* distribution of class action "Reserve Fund" to establish a program that would, in part, increase access to justice "for those who might not otherwise have access to the legal system"); see also Doyle, *Residual Funds in Class Action Settlements*, at 2627 (providing examples of approved class action settlements with *cy pres* distribution components that improved access to justice for indigent litigants).

These awards are based on one of the underlying premises for all class action cases: to provide access to justice for persons who would not otherwise be able to obtain the protections of the justice system. *See* Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice*, *Key Issues in 2013 and Beyond*, 27 Mgmt. Info. Exch. J., 24, 25 (Spring 2013) found at http://americanbar.org. ("[L]egal aid or [Access To Justice] organizations are always appropriate recipients of cy pres or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system."); Doyle, *Residual Funds in Class Action Settlements*, at 27 (stating that the myriad of state statutes and rules enacted to "require residual funds to be distributed, at least in part, to legal aid projects … provide(s) evidence of a public policy favoring cy pres awards that serve the justice system").

C. A Growing Number of States Have Adopted Rules and Statutes that Provide that Access to Justice is an Appropriate Use of *Cy Pres* Funds

Arizona courts have recognized the role class actions serve in promoting access to justice. *See ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98, ¶ 14, 50 P.3d 844, 848 (2002) (A class action allows for the bringing of a claim that is not economically feasible, thus, allowing for the "vindication of rights that would otherwise go unprosecuted.") The class action also serves to educate individuals about their rights as well as protect those rights. *Id.*

Those are the very reasons legal services programs were established. They represent low-income persons who financially cannot bring or defend cases. Without legal services, these persons' most fundamental legal rights would go unprotected. The victim of domestic violence who needs a divorce, custody and child support; the tenant living in substandard housing without air conditioning; the farm worker being mistreated by her supervisor; or the child improperly denied food stamps, cash assistance, or Medicaid. These are all cases where rights would not be vindicated without legal services programs. The analogy to class action cases is straight forward.

Legal services programs not only provide direct representation, they (and the Arizona Bar Foundation) prepare legal educational materials, put on workshops and clinics, and make public presentations. They serve the same educational

interests as class actions. *See, e.g.*, Community Legal Services website at clsaz.org; Arizona Bar Foundation resources at AzCourtHelp.org; AZLawHelp.org; LawForSeniors.org; LawForKids.org; LawForVeterans.org; AZEvictionHelp.org; and AZCrimeVictimHelp.org.

Whether awarded by a court order or pursuant to a state statute or rule, class action *cy pres* distributions to legal assistance organizations are widely recognized as an appropriate and successful mechanism to further access to justice. *See, e.g.*, Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 Geo. J. Legal Ethics 435, 438 (2012) (*cy pres* distributions to specific legal aid organizations have advanced legal services); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: A Settling Concept*, 58 La. B.J. 248, 251 (2011) (discussing how *cy pres* awards made to local legal aid organizations will promote access to the courts, in part, by funding and coordinating a pro bono panel utilizing local attorneys); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12, 13-14 (2009) (identifying legal aid organizations which have received residual *cy pres* funds because of the indirect benefit they provide to class members, which is similar to the central purpose for which rule 23 of the federal rules of civil procedure was designed – access to justice); Nina Schuyler, *Cy Pres Awards – A Windfall for Nonprofits*, 33 San Francisco Attorney 26, 27–28 (Spring 2007) (lauding the assistance that Volunteer Legal Services has provide to low-income residents); *Cy Pres Nets $162,000 for*

Justice Foundation, 30 May Mont. Law. 24, 24 (2005) (noting that a significant *cy pres* distribution to the Montana Justice Foundation will help fund legal aid for indigent individuals).

D. This Petition Supports the Goals of the Arizona Supreme Court and the Access to Justice Commission Established by the Court

The Court established the Arizona Commission on Access to Justice in 2014. Administrative Order No. 2014-83. The Court identified as one purpose of the Commission during its first year to look at ways of "promoting access to justice for individuals who cannot afford legal counsel . . .." The Arizona Supreme Court's strategic plan includes access to justice as one of its goals. This Petition would promote that purpose.

V. Potential Benefit from Residual Funds Designation

The history of the implementation of similar provisions in other states shows that use of the residual funds can be an effective tool to support legal services. States vary in their procedures for either mandating or providing an option for the residual funds disbursement to an entity that supports legal services or access to the courts for low-income persons.

The ABA Resource Center also attempts to collect information on how much funding is being generated annually by states with rule or statutory class action residual funds distribution provisions. There is not accurate or complete data for all states, but the existing data shows that the amount collected annually varies

significantly, both from year to year within each state and from state to state. The ABA Array database records over 74 million dollars going to support legal services in 2021.

This information demonstrates that there is the potential for a large increase in funds designated toward access to justice efforts when rules and/or statutes concerning class action residual funds are amended. With now 24 states and a territory establishing *cy pres* rules to support legal services, it is clear that there is a growing recognition and significant momentum toward the use of residual funds as an appropriate way to obtain additional funding for legal services.

The Arizona Bar Foundation respectfully requests that the Court approve this Petition so that the legal services and access to justice programs in Arizona can reap the benefits of the use of residual funds to help low-income Arizonans. This amendment is consistent with the furtherance of important public policy goals, including the efficient use and conservation of judicial resources, the promotion of settlements, the provision of legal representation and services to low-income Arizonans and the improvement of the administration of justice.

VI. The Access to Justice Programs Will Maximize the Use of the Residual Funds

The history of the implementation of similar provisions in other states shows that use of the residual funds can be an effective tool to support legal services. Legal services programs are very adept at making additional money go a long way.

An attorney hired at $50,000 can be expected to assist over 300 clients a year. Relatively small amounts of money can print out educational brochures and support clinics. Additional funds can support the volunteer lawyers' programs. These programs have modest office space and no frills.

The Court's approval of the Petition will support legal services and access to justice programs in Arizona. With the rule change, our legal services and access to justice programs will have access to more resources to use to help low-income Arizonans, as has occurred in other states. It is a win-win for all of Arizona.

Conclusion

For the above reasons, the Arizona Bar Foundation respectfully requests that the Court Amend Rule 23 to specifically require residual funds to class action cases to be distributed to the Arizona Bar Foundation to grant Arizona legal services nonprofit entities for use, in accordance with judicial instructions for the award, toward the provision of legal services and access to justice for low-income residents of Arizona.

Respectfully submitted this 10th day of January 2024.

Hon. Joseph Kreamer, 2024 President,
Arizona Foundation for Legal Services
& Education Board of Directors
/s/ *Joseph Kreamer*
Joseph Kreamer
of Arizona Bar Foundation

Original electronically filed with the Clerk of the Supreme Court of Arizona this 10th day of January 2024.

By: /s/ *Andrew P. Schaffer*

Tab M

Zamen, Shiva

From: Pete Schenkkan <PSchenkkan@gdhm.com>
Sent: Thursday, December 7, 2023 3:29 PM
To: Richard Orsinger; 'Ana Estevez'; 'lisa'; 'Nina Cortell'; 'lhoffman@central.uh.edu'; 'psbaron@baroncounsel.com'; 'John Kim'; 'John Warren'; 'Judge Emily Miskel'; 'Bill Boyce'; 'Professor Dorsaneo'; 'Robert L Levy'; 'Sharon Tabbert'; 'Alexandra W. Albright'; 'Jaclyn Daumerie'; Babcock, Chip
Subject: Voting on what to do with unclaimed or undistributable class action settlement funds

Hello, friends.

I favor amending Rule 42 to provide that all unclaimed or undistributable settlement funds go to "the TAJC" or "one or more organizations that provide legal services or support pro bono legal services to the poor in civil matters." Of the options Richard lists, I favor #1, listing the organizations.

Below are reasons (law and policy) why.

Pete

With input from extensive and vigorous SCAC debate, in 2003 the Court substantially amended Rule 42 governing class actions, as required by a 2003 statute that is now Tex. Civ. Prac. & Rem. Code Ch. 26. The statute and resulting rule significantly reduce the risks that judges chosen by class counsel will bless settlements that only, or inappropriately, benefit the defendant and/or class counsel.

Class actions are almost always decided by settlement. The defendant and class counsel agree on a price (cash and/or coupons or other things of some at least arguable value) that the defendant will pay in return for res judicata against all members of the putative class who do not opt out. Settlements are almost never subject to appellate review.

Many class members do not opt out but cannot be contacted or do not submit a claim under the settlement. The question is what Rule 42 should require a settlement to do with that money in order to qualify for approval.

This is a policy question: No statute or common law requires use of the cy pres doctrine. The doctrine comes from the wills/trust equity context. Its application is required by Texas statute only in a part of that context.

The Texas Supreme Court has authority to make this policy decision. Tex. Civ. Prac. & Rem. Code section 26.001(a) requires it to "adopt rules to provide for the fair and efficient resolution of class actions."

Options 2, 5 and 6 are bad policy. They leave defendant and class counsel free to direct a substantial portion of the price defendant agreed to pay for res judicata, and class counsel uses to justify a lodestar enhancement, to beneficiaries of their choice. The district judge has little incentive to refuse approval of any choice not so flagrantly abusive as to attract criminal investigation or at least bad press. Defendant and class counsel can minimize any risk of disapproval by choosing a beneficiary favored by the judge, which in some ways is even worse for the credibility of the legal system.

Option 4, application of the cy pres doctrine, does very little to reduce the risk. Cy pres "standards" are too vague to be of much use, and do not prevent a choice that benefits defendants and/or class counsel.

Option 3 is a broad list of as yet unspecified permissible recipients of as yet unspecified types. It has meaning only if and to the extent of potential recipients and types of recipients actually listed. We are not being offered a choice of actual recipients or types of recipients to vote on.

Requiring that the unclaimed funds go to support legal services to the poor is fully appropriate.

Class actions are exceptions to many procedural requirements that all rest on a fundamental legal principle: an individual plaintiff controls their causes of action, including whether to file at all and whether to settle on what terms.

The class action exceptions are justified solely on the grounds that letting common questions predominate over such individual rights and class counsel to bind people they've never met, many of whom cannot be contacted and many others of whom will not in fact claim the proceeds, is sometimes as a practical matter the only way for the system to enable a lawyer to be paid to adjudicate the common questions when the stakes are too small for individual class members to afford counsel to litigate their individual cases.

Legal services to the poor is just another aspect of the same problem.

Using the funds for legal services to the poor is not unfair to anyone:

a. The defendant still buys res judicata for the price it agreed to.
b. The class members who do claim shares of the settlement funds still get what the settlement said was sufficient.
c. The plaintiffs' lawyers still get fees agreed to by the defendants within a range set and checked by the court for reasonableness as specified in the Civ. Prac. & Rem. Code and Rule 42.

d. The portion of the money that the settling defendants and plaintiffs' counsel and the courts agreed was fair but is unclaimed goes to help remedy another defect in the civil legal system.

Pete Schenkkan | Attorney
Direct: (512) 480-5673 | Fax: (512) 480-5873

GRAVES DOUGHERTY HEARON & MOODY
401 Congress Avenue, Suite 2700
Austin, Texas 78701
www.gdhm.com

From: Richard Orsinger <richard@ondafamilylaw.com>
Sent: Sunday, December 3, 2023 9:01 PM
To: 'Ana Estevez' [redacted]; 'lisa' <lisa@kuhnhobbs.com>; 'Nina Cortell' <Nina.Cortell@haynesboone.com>; 'lhoffman@central.uh.edu' <lhoffman@central.uh.edu>; 'psbaron@baroncounsel.com' <psbaron@baroncounsel.com>; 'John Kim' <jhk@thekimlawfirm.com>; 'John Warren' <John.warren@dallascounty.org>; 'Judge Emily Miskel' [redacted]; 'Bill Boyce' [redacted]; 'Professor Dorsaneo' <wdorsane@mail.smu.edu>; 'Robert L Levy' <robert.l.levy@exxonmobil.com>; 'Sharon Tabbert' <smagill@mail.smu.edu>; Pete Schenkkan <PSchenkkan@gdhm.com>; 'Alexandra W. Albright' <aalbright@adjtlaw.com>; 'Jaclyn Daumerie' [redacted]; cbabcock@jw.com
Subject: SCAC Subcommittee on Rules 16-165a--Rule 42 regarding class action settlements; allocating part of residual funds after settlement for legal aid or other access to justice operations

Dear subcommittee members:

We have follow-up task to do on the issue of unclaimed funds in class actions in Texas court proceedings. I have attached my last email to you on this subject.

You will recall the Chief Justice Hecht referred to the SCAC and Chip referred to our Subcommittee the following:

> Texas Rule of Civil Procedure 42. At least eleven states have rules or statutes that expressly address distribution of residual class action funds to legal aid. Five of those states (Indiana, Kentucky, North Carolina, Pennsylvania, and South Dakota) require a minimum distribution to legal aid. Massachusetts requires notice to legal aid before the court enters judgment or approves a settlement—similar to a 2002 proposal from the Texas Access to Justice Commission. The Court now asks the Committee to consider whether to amend Rule of Civil Procedure 42 in line with other states and to draft any recommended amendments. The Committee's discussion at its September 21-22, 2002 meeting and Highland Homes, Ltd. v. State, 448 S.W.3d 403 (Tex. 2014) may inform its work.

At the SCAC meeting on 8-18-2023, we had a long discussion on this subject. The excerpt of that discussion is attached. The full committee voted:

CHAIRMAN BABCOCK: So who thinks that the Supreme Court should have the authority to designate who gets the unclaimed money?

MR. ORSINGER: Exercise the authority.

CHAIRMAN BABCOCK: Whatever. Supreme Court. Okay. How many people think the parties and the judge? Okay. Supreme Court wins that one, 12 to 7 with the chair not voting.

So, you can see that a 2/3 majority preferred for the Supreme Court to specify who could receive unclaimed class action funds, but 37% of the vote was for the Supreme Court not to prescribe who could receive unclaimed funds.

I propose that we write several variations of Rule 42 in order to sharpen the discussion. Examples:

1. A Rule 42 that specifies that 100% of unclaimed funds must go to an approved list of recipients, such as the Texas Access to Justice Foundation, or the Texas Access to Justice Commission, or a Texas Legal Aid organization, etc.
2. A Rule 42 that requires that at least half of unclaimed funds go to an approved list of recipients, and the remainder is left to the discretion of attorneys for the plaintiffs and defendants, subject to the trial court's approval or if the attorneys cannot agree, in the sole discretion of the court.
3. A Rule 42 that describes broad categories of permitted recipients. Recipients could be identified in a list or by a general description.
4. A Rule 42 to directs the funds to an organization that comes as close as possible to benefitting the injured class or helping to avoid the harm (through education, etc.).
5. A Rule 42 that states that the choice of recipients is left to the discretion of attorneys for the plaintiffs and defendants, subject to the trial court's approval or discretion if there is not agreement.
6. A Rule 42 that continues to say nothing about this subject.

It seems like a prudent safeguard that Rule 42 should specifically require notice to class members and an opportunity to object to the recipients.

Please share your thoughts and suggestions, or proposed language.

Thanks.

Richard

Tab N

Memorandum

To: Supreme Court Advisory Committee

From: Rules 167-206 Subcommittee

Date: April 3, 2024

Re: Uniform Interstate Depositions and Discovery Act

We were given the following assignment by the Supreme Court:

Uniform Interstate Depositions and Discovery Act. Section 1 of HB 3929 permits the Court to adopt by rule the Uniform Interstate Depositions and Discovery Act, which is a model statute adopted by 48 states to establish a uniform process for obtaining depositions and discovery in concert with other participating states. Section 2 repeals a conflicting statute—Civil Practice and Remedies Code § 20.002—upon the Court's adoption of rules. The Committee should consider whether the discovery rules should be changed and draft any recommended amendments.

Depositions in foreign jurisdictions are currently governed by TRCP 201. The committee discussed the uniform act and reviewed some articles about the act. No one on the committee had used the uniform act before. Many states have adopted the act—with some additions or changes. We did not review all of the differences between the states.

The committee recommends adoption of the uniform act. It will not entirely replace Rule 201 which makes some mention of depositions outside of the United States. Those are not covered by the uniform act and would require a separate rule.

Tab O

2019 Bus. Disp. 4-III

State Bar of Texas | 11th Annual

TXCLE Business Disputes
Carlos R. Soltero

2019

Chapter 4. Discovery--3rd Party, Out of State, and Abroad

III. GENERAL RULES AND PROCEDURES FOR OBTAINING DOCUMENTS AND TESTIMONY FROM NONPARTIES.

A. Some initial questions to consider:

• Is the matter pending in court or arbitration?

• If court, state or federal?

• Where is the unwilling nonparty witness (and/or the documents) located?

B. Litigation in Texas state court with a nonparty witness who resides, is employed, or regularly transacts business in Texas.

Among things to determine is the location of your witness and the place where the deposition or the document production may take place under the rules. The rules provide that the deposition must be within 150 miles of where the witness resides or is served. TRCP 176.3

Another is to determine the enforcing court--a nonparty subpoena for deposition/document production can only be enforced in the jurisdiction which issued the subpoena, where the subpoena was served, or where the deposition is to occur. TRCP 176.8, 215.1. A nonparty may seek protection from a subpoena in a court where the party was served with the subpoena (usually the witness' home county) even if the dispute is pending elsewhere. TRCP 176.6(e).

For document production, a notice should be served 10 days before the actual subpoena compelling production is served. For depositions, notice and subpoena may be served simultaneously.

The form of the subpoena is also specified by rule: TRCP 176.1. For deposition only, the subpoena and notice should be served a "reasonable" time before the deposition. TRCP 199.2. For document production, notice must be served 10 days prior to subpoena and the subpoena must be served a "reasonable" time before the commanded document production. TRCP 199.2, 205.3.

Subpoenas may be issued by the court clerk, an attorney authorized to practice in the State of Texas, or a deposition officer. TRCP 176.4.

C. Enforcement challenges.

Discovery requests, deposition notices and subpoenas served on nonparties must be filed. TRCP 191.4(b)(1). The rules do not require responses and objections by nonparties to be filed. TRCP 191.4(b)(1). However, if the party issuing discovery seeks court intervention in requiring production of documents or a witness, the responses may be filed as exhibits or attachments or otherwise introduced into evidence.

Where should one move to enforce? Subpoenas may be enforced by the issuing court or a district court in the county in which the subpoena was served. TRCP 176.8. *In re Suarez and Texas Dep't of Family & Protective Services*, 261 S.W.3d at 883 ("the rule provides for enforcement of a subpoena through contempt, not sanctions"). On matters relating to a deposition, an application for an order may be made to the Court in which the action is pending, or to any district court in the district where the deposition is being taken.

What can one obtain by enforcement? By rule, a court's power to impose sanctions on non-parties is limited to its **contempt** power. *See* TRCP 215.2(a) & (c) (authorizing contempt as only sanction against nonparties); *see also Jefa Co., Inc. v. Mustang Tractor and Equipment Co.,* 868 S.W.2d 905, 908 (Tex. App.-Houston [14th Dist.] 1994, writ denied) ("appropriate sanction for a nonparty's noncompliance with discovery is placing the nonparty in contempt of court"); *In re White*, 227 S.W.3d 234, 236-37 (Tex. App.--San Antonio 2007, orig. proceeding) (trial court abused its discretion in ordering nonparty to pay court reporter fees); *Exoxemis, Inc. v. Seale,* No. 04-95-00673-CV, 1996 WL 471271, *6 (Tex. App.-San Antonio Aug. 21, 1996, no writ) (trial court **could not impose sanction** on nonparty because "the trial court was powerless to treat him as a party in the absence of proper jurisdiction over his person in accordance with the mandatory rules relating to service of process"); *In re Suarez*, 261 S.W.3d at 883-84 ("We decline to hold that a party can file a motion for sanctions against a non-party, serve the motion on the non-party with a citation information it that it has 'been sued', and thereby subject the non-party to possible sanctions based on its alleged violation of a subpoena occurring before the sanctions motion was filed. Neither will we muddle the rules' clear provisions for addressing a failure to obey a subpoena--a motion for contempt pursuant to rule 176.8.").

If a deponent fails to appear or to be sworn or answer a question, the failure may be considered a contempt of the court in the district in which the deposition is being taken. TRCP 215.2. If a

nonparty fails to comply with an order under Rule 205.3 (production of documents and tangible things without a deposition), the court which made the order may treat the failure to obey as contempt of court. TRCP 215.2.

When found guilty of contempt, the court is limited to a monetary fine not to exceed $500 or incarceration. TEX. GOV'T CODE §21.002(b); *see also City of Houston v. Chambers*, 899 S.W.2d 306 (Tex. App. -- Houston [14th Dist] 1995, no pet.) (holding that City, which was nonparty to underlying action, could not be ordered to pay court reporters fees as sanctions); *Pope v. Davidson*, 849 S.W.2d 916 (Tex. App. -- Houston [14th] 1993, no pet.) (court could not require party to perform community service).

The rules do not specifically mention the motion required to tee up the issue before the court, if not the court in which the original action is pending. Local rules and court procedures should also be considered.

Also, nonparties typically may not appeal,[3] but they may petition for a writ of mandamus to challenge a ruling the nonparty believes is an abuse of discretion.

D. Litigation in a Texas state court with a witness who resides out of state.

A Texas court may lack jurisdiction over an out-of-state witness unless some exceptions apply, such as if the witness being employed in Texas or regularly transacting business in person in Texas. TRCP 199.2(b)(2); *In re Bannum, Inc.*, 03-09-00512-CV, 2009 WL 8599250, 2009 Tex. App. LEXIS 10088 *2-4 (Tex. App.--Austin Oct. 30, 2009 orig. proceeding).) (holding that Florida resident could not be compelled to appear in Austin for deposition because witness resided in Florida, and nothing in the record demonstrated that he routinely conducts business in Texas); *Wal-Mart Stores Inc. v. Street,* 754 S.W.2d 153, 155 (Tex. 1988) (explaining that rules do not allow court to require nonparty to be deposed in county where he does not live or work; court should have ordered that deposition take place in county where nonparty worked and lived); *In re Wells Fargo Bank*, 2010 WL 3271159, 2010 Tex. App. LEXIS 6917 (Tex. App.--Austin, August 16, 2010, orig. proceeding) (nonparty's in-house counsel could not be deposed in Texas because the in-house counsel worked and lived in Iowa, was not a party to the case, had not been designated as a corporate representative and was not served with a subpoena in Texas).

If Texas court does not have jurisdiction over an out-of-state witness, then the laws and procedure of the state where the nonparty is located will likely be the ones to govern and to which a party may avail itself to address non-compliance. *See In re Prince*, 14-06-00895-CV, 2006 WL 3589484, 2006 Tex. App. LEXIS 10558 *6-13. There may also be choice of law questions regarding which law applies (e.g., which law of privileges). *See e.g., Volkswagen*, 909 S.W.2d at 901-03; *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 646-48 (Tex. 1995); *Perkins v. State*, 2004 WL 3093239 *6 (Tex. Crim. 2004).

The trend is towards adopting the Uniform Interstate Depositions and Discovery Act (UIDDA) but not all states have adopted it. To find out if a state has adopted the UIDDA, go to: http://uniformlaws.org/Act.aspx?title=Interstate Depositions and Discovery Act. Under the UIDDA, litigants present a clerk of the court located in the state where discoverable materials are sought with a subpoena issued by a court in the trial state. UIDDA §3(a). A subpoena may be issued in any manner authorized under the laws of the state in which the action is pending. *See* Comments to UIDDA. For example, in Texas, an attorney is authorized to issue a subpoena and present it to the clerk of court where discovery is sought. *Id*. "Presenting" to a clerk of the court includes delivering to or filing the subpoena. *See* Comments to UIDDA. When the clerk receives the foreign subpoena, the clerk will issue a subpoena for service upon the person or entity on which the original subpoena is directed. UIDDA §3(b). The terms of the issued subpoena must incorporate the same terms as the original subpoena and contain the contact information for all counsel of record and any party not represented by counsel. UIDDA §3(c).

Discovery authorized by the subpoena is to comply with the rules of state in which it occurs. *See* UIDDA §5; *See also In re Reed*, 03-09-00361-CV, 2009 WL 2058911 (Tex. App.--Austin, July 10, 2009, no pet.): (refusing to enforce order from Minnesota court requiring deposition and document production because it did not strictly comply with TRCP 201.2 or CPRC 20.002).

Motions to quash, enforce, or modify a subpoena issued pursuant to the Act shall be brought in and governed by the rules the discovery state. *See* UIDDA §6. The out-of-state lawyer must get local counsel or be admitted to practice pursuant to the rules of the state where discovery is sought. *See* Comments to UIDDA § 6A helpful example given by the UIDDA Rules Committee.

E. Assisting with an unwilling Texas resident in sister state court proceedings.

To facilitate discovery in Texas for use in a foreign jurisdiction--i.e., in another state or country--Texas law provides what is known as a "helping" statute. CPRC § 20.002 ("Testimony Required by Foreign Jurisdiction"); *In re Reed*, 03-09-00361-CV, 2009 Tex. App. LEXIS 5360 *6 (Tex. App.--Austin 2009, orig. proceeding). "Texas rules of civil procedure apply to a request originating from another state for a Texas deposition." *In re Bennett*, 502 S.W.3d 373, 377-78 (Tex. App.--Houston [14th Dist.] 2016, orig. proceeding) (Texas court did not have authority to grant protection or quashing of depositions based on relevancy, the Wyoming court was the proper forum for that objection). The Texas rules will govern and treat discovery requests from another state as if the case were pending in Texas. *In re Prince*, 14-06-00895-CV, 2006 WL 3589484, 2006 Tex. App. LEXIS 10558 *5-13 (Texas court did not have authority to order non-party witness to appear and produce documents in California for a California divorce proceeding). The witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in Texas. TRCP 201.2; CPRC 20.002.

Securing an order or commission from the court in the sister state where the matter is pending may be helpful. *See e.g., Union Carbide Corp.*, 349 S.W.3d at 140 (letters rogatory from Mississippi

court to Dallas County District court requesting Dallas court's assistance in issuing a subpoena duces tecum on expert witness for production of information for use in Mississippi suit).

F. Litigation in Federal court

The procedures for conducting discovery in federal district courts throughout the country is easier and largely standardized. *See* FRCP 45. Unless you have an out-of-country witness, you will use the same procedures regardless of where your witness is located.

The federal rules effectively authorize service of a subpoena anywhere in the United States by an attorney representing any party in federal court. FRCP(a)(3). A clerk of the court or a **qualified attorney** can issue a subpoena. FRCP(a)(3). A **qualified attorney** is one who is authorized to practice in the jurisdiction of the issuing court or is authorized to practice in the jurisdiction where the underlying action is pending (includes attorneys admitted pro hac vice). Also, "An attorney also may issue and sign a subpoena as an officer of: (A) a court in which the attorney is authorized to practice; or **(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending."** Fed. R. Civ. P. 45(a)(3).

For subpoenas commanding deposition testimony, the place must be no more than 100 miles from where the non-party witness lives, works, or regularly does business, even if the witness is a party or a party's officer, or, in the case of a trial subpoena, elsewhere if such witness would not incur "substantial expense." FRCP 45(c)(3)(a)(ii). Document subpoenas must issue out of the district court for the jurisdiction where the production or inspection is to occur, which is not necessarily where the documents are physically located. FRCP 45.

Subpoena power is nationwide, but the issuing court must have personal jurisdiction over the witness, in other words, it must be procedurally proper to personally serve the subpoena on the witness within the district of the issuing court. FRCP45(b)(2).

A federal subpoena must contain the identity of the court from which the subpoena was issued; and the identity of the court in which the underlying action is pending which may properly be the issuing court under the 2013 amendments, including a proper citation of the title of the action and the civil action number.

G. Arbitration

The availability of nonparty discovery depends on a number of factors, including the parties' particular arbitration agreement, the rules applicable to the arbitration, and whether the arbitration is proceeding under the Federal Arbitration Act or the Texas Arbitration Act. *Compare* 9 U.S.C. §7 *with* CPRC 171.050.

The Federal Arbitration Act applies to many transactions as long as they involve interstate commerce or are maritime transactions. 9 U.S.C. §1. A nonparty witness may be compelled to appear and bring documents to an arbitration proceeding, but under the FAA they probably cannot be compelled to participate in discovery. 9 U.S.C. §7 ("the arbitrators...may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case.")

"The arbitrators selected ... may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case .... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators ... in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. 9 U.S.C. § 7 (emphasis added)."

There is a circuit split as to whether this provision authorizes arbitrators to order discovery from nonparties and whether district courts may enforce such orders. The emerging rule is that the arbitrator's subpoena authority under FAA §7 **does not** include the authority to subpoena nonparties or nonparties for prehearing discovery even if a special need or hardship is shown. *See e.g., Hay Group., Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 408-09 (3d Cir. 2004). One Judge in the Northern District of Texas agrees with the Second and Third Circuits. *Empire Financial Group, Inc. v. Penson Financial Services*, 2010 WL 74579 *3 (N.D. Tex.) (adopting the reasoning of the Second and Third Circuits and holding that §7 of the FAA does not authorize arbitrators to compel production of documents from a nonparty unless they are doing so in connection with the nonparty's attendance at an arbitration hearing).

Under the Texas Arbitration Act - CPRC Chapter 171 that applies to intrastate or arbitration contracts governed by Texas law should always be subject to the nonparty discovery provisions of the TAA, unless it is one of the contracts or claims specifically excluded by the statute under CPRC 171.001. According to the Texas Supreme Court, the FAA only preempts the TAA if: (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses under state law, and (4) state law affects the enforceability of the agreement. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 98 (Tex. 2011) *cert. denied*, 132 S. Ct. 455 (2011).

Contrary to the FAA, the TAA **expressly authorizes** discovery from nonparties. An arbitrator may authorize a nonparty deposition in two circumstances: (1) the nonparty is outside subpoena range

or unable to attend the hearing or (2) is an adverse witness. CPRC 171.050. Furthermore, the TAA authorizes an arbitrator to issue a subpoena compelling the attendance of a witness or production of evidence. CPRC 171.051.

An additional consideration is whether to seek discovery before or outside of the arbitration process through the court system as provided for in CPRC 171.086(a)(6); *Transwestern Pipeline Co. v. Blackburn*, 831 S.W.2d 72, 77-78 (Tex. App. - Amarillo 1992, orig. proceeding) (trial court abused its discretion by authorizing independent discovery after parties were ordered to, and did, institute binding arbitration); *Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735, 737 (Tex. App. - Amarillo, 1990) (trial court properly denied pre-arbitration discovery request about arbitrator in case referred to arbitration).

A subpoena issued under CPRC 171.051 shall be served in the manner provided by law for the service of a subpoena issued in a civil action pending in a district court. The nonparty witness' address should be included so the witness can be properly served. Furthermore, each provision of law requiring a witness to appear, produce evidence, and testify under a subpoena issued in a civil action pending in a district court applies to a subpoena issued under this section. There are additional balancing factors for arbitrators to consider regarding the hardship and relevance of the third party's information.

Consult the applicable arbitration rules and agreements on specific disputes.

Footnotes

3 *In re Parker Family Trust*, 2014 WL 4055992, 2014 Tex. App. LEXIS 8920 *3 (Tex. App.--Corpus Christi--Edinburg 2014, orig. proceeding) (“it is well-established that an appeal can generally only be brought by a named party to the suit.”).

End of Document

Tab P

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 20. Depositions

V.T.C.A., Civil Practice & Remedies Code § 20.002

§ 20.002. Testimony Required by Foreign Jurisdiction

Currentness

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

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Editors' Notes

REPEAL

<This section is repealed by Acts 2023, 88th Leg., ch. 616 (H.B. 3929), § 2, effective Sept. 1, 2025. See historical and statutory notes.>

Notes of Decisions (1)

O'CONNOR'S CROSS REFERENCES

See also Gov't Code §§154.101(f), 154.112, 406.016; TRCP 199-202; ***O'Connor's Texas Rules***, "Depositions," ch. 6-F, §1 et seq.

O'CONNOR'S ANNOTATIONS

Warford v. Childers, 642 S.W.2d 63, 66 (Tex.App.--Amarillo 1982, no writ). "The ultimate question is whether a trial court's order resolving a dispute growing out of discovery proceeding conducted under the [TRCS] art. 3769a [now CPRC §20.002] umbrella can be classified as a final,

rather than an interlocutory, judgment. [¶] [T]he only issue in the Texas trial court was the one that is now before us. When the trial court rendered its order, it disposed of every aspect of the case before it and settled all issues raised by the parties. To hold that such an order is interlocutory and non-appealable would forever foreclose review by the orderly process of appeal and would relegate the parties to an extraordinary proceeding. … Thus, although the order may have an interlocutory relationship with the [sister state's] suit, we conclude that it is a final judgment on all issues in controversy in Texas and that we have jurisdiction to review it by appeal. *At 65 n.3:* Because art. 3769 … requires the witness to appear and testify 'in the same manner and by the same process and proceeding as may be employed' in cases pending in Texas, the out-of-state litigants can seek relief under [TRCP] 215a."

V. T. C. A., Civil Practice & Remedies Code § 20.002, TX CIV PRAC & REM § 20.002
Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

End of Document

Tab Q

O'Connor's California Practice * Civil Pretrial Ch. 7-C § 7 (2023 ed.)

O'Connor's California Practice * Civil Pretrial

Chapter 7. Methods of Discovery

C. Depositions

§ 7. How to require deposition attendance

The primary ways to require a person to attend a deposition include the following:

§ 7.1. Agreement.

The deposition of most deponents (party or nonparty, resident or nonresident) can be taken at any place or time if the parties and the deponent agree to it in writing. *See* CCP § 2016.030; *see also* Ogden, *West's California Code Forms, Civil Procedure* § 2025.270 Form 5 (7th ed.) (sample form for deposition stipulation). See "Modifying discovery by stipulation," ch. 7-A, § 4.1.

§ 7.2. Deposition notice.

A deposition notice is used to compel a party and its affiliated witnesses, whether residents or nonresidents, to appear, testify, and produce documents, ESI, and other tangible things at a deposition. *See* CCP § 2025.280(a). A resident party can be compelled to appear at a deposition in California, while a nonresident party can be compelled to appear in its home state or country. *See* CCP § 2026.010(a), (b) (deposition outside California but in U.S.), § 2027.010(a), (b) (deposition outside U.S.). See "Deposition notice for oral deposition," ch. 7-C, § 9.2.

Practice Tip

If you are uncertain whether a witness is a party-affiliated witness that can be required to attend a deposition by a deposition notice (e.g., you do not know whether the witness is still an employee of the party), consider serving a deposition subpoena on the witness (in case the witness is not a party-affiliated witness) and a deposition notice on the other party's attorney (in case the witness is a party-affiliated witness). See "Party-affiliated witness," ch. 7-C, § 2.5.

§ 7.3. Deposition subpoena.

A deposition subpoena is used to compel a nonparty deponent who is a California resident to appear, testify, and produce documents and other tangible things at a deposition. *See* CCP §§ 2020.010(b), 2025.280(b). See "Deposition Subpoenas," ch. 8-B, § 1 et seq. As a general rule, any person who can be subpoenaed can be deposed. See "Who can be subpoenaed," ch. 8-A, § 4.1.

7-13. DEPOSITION NOTICE VS. DEPOSITION SUBPOENA

		DEPOSITION NOTICE	DEPOSITION SUBPOENA
Who can be compelled by deposition notice & deposition subpoena			
1	Party	Yes. CCP § 2025.280(a).	No.
2	Party's officer, director, or managing agent	Yes. CCP § 2025.280(a).	No.
3	Party's employee	Yes. CCP § 2025.280(a).	No.
4	Nonparty with immediate benefit in suit	No.	Yes. *See* CCP § 2025.280(b).
5	Party's designated expert	Yes. CCP § 2034.460(a).	No.
6	Nonretained expert (e.g., treating doctor)	No.	Yes. *See* CCP § 2025.280(b).
7	Nonparty deponent	No.	Yes. *See* CCP §§ 2020.010(b), 2025.280(b).
Requirements for deposition notice & deposition subpoena			
8	How to describe things to be produced	All things and categories with reasonable particularity. CCP § 2025.220(a)(4).	Items specifically; categories with reasonable particularity; desired form of ESI, if applicable. CCP §§ 2020.410(a), 2020.510(a)(2), (4).
9	Attach declaration showing good cause and materiality	No. See ch. 8-A, § 6.4.2.	No. See ch. 8-A, § 6.4.2.
10	When to pay witness fees**	On service of notice or on commencement. See ch. 7-J, § 11.3.2(1).	On service of subpoena or on appearance. See ch. 8-A, § 10.2.4(1)(a).
11	Which deponents are paid fees	Expert witness but not party or party-affiliated witness. See ch. 7-C, § 8.	Subpoenaed nonparties. See ch. 8-A, § 10.2.1(1).

On whom & when to serve deposition notice & deposition subpoena			
12	For testimony only, serve—	Deposition notice on party's attorney, ten days before deposition. *See* CCP §§ 2025.270(a), 2025.280(a).	SUBP-015* on nonparty deponent, reasonable time before deposition. *See* CCP § 2020.220(a).
13	For testimony and production, serve—	Deposition notice on party's attorney, ten days before deposition. *See* CCP §§ 2025.270(a), 2025.280(a).	SUBP-020* on nonparty deponent, reasonable time before deposition. *See* CCP § 2020.220(a).
14	For production only, serve—	N/A	SUBP-010* on nonparty deponent, 15 days before date for production. *See* CCP § 2020.410(c).
15	Serve notice of deposition on other parties—	Ten days before deposition. *See* CCP §§ 2025.240(a), 2025.270(a).	Ten days before deposition. *See* CCP §§ 2025.240(a), 2025.270(a), (c).

§ 7.4. Court order.

1. Out-of-state parties + deposition in California.

It is unclear whether parties who are not residents of California can be required by motion and court order to travel to the state for a deposition. Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* Ch. 8-E ¶ 8:631 (The Rutter Group 2022); *cf.* Am.Jur., *Trials*§ 24 (nonresident Ps generally must attend deposition in forum where they brought action, but courts appear to be more reluctant to require nonresident Ds to travel to forum for deposition). *Compare* **Toyota Motor Corp. v. Superior Ct.** (2d Dist.2011) 197 Cal.App.4th 1107, 1125 (courts cannot order nonresidents to attend California depositions), *with* **Glass v. Superior Ct.** (4th Dist.1988) 204 Cal.App.3d 1048, 1052–53 (by court order, Indiana corporation that filed suit in California was required to send representatives to California for depositions noticed by Ds).

Note

Nonresident parties can be deposed remotely or in person in their home state or country by service of a deposition notice. See "Deposition notice," ch. 7-C, § 7.2.

2. Prisoners.

(1) State prisoner.

To take the deposition of a prisoner incarcerated in a state institution, a party must secure a court order; deposition testimony

cannot be obtained by subpoena, deposition notice (even if the prisoner is a party), or writ of habeas corpus ad testificandum. Sink, *Expert Series: California Subpoena Handbook*§ 2:2[A] (2022–2023 ed.); *see* CCP § 1995 (county jail); Pen. C. § 2623 (state prison). To obtain a court order, the party must make a motion accompanied by an affidavit identifying (1) the nature of the proceeding, (2) the testimony expected, and (3) the materiality of the testimony. CCP § 1996 (county jail); Pen. C. § 2623 (state prison). For more on the procedure to compel a prisoner's testimony, see Sink, *Expert Series: California Subpoena Handbook*§ 2:2[A] (2022–2023 ed.).

(a) Same county.

Persons incarcerated in a jail in the county where the case is pending can be produced for a deposition, trial, or hearing. *See* CCP § 1997.

(b) Different county.

Persons incarcerated in a jail in a county other than the one where the case is pending can be produced for a deposition only; they cannot be produced for a trial or hearing. *See* CCP § 1997.

(2) Federal prisoner.

To take the deposition of a federal prisoner incarcerated in California, the attorney must first contact the prisoner directly. *Legal Resource Guide to the Federal Bureau of Prisons* at 37. If the prisoner agrees to be deposed, the attorney must then contact the appropriate consolidated legal center to make arrangements. *Id.* at 37–38; *see* 28 C.F.R. § 543.13. Contact information for facilities operated by the Federal Bureau of Prisons can be found at www.bop.gov/locations.

§ 7.5. Other states' laws & foreign treaties.

Nonparties who are not residents of California cannot be required to attend a deposition in California. *See* CCP § 1878 ("witness" includes person whose declaration under oath is made by deposition), § 1989 (witness is not required to attend unless she is resident of state at time of service).

1. Out-of-state nonparties.

Nonparties who are not residents of California but are residents of a U.S. state, territory, or insular possession can be required to attend a deposition and produce evidence at their place of residence according to that place's local laws. *See* CCP § 2026.010(c); *see, e.g.*, **America Online, Inc. v. Nam Tai Elecs., Inc.** (Va.2002) 571 S.E.2d 128, 135 (custodian of Virginia corporation was required to produce business records under Virginia law for California action). The procedures for compelling an out-of-state nonparty to attend a deposition depend on whether the state has adopted the Uniform Interstate Depositions and Discovery Act (UIDDA) or its predecessor, the Uniform Foreign Depositions Act (UFDA), or whether the state has its own nonuniform procedure.

(1) State has adopted UIDDA.

(a) Generally.

Most states, including California, have adopted the UIDDA. *See* CCP §§ 2029.100 to 2029.900. See chart 7-14, below. Under the model version of the UIDDA, a party can require an out-of-state deponent to attend a deposition by obtaining a subpoena

in the underlying litigation and submitting it and a draft of a subpoena to a clerk in the deponent's home state. Unif. Interstate Depositions and Discovery Act § 3 & cmt. ¶ 4. The clerk will then issue a subpoena for service on the deponent. *Id.* § 3(b). The deposing party is not required to hire counsel in the deponent's state to have the subpoena issued or present the matter to a judge in the deponent's state before the subpoena can be issued. *Id.* § 3, cmt. ¶ 4. A party to a California action who wants to depose an out-of-state nonparty under the UIDDA should refer to that state's version of the model act for the specific procedure to use. *See* CCP § 2026.010(c).

Note

Some states have adopted variations of the Model UIDDA. For example, California's version of the UIDDA was recently amended to address situations where a subpoena is sought under another state's law that (1) interferes with a person's right to choose or obtain an abortion, (2) authorizes a civil action in which the sole purpose is to punish an offense against the public justice of that state and would require the disclosure of certain sensitive information, or (3) authorizes a civil or criminal action against a person or entity that allows a child to receive gender-affirming care. See CCP §§ 2029.200(b), 2029.300(e), 2029.350(b), (c); Ins. C. § 791.02(ac); Stats. 2022, ch. 628, §§ 3 to 5.5; Stats. 2022, ch. 810, §§ 2 to 3.5. New York's version of the UIDDA also addresses subpoenas sought in certain out-of-state proceedings relating to abortion services or procedures. See N.Y. C.P.L.R. § 3119(g).

(b) Other discovery disputes.

Under the UIDDA, motions to enforce, modify, or quash a subpoena and motions for protective orders must be brought in the deponent's state and are governed by the laws of that state. Unif. Interstate Depositions and Discovery Act § 6; *see* CCP § 2029.600(a); *see, e.g.*, **Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.** (Va.2015) 770 S.E.2d 440, 445–46 (when P in Virginia action sought discovery under UIDDA from company in California, Virginia court did not have power to enforce subpoena); **Kapon v. Koch** (Ct.App.2014) 23 N.Y.3d 32, 34–35 (when P in California action sought discovery under UIDDA from New York residents, New York court applied its own state law to decide deponents' motion to quash). Questions about what is discoverable and other discovery issues are also governed by the laws of the deponent's state. *See* Unif. Interstate Depositions and Discovery Act § 5, cmt. ¶ 1; *see, e.g.*, CCP § 2029.500 (California version of UIDDA); **Digital Music News LLC v. Superior Ct.** (2d Dist.2014) 226 Cal.App.4th 216, 223–24 (although discovery sought from California company under UIDDA was intended for use in New York action, question about what was discoverable was governed by California's Civil Discovery Act), *disapproved on other grounds*, **Williams v. Superior Ct.** (2017) 3 Cal.5th 531.

(2) State has adopted UFDA.

Some states have adopted the UFDA. See chart 7-14, below. Under the model version of the UFDA, a party can require an out-of-state deponent to attend a deposition by obtaining a commission from the California court where the suit is pending and then submitting the commission to a court in the deponent's state. *See* Unif. Interstate Depositions and Discovery Act, Prefatory Note; *see also* CCP § 2026.010(f) (contents of and procedure for obtaining commission from California court); Judicial Council Forms, form DISC-030 (optional form to obtain commission). The commission provides official evidence that a suit is pending in the issuing court and gives the out-of-state court a foundation to issue a subpoena to compel the deponent to attend the deposition. *See* Judicial Council Forms, form DISC-030. The deponent can then be compelled to appear and testify in the same manner and by the same process that is used to depose a witness for a case in the deponent's state. Unif. Interstate Depositions and Discovery Act, Prefatory Note. A party to a California action who wants to depose an out-of-state nonparty under the UFDA should refer to that state's version of the model act for the specific procedure to use.

See CCP § 2026.010(c).

(3) State has nonuniform procedure.

If the deponent's state has not adopted the UIDDA or UFDA, the method for requiring the deponent to attend the deposition varies. A party to a California action who wants to depose an out-of-state nonparty should refer to that state's laws for the specific procedure to use. *See* CCP § 2026.010(c).

Chart 7-14, below, lists the procedures adopted by each state for compelling a nonparty who resides in that state to attend a deposition.

7-14. COMPELLING DEPOSITION OF OUT-OF-STATE WITNESS IN CALIFORNIA CASE[1]

STATE	METHOD TO OBTAIN DEPOSITION SUBPOENA	STATUTE/RULE
Alabama	UIDDA	Ala. C. § 12-21-400 et seq.
Alaska	UIDDA	Alaska R. Civ. P. 45.1
Arizona	UIDDA	Ariz. R. Civ. P. 45.1
Arkansas	UIDDA	Ark. R. Civ. P. 45.1
Colorado	UIDDA	Colo. Rev. Stat. § 13-90.5-101 et seq.
Connecticut[2]	UIDDA	Conn. Gen. Stat. § 52-655 et seq.
Delaware	UIDDA	Del. C. Ann. tit. 10, § 4311
District of Columbia	UIDDA	D.C. C. § 13-441 et seq.
Florida	UIDDA	Fla. Stat. § 92.251
Georgia	UIDDA, UFDA	Ga. C. Ann. § 24-13-110 et seq.
Hawaii	UIDDA	Haw. Rev. Stat. § 624D-1 et seq.
Idaho	UIDDA	Idaho R. Civ. P. 45(j)
Illinois	UIDDA	735 Ill. Comp. Stat. § 35/1 et seq.
Indiana	UIDDA	Ind. C. § 34-44.5-1-1 et seq.

Iowa	UIDDA	Iowa R. Civ. P. 1.1702
Kansas	UIDDA	Kan. Stat. Ann. § 60-228a
Kentucky	UIDDA	Ky. Rev. Stat. Ann. § 421.360
Louisiana	UIDDA, UFDA	La. Stat. Ann. § 13:3821 (UFDA), § 13:3825 (UIDDA)
Maine	UIDDA	14 Me. Rev. Stat. Ann. § 401 et seq.
Maryland	UIDDA	Md. C. Ann., Cts. & Jud. Proc. § 9-401 et seq.
Massachusetts[3]	Obtain commission from California court that authorizes notary public to issue subpoena, and serve deposition notice; then, send certified copy of commission and proof of service of notice to notary public in Massachusetts OR Obtain commission from California court; retain local counsel to open case in Massachusetts court and file petition for subpoena	Mass. Gen. Laws ch. 223A, § 11, ch. 233, § 45; Mass. R. Civ. P. 45(d)(1)
Michigan	UIDDA	Mich. Comp. Laws § 600.2201 et seq.; M.C.R. 2.305(F)
Minnesota	UIDDA	Minn. R. Civ. P. 45.06
Mississippi	UIDDA	Miss. Code Ann. § 11-59-1 et seq.; Miss. R. Civ. P. 45(a)(3)
Missouri[3]	File ex parte application in Missouri court for subpoena OR Obtain commission from California court (person appointed in commission to conduct deposition has power to compel attendance of deponent)	Mo. Rev. Stat. § 492.100; Mo. Sup. Ct. R. 57.08; *see* Mo. Sup. Ct. R. 57.09
Montana	UIDDA	Mont. R. Civ. P. 28(c)
Nebraska	UIDDA	Neb. Ct. R. Disc. §§ 6-328, subd. (e), 6-330(A)
Nevada	UIDDA	Nev. Rev. Stat. § 53.100 et seq.
New Hampshire	UFDA	N.H. Rev. Stat. Ann. § 517-A:1; *see* N.H. Rev. Stat. Ann. § 517:18

New Jersey	UIDDA	N.J. Ct. R. 4:11-4(b)
New Mexico	UIDDA	NMRA, Rule 1-045.1
New York	UIDDA, UFDA	N.Y. C.P.L.R. § 3102(e) (UFDA), § 3119 (UIDDA)
North Carolina	UIDDA	N.C. Gen. Stat. § 1F-1 et seq.
North Dakota	UIDDA	N.D. R. Ct. 5.1; N.D. R. Civ. P. 45(a)(3)
Ohio	UIDDA	Ohio Rev. Code Ann. § 2319.09; *see* Ohio Rev. Code Ann. § 2319.08; Ohio R. Civ. P. 45
Oklahoma	UIDDA	Okla. Stat. tit. 12, § 3250 et seq.
Oregon	UIDDA	Or. R. Civ. P. 38(C); Or. Unif. Trial Ct. R. 5.140
Pennsylvania	UIDDA	42 Pa. Cons. Stat. § 5331 et seq.
Rhode Island	UIDDA	R.I. Gen. Laws § 9-18.1-1 et seq.
South Carolina	UIDDA	S.C. Code Ann. § 15-47-100 et seq.; S.C. R. Civ. P. 28(d)
South Dakota	UIDDA	S.D. Codified Laws § 15-6-28.1 et seq.
Tennessee	UIDDA	Tenn. Code Ann. § 24-9-201 et seq.
Texas	Obtain commission from California court, then follow regular procedure for obtaining subpoena in Texas (as if deposition were for Texas case)	Tex. Civ. Prac. & Rem. C. § 20.002; Tex. R. Civ. P. 201.2; *see* Tex. R. Civ. P. 176.1 et seq., 199.1 et seq.
Utah	UIDDA	Utah Code Ann. § 78B-17-101 et seq.
Vermont	UIDDA	Vt. R. Civ. P. 45(f)
Virginia	UIDDA	Va. Code Ann. § 8.01-412.8 et seq.
Washington	UIDDA	Wash. Rev. Code § 5.51.010 et seq.
West Virginia	UIDDA	W.Va. C. § 56-12-1 et seq.; *see* W.Va. R. Civ. P. 28(d), 45
Wisconsin	UIDDA	Wis. Stat. § 887.24

Wyoming	UIDDA, UFDA	Wyo. Stat. Ann. § 1-12-115 (UFDA); Wyo. R. Civ. P. 28(c) (UIDDA)

2. Foreign nonparties.

Nonparties who are residents of a foreign country can be required to attend a deposition and produce evidence in that country as provided by that country's laws. *See* CCP § 2027.010(c). If the nonparty is a resident of a country that has signed the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, the deposing party can use the Convention's procedures to secure the relevant testimony or other information. *See* Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* Ch. 8-B ¶¶ 8:50 to 8:53 (The Rutter Group 2022).

Practice Tip

It is difficult, expensive, and time-consuming to take the deposition of an unwilling witness in a foreign country. See generally CCP § 2027.010 (procedures for conducting deposition in foreign country). For a discussion of the procedures, see "In foreign country," **O'Connor's Federal Rules * Civil Trials**, ch. 6-F, § 3.3.2 (2023 ed.).

Footnotes

* **Legend:**

SUBP-010	Judicial Council Form SUBP-010
SUBP-015	Judicial Council Form SUBP-015
SUBP-020	Judicial Council Form SUBP-020

** Special rules apply to the payment of witness fees for public employees. See "Government witness fees," ch. 8-A, § 10.4.

1 Use Judicial Council Form DISC-030 to obtain a commission to take a deposition in another state. The clerk can issue the commission without a noticed motion or court order, unless the other jurisdiction requires it. *See* CCP § 2026.010(f). If a court order is required by the discovery state, an order for a commission can be

obtained by ex parte application. *Id.*

2 In Connecticut, the UIDDA applies to discovery requests made on or after 7-1-23. Instructions for discovery requests made before 7-1-23 are available at www.jud.ct.gov/CIVILPROC/DEPOSE.PDF.

3 This state is considering a proposal to adopt the UIDDA. For more information, see uniformlaws.org/UIDDA.

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Tab R

62 No. 10 DRI For Def. 54

DRI For the Defense
October, 2020

Raising the Bar

Avoiding Procedural Potholes

SUBPOENAING OUT-OF-STATE NONPARTIES

Emily M. Melvin [a1]

Obtaining information from nonparties in a case can be riddled with procedural potholes. For state proceedings, issuing a subpoena to an out-of-state nonparty can be especially fraught with difficulties. The United States Supreme Court held long ago, in *Minder v. Georgia*, 183 U.S. 559, 562 (1902), that a state court does not have the power to compel nonparties "who are beyond the limits of the state" to respond to discovery.

Additionally, ethics opinions from several states have found that knowingly requesting issuance of an unenforceable out-of-state subpoena constitutes professional misconduct because the lawyer is engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See, e.g.,* Vermont Advisory Ethics Opinion 93-04; *see also* North Carolina 2010 Formal Ethics Opinion 2; Virginia Legal Ethics Opinion 1495. For these reasons, states have developed their own procedures and requirements for "domesticating" out-of-state subpoenas for in-state service. Previously, these procedures and requirements varied drastically from state to state, with some even requiring local counsel in the discovery state to file an action to establish jurisdiction over the nonparty.

In 2007, the Uniform Interstate Depositions and Discovery Act (UIDDA) was promulgated in an attempt to standardize the process. Today, forty-two states have adopted the UIDDA. This article provides a step-by-step guide to issuing a subpoena pursuant to the UIDDA and highlights important considerations along the way.

The Process

Imagine you are representing a defendant in North Carolina and need to obtain relevant records from a nonparty witness in Virginia. You will need to take the following actions:

1. Determine whether Virginia has adopted the UIDDA or whether it follows a different procedure. Some states that have adopted the UIDDA, like Virginia, have added slight alterations. For instance, Virginia has added that a party requesting issuance of a subpoena must submit "a written statement that the law of the foreign jurisdiction grants reciprocal privileges to citizens of the Commonwealth for taking discovery in the jurisdiction that issued the foreign subpoena."

2. Prepare and execute a North Carolina subpoena duces tecum pursuant to Rule 45 of the North Carolina Rules of Civil Procedure. The North Carolina subpoena should clearly state that it is not enforceable, but is being provided for the purpose of obtaining a UIDDA subpoena.

3. Prepare a non-executed Virginia subpoena complying with Virginia's rules of discovery along with a letter to the clerk of court in the county where the records sought are maintained. The Virginia subpoena should incorporate the terms of the North Carolina subpoena and list the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel. Moreover, the letter to the clerk should request that the clerk file and issue the Virginia subpoena and notify the clerk that the Virginia subpoena is being sought pursuant to the Virginia statute (citing the appropriate statute or rule quoting the UIDDA). The letter may also tell the clerk which documents to issue, which ones to endorse or file-stamp and return, and whether service by sheriff is requested.

4. Prepare any forms or cover sheets required by the Virginia court. Some states have an application form or cover sheet to submit along with the subpoena documents that can often be located on the court's website. The clerk's office will usually have a webpage explaining the forms and procedures that should be consulted in preparing or sending a subpoena.

5. Send all the materials--the executed North Carolina subpoena, the non-executed Virginia subpoena, the requisite form or cover sheet, and the letter to the clerk--to the clerk of court in the county where discovery is sought. It is important to note that the materials must be sent to the clerk in the county where the discovery is sought to be conducted. Otherwise, the clerk will not issue the in-state subpoena.

6. Serve the subpoena documents. There are two optimal service options after the clerk has issued the subpoena. In accordance with the discovery state's rules, the clerk may send the issued subpoena materials to a process server in that state or have the county sheriff's ***55** department serve the materials. Either option should be specified in the letter to the clerk of court.

Using a process server can be extremely efficient. If the state's rules allow, a process server can deliver the materials to the clerk, wait for the clerk to return copies of the finalized materials, then turn around and serve the subpoena. This ensures timely service.

Important Considerations

While the UIDDA eliminates the need to engage local counsel to help issue and serve an out-of-state subpoena, local counsel is likely necessary in certain instances. A request for the issuance of a subpoena under the UIDDA does not constitute an appearance in the courts of the state in which the record is maintained. Thus, if the nonparty refuses to respond to the subpoena or moves to quash or modify the subpoena, then local counsel may be needed. Any motion directly affecting the subpoena, such as a motion to quash, compel, or modify the subpoena, must be filed in and is governed by the rules of the state where the subpoena will be issued.

Another important consideration is whether the nonparty is an out-of-state corporation with a registered agent in the trial state. Only a handful of courts have addressed whether an attorney can compel an out-of-state corporation to produce records by serving the in-state registered agent instead of complying with the UIDDA. These courts have ruled that such service renders the subpoena unenforceable. The decisions hold that having a registered agent and doing business in a state do not necessarily obligate a nonparty corporation to produce records located outside the state. *See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. 2015); *Ulloa v. CMI, Inc.*, 133 So. 3d 914 (Fla. 2013). For this reason, the safest option when subpoenaing an out-of-state corporation is to follow the discovery state's UIDDA law.

Finally, a subpoena issued pursuant to a state's UIDDA law may not compel the nonparty to appear for deposition in the trial state or to send the subpoenaed discovery to the trial state. Not only is the subpoenaed discovery governed by the laws of the discovery state, the discovery takes place in that state. For this reason, the subpoenaing attorney must name a location in the discovery state to depose the nonparty or where the nonparty is to send production, such as a court reporting agency.

Obtaining an out-of-state subpoena is not a straightforward process. However, with some care and attention to detail, the bumps in the road can be avoided.

Footnotes

a1 Emily M. Melvin is an associate with Ellis & Winters LLP in Greensboro, North Carolina. Her law practice primarily includes commercial litigation. Ms. Melvin has been a member of DRI since 2019.

End of Document

Tab S

§ 1. Short Title.

This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

§ 2. Definitions.

(1) “Foreign jurisdiction” means a state other than this state.
(2) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.
(3) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
(4) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, [a federally recognized Indian tribe], or any territory or insular possession subject to the jurisdiction of the United States.
(5) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to:
(A) attend and give testimony at a deposition;
(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or
(C) permit inspection of premises under the control of the person.

§ 3. Issuance of Subpoena.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the [county, district, circuit, or parish] in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.
(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.
(c) A subpoena under subsection (b) must:
(A) incorporate the terms used in the foreign subpoena; and
(B) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

§ 4. Service of Subpoena.

A subpoena issued by a clerk of court under Section 3 must be served in compliance with [cite applicable rules or statutes of this state for service of subpoena].

§ 5. Deposition, Production, and Inspection.

[Cite rules or statutes of this state applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

§ 6. Application to Court.

An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

§ 7. Uniformity of Application and Construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it

Tab T

Memorandum

To: Supreme Court Advisory Committee

From: Rules 167-206 subcommittee

Date: March 28, 2024

Re: Interpreter Costs

We were given the following assignment by the Supreme Court:
Court Interpreter Cost. Both HB 3474 (Section 10.07) and SB 380 (Section 1) amend Government Code § 57.002(g) to clarify that a person who has filed a Statement of Inability to Afford Payment of Court Costs need not pay interpreter costs unless the statement is successfully challenged. The Committee should consider whether Texas Rule of Civil Procedure 183 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

The committee reviewed TRCP 145 and 183 and the Government Code amendments. The Government Code is a comprehensive rule about interpreters and CART providers. By contrast, rule 183 is bare bones and seems to conflict with the statute.

The committee recommends a complete revision to rule 183 to follow the Government Code. In addition, rule 145 should be amended to list an interpreter under the definition of "costs."

Current law—Rule 183. Interpreters

The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Proposed Replacement

Rule 183 Interpreters and CART Providers

(a) A court shall appoint a certified court interpreter or a certified CART provider for an individual who has a hearing impairment or a licensed court interpreter for an individual who can hear but does not comprehend or communicate in English if a motion for the appointment of an interpreter or provider is filed by a party or requested by a witness.

(b) A court may, on its own motion, appoint a certified court interpreter or a certified CART provider for an individual who has a hearing impairment or a licensed court interpreter for an individual who can hear but does not comprehend or communicate in English.

(c) With the agreement of the parties, a court may use a non-licensed interpreter for an individual who can hear but who does not comprehend or communicate in English.

(d) The court may fix the interpreter's reasonable compensation.

(1) The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(2) A party to a proceeding in a court who files a statement of inability to afford payment of court costs under Rule 145 is not required to provide an interpreter at the party's expense or pay the costs associated with the services of an interpreter appointed under this section, unless the statement has been contested and the court has ordered the party to pay costs pursuant to Rule 145.

[Alternative version]

Interpretive services shall not be charged as costs against a party to a proceeding in a court who files a statement of inability to afford payment of

court costs under Rule 145, unless the statement has been contested and the court has ordered the party to pay costs pursuant to Rule 145.

(3) Interpreter services or other auxiliary aids for individuals who are deaf, hard of hearing, or have communication disabilities, shall be provided to those individuals free of charge pursuant to federal and state laws.

Comment

This rule has been re-written to comply with section 57.002 of the Texas Government Code. There are certain exceptions to the requirement of a licensed interpreter in the code.

Suggested Revision to Rule 145(a)

(a) Costs Defined. "Costs" mean any fee charged by the court or an officer of the court, including, but not limited to, filing fees, fees for issuance and service of process, fees for copies, fees for a court-appointed professional, fees for an interpreter, and fees charged by the clerk or court reporter for preparation of the appellate record.

Tab U

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle D. Judicial Personnel and Officials
Chapter 57. Court Interpreters (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Government Code § 57.002

§ 57.002. Appointment of Interpreter or CART Provider; CART Provider List; Payment of Interpreter Costs

Effective: September 1, 2023
Currentness

(a) A court shall appoint a certified court interpreter or a certified CART provider for an individual who has a hearing impairment or a licensed court interpreter for an individual who can hear but does not comprehend or communicate in English if a motion for the appointment of an interpreter or provider is filed by a party or requested by a witness in a civil or criminal proceeding in the court.

(b) A court may, on its own motion, appoint a certified court interpreter or a certified CART provider for an individual who has a hearing impairment or a licensed court interpreter for an individual who can hear but does not comprehend or communicate in English.

(b-1) A licensed court interpreter appointed by a court under Subsection (a) or (b) must hold a license that includes the appropriate designation under Section 157.101(d) that indicates the interpreter is permitted to interpret in that court.

(c) Subject to Subsection (e), in a county with a population of less than 50,000, a court may appoint a spoken language interpreter who is not a licensed court interpreter.

(d) Subject to Subsection (e), in a county with a population of 50,000 or more, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter if:

(1) the language necessary in the proceeding is a language other than Spanish; and

(2) the court makes a finding that there is no licensed court interpreter within 75 miles who can interpret in the language that is necessary in a proceeding.

(d-1) Subject to Subsection (e), a court in a county to which Section 21.021, Civil Practice and Remedies Code, applies may appoint a spoken language interpreter who is not a licensed court interpreter.

(e) A person appointed under Subsection (c) or (d):

(1) must be qualified by the court as an expert under the Texas Rules of Evidence;

(2) must be at least 18 years of age; and

(3) may not be a party to the proceeding.

(f) The department shall maintain a list of certified CART providers and, on request, may send the list to a person or court.

(g) A party to a proceeding in a court who files a statement of inability to afford payment of court costs under Rule 145, Texas Rules of Civil Procedure, is not required to provide an interpreter at the party's expense or pay the costs associated with the services of an interpreter appointed under this section that are incurred during the course of the action, unless the statement has been contested and the court has ordered the party to pay costs pursuant to Rule 145. Nothing in this subsection is intended to apply to interpreter services or other auxiliary aids for individuals who are deaf, hard of hearing, or have communication disabilities, which shall be provided to those individuals free of charge pursuant to federal and state laws.

(h) Each county auditor, or other individual designated by the commissioners court of a county, in consultation with the district and county clerks shall submit to the Office of Court Administration of the Texas Judicial System, in the manner prescribed by the office, information on the money the county spent during the preceding fiscal year to provide court-ordered interpretation services in civil and criminal proceedings. The information must include:

(1) the number of interpreters appointed;

(2) the number of interpreters appointed for parties or witnesses who are indigent;

(3) the amount of money the county spent to provide court-ordered interpretation services; and

(4) for civil proceedings, whether a party to the proceeding filed a statement of inability to afford payment of court costs under Rule 145, Texas Rules of Civil Procedure, applicable to the appointment of an interpreter.

(i) Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall:

(1) submit to the legislature a report that aggregates by county the information submitted under Subsection (h) for the preceding fiscal year; and

(2) publish the report on the office's Internet website.

Credits

Added by Acts 2001, 77th Leg., ch. 1139, § 1, eff. Sept. 1, 2001. Amended by Acts 2005, 79th Leg., ch. 584, § 1, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 614, § 2, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 921, § 7.002, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 1198, § 1, eff. Sept. 1, 2011. Added by Acts 2011, 82nd Leg., ch. 1341 (S.B. 1233), § 12, eff. June 17, 2011. Amended by Acts 2013, 83rd Leg., ch. 1223 (S.B. 1620), §§ 2, 3, eff. June 14, 2013; Acts 2017, 85th Leg., ch. 516 (S.B. 43), § 1, eff. Sept. 1, 2017; Acts 2023, 88th Leg., ch. 144 (S.B. 380), §§ 1, 2, eff. May 23, 2023; Acts 2023, 88th Leg., ch. 861 (H.B. 3474), §§ 10.006, 10.007, eff. Sept. 1, 2023.

Editors' Notes

Relevant Additional Resources

Additional Resources listed below contain your search terms.

HISTORICAL AND STATUTORY NOTES

Acts 2005, 79th Leg., ch. 584 rewrote subsec. (c) and added subsecs. (d) and (e). Prior to amendment, subsec. (c) had read:

"(c) In a county with a population of less than 50,000, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter and who:

"(1) is qualified by the court as an expert under the Texas Rules of Evidence;

"(2) is at least 18 years of age; and

"(3) is not a party to the proceeding."

Section 2 of Acts 2005, 79th Leg., ch. 584 provides:

"The change in law made by this Act applies only to the appointment of a court interpreter under Chapter 57, **Government Code**, as amended by this Act, on or after the effective date [Sept. 1, 2005] of this Act. The appointment of a court interpreter before the effective date of this Act is governed by the law in effect when the interpreter was appointed, and the former law is continued in effect for that purpose."

Acts 2005, 79th Leg., ch. 614 deleted "certified or" preceding "licensed court interpreter" from the introductory paragraph of subsec. (c).

Section 12 of Acts 2005, 79th Leg., ch. 614 provides:

"(a) Except as provided by Subsection (b) of this section, the change in law made by this Act applies only to the appointment of a court interpreter under Chapter 57, **Government Code**, as amended by this Act, on or after September 1, 2005. The appointment of a court interpreter before September 1, 2005, is governed by the law in effect when the interpreter was appointed, and the former law is continued in effect for that purpose.

"(b) Section 21.003, Civil Practice and Remedies Code, as amended by this Act, and Article 38.31(g)(2), Code of Criminal Procedure, as amended by this Act apply only to the qualifications of a court interpreter appointed under Chapter 57, **Government Code**, as amended by this Act, on or after September 1, 2006. The qualifications of a court interpreter appointed before September 1, 2006, are governed by the law in effect when the interpreter was appointed, and the former law is continued in effect for that purpose."

Acts 2007, 80th Leg., ch. 921 reenacted subsec. (c) merging the amendments by Acts 2005, 79th Leg., ch. 584, which made the subsection subject to subsec. (e), and Acts 2005, 79th Leg., ch. 614 which deleted reference to a certified court interpreter.

Acts 2009, 81st Leg., ch. 1198 added subsec. (b-1).

Section 4(c) of Acts 2009, 81st Leg., ch. 1198 provides:

"Section **57.002**(b-1), **Government Code**, as added by this Act, applies only to the appointment of a licensed court interpreter on or after January 1, 2012. An appointment before that date is governed by the law in effect on the date the appointment was made, and the former law is continued in effect for that purpose."

Acts 2011, 82nd Leg., ch. 1341 (S.B. 1233) added subsec. (d-1).

2013 Legislation

Acts 2013, 83rd Leg., ch. 1223 (S.B. 1620) rewrote subsecs. (a) and (b), and added subsec. (f). Prior thereto, subsecs. (a) and (b) read:

"(a) A court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court.

"(b) A court may, on its own motion, appoint a certified court interpreter or a licensed court interpreter."

2017 Legislation

Acts 2017, 85th Leg., ch. 516 (S.B. 43), in (b-1), corrected the textual cross reference.

2023 Legislation

Acts 2023, 88th Leg., ch. 144 (S.B. 380), § 1, amended the section heading as follows:

"**§ 57.002. Appointment of Interpreter or CART Provider; CART Provider List; Payment of Interpreter Costs**"

Acts 2023, 88th Leg., ch. 144 (S.B. 380), § 2, added subsections (g) to (i).

Section 3 of Acts 2023, 88th Leg., ch. 144 (S.B. 380) provides:

"SECTION 3. The change in law made by this Act applies to an action pending on the effective date of this Act or filed on or after the effective date of this Act."

Acts 2023, 88th Leg., ch. 861 (H.B. 3474), § 10.006, amended the section heading as follows:

"**§ 57.002. Appointment of Interpreter or Cart Provider; Cart Provider List; Payment of Interpreter Costs**"

Acts 2023, 88th Leg., ch. 861 (H.B. 3474), § 10.007, added (g) to (i).

Section 10.010 of Acts 2023, 88th Leg., ch. 861 (H.B. 3474) provides:

"SECTION 10.010. (a) This article is and shall be construed to be consistent with the procedures set forth in Rules 199.1(c) and 203.6(a), Texas Rules of Civil Procedure, as of September 1, 2023.

"(b) Section **57**.**002**, **Government** **Code**, as amended by this article, applies to an action pending on September 1, 2023, or filed on or after that date."

Relevant Notes of Decisions (3)

View all 14

Notes of Decisions listed below contain your search terms.

Criminal proceedings

For the purposes of section **57**.**002** of the **Government** **Code**, a grand jury hearing is a "criminal proceeding" requiring the appointment of a properly qualified interpreter for a witness who is either non-English speaking or deaf or hearing-impaired. Tex. Atty. Gen. Op., No. JC-0579 (2002).

In a criminal proceeding, a court must take into account the defendant's constitutional right to an interpreter and article 38.30 of the Code of Criminal Procedure; Chapter 57 of the **Government** **Code** establishes qualifications for spoken-language interpreters appointed in criminal cases under the authority of article 38.30. Tex. Atty. Gen. Op., No. JC-0584 (2002).

Payment of interpreters

Chapter 57 of the **Government** **Code** does not alter preexisting law on the payment of appointed court interpreters and does not require counties to pay for spoken-language interpreters in civil cases. Tex. Atty. Gen. Op., No. JC-0584 (2002).

V. T. C. A., **Government** **Code** § **57**.**002**, TX GOVT § **57**.**002**

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

End of Document

Tab V

Supreme Court of Texas

Misc. Docket No. 24-9005

Preliminary Approval of Amendments to the Texas Rules of Appellate Procedure Related to the Fifteenth Court of Appeals

ORDERED that:

1. In accordance with the Act of May 21, 2023, 88th Leg., R.S. ch. 459 (S.B. 1045), the Court invites public comments on proposed new Texas Rule of Appellate Procedure 27a and on proposed amendments to Texas Rules of Appellate Procedure 25, 32, and 39. The new rule is shown in clean form, whereas the amendments are demonstrated in redline form.

2. Comments regarding the new and amended rules should be submitted in writing to rulescomments@txcourts.gov by May 1, 2024.

3. The Court will issue an order finalizing the rules after the close of the comment period. The Court may change the rules in response to public comments. The Court expects the amendments to take effect on September 1, 2024.

4. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

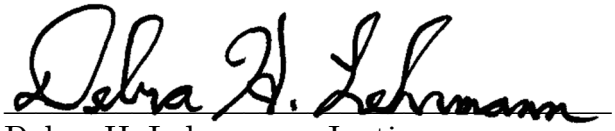
   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

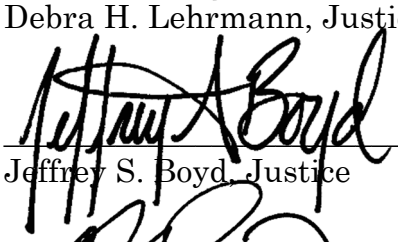
   d. submit a copy of this Order for publication in the *Texas Register*.

Dated: February 6, 2024.

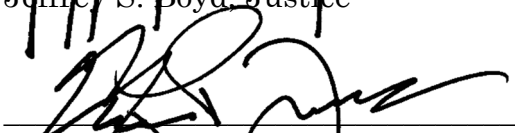
Nathan L. Hecht, Chief Justice



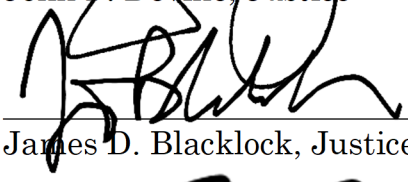
Debra H. Lehrmann, Justice



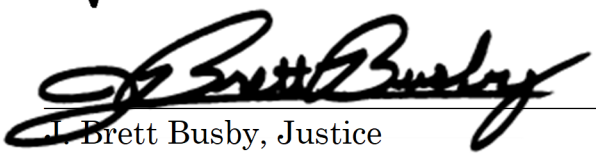
Jeffrey S. Boyd, Justice



John P. Devine, Justice



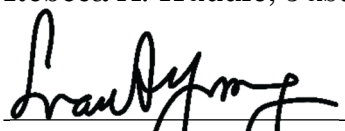
James D. Blacklock, Justice



J. Brett Busby, Justice

Jane N. Bland, Justice

Rebeca A. Huddle, Justice



Evan A. Young, Justice

Court of Criminal Appeals of Texas

Misc. Docket No. 24-002

Preliminary Approval of Amendments to Texas Rules of Appellate Procedure Related to the Fifteenth Court of Appeals

ORDERED that:

1. In accordance with the Act of May 21, 2023, 88th Leg., R.S. ch. 459 (S.B. 1045, codified at TEX. GOV'T CODE § 75), the Court invites public comments on proposed amendments to Texas Rules of Appellate Procedure 25, 27, 32, and 39.

2. Comments regarding the proposed amendments should be submitted in writing to the Court of Criminal Appeals by May 1, 2024 at txccarulescomments@txcourts.gov or by mail to the Clerk of the Court of Criminal Appeals at P.O. Box 12308, Austin, Texas 78711.

3. The Court will issue an order finalizing the amendments after the close of the comment period. The Court may change the amendments in response to public comments. The Court expects the final amendments to take effect on September 1, 2024.

4. The Clerk is directed to:

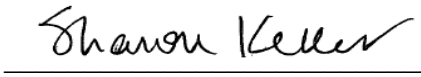
    a. file a copy of this Order with the Secretary of State;

    b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

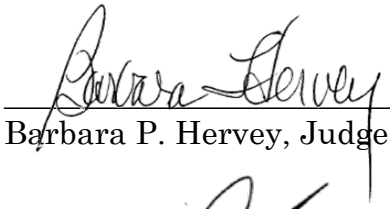
    c. send a copy of this Order to each elected member of the Legislature; and

    d. submit a copy of this Order for publication in the *Texas Register*.

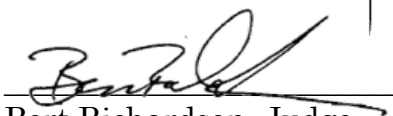
Dated: February 6, 2024.



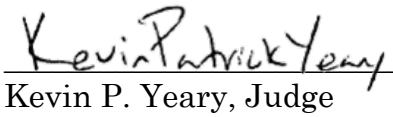
Sharon Keller, Presiding Judge



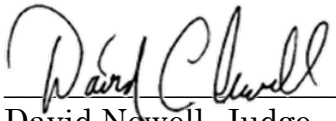
Barbara P. Hervey, Judge



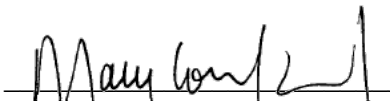
Bert Richardson, Judge



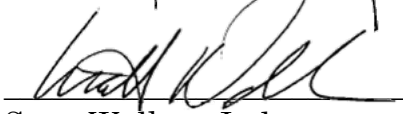
Kevin P. Yeary, Judge



David Newell, Judge

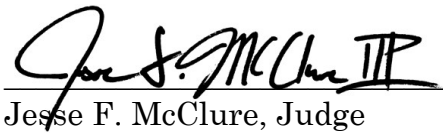


Mary Lou Keel, Judge



Scott Walker, Judge

Michelle Slaughter, Judge



Jesse F. McClure, Judge

TEXAS RULES OF APPELLATE PROCEDURE

Rule 25. Perfecting Appeal

25.1. Civil Cases

(a) *Notice of Appeal*. An appeal is perfected when a written notice of appeal is filed with the trial court clerk. If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice.

(b) *Jurisdiction of Appellate Court*. The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.

(c) *Who Must File Notice*. A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.

(d) *Contents of Notice*. The notice of appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to appeal;

(4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts;

(5) state the name of each party filing the notice;

(6) in an accelerated appeal, state that the appeal is accelerated and state whether it is a parental termination or child protection case or an appeal from an order certifying a child to stand trial as an adult, as defined in Rule 28.4;

(7) in a restricted appeal:

(A) state that the appellant is a party affected by the trial court's judgment but did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of;

(B) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and

(C) be verified by the appellant if the appellant does not have counsel.

(8) state, if applicable, that the appellant is presumed indigent and may proceed without paying costs under Rule 20.1~~.~~;

(9) state whether the appeal involves a matter:

(A) brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education;

(B) brought by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct; or

(C) in which a party to the proceeding challenges the constitutionality or validity of a state statute or rule and the attorney general is a party to the case.

(e) *Notice of Notice.* The notice of appeal must be served on all parties to the trial court's final judgment or, in an interlocutory appeal, on all parties to the trial court proceeding. At or before the time of the notice of appeal's filing, the filing party must also deliver a copy of the notice of appeal to each court reporter responsible for preparing the reporter's record.

(f) *Trial Court Clerk's Duties.* The trial court clerk must immediately deliver a copy of the notice of appeal to the appellate court clerk, to the trial judge, and to each court reporter responsible for preparing the reporter's record.

(g) *Amending the Notice*. An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(h) *Enforcement of Judgment Not Suspended by Appeal*. The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless:

(1) the judgment is superseded in accordance with Rule 24, or

(2) the appellant is entitled to supersede the judgment without security by filing a notice of appeal.

Notes and Comments

Comment to 2024 change: Rule 25.1(d)(9) is adopted to implement Texas Government Code Section 22.220(d), which describes matters within the Fifteenth Court of Appeals' exclusive intermediate appellate jurisdiction. The addition is designed to assist the courts of appeals in the orderly transfer of cases and to assist parties in determining which court should hear their appeal.

***

Rule 27a. Transfers Between Courts of Appeals (New Rule)

(a) *Definitions.*

(1) "Transferor court" means the court of appeals in which the appeal is pending.

(2) "Transferee court" means the court of appeals to which a party requests or the transferor courts seeks to transfer the appeal.

(b) *Application.*

(1) The transfer process in this rule applies to appeals:

(A) improperly taken to the Fifteenth Court of Appeals; or

(B) over which the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction.

(2) This rule does not apply to appeals transferred by the Supreme Court for good cause, including for docket equalization purposes.

(c) *Transfer by a Court of Appeals.*

(1) On a Party's Motion.

(A) A party may file a motion to transfer an appeal. The motion should be filed within 30 days after the appeal is perfected but must be filed by the date the appellee's brief is filed. The motion must be filed in the transferor court and may be supported by briefing. The movant must immediately notify the transferee court of the motion.

(B) The transferor court must notify the parties and the transferee court of its decision on the motion. The transferor court may transfer the appeal if:

(i) no party files an objection to the transfer within 10 days after the motion's filing or the transferor court determines that any filed objection lacks merit; and

(ii) the transferee court agrees to the transfer.

(C) The transferee court must file, within 20 days after receiving notice from the transferor court of its decision on the motion, a letter in the transferor court explaining whether it agrees with the transferor court's decision.

(2) On Its Own Initiative.

(A) The transferor court must notify the parties and the transferee court of its intent to transfer on its own initiative.

(B) The transferor court may transfer an appeal on its own initiative if:

(i) no party files an objection to the transfer within 10 days after receiving notice from the transferor court of its intent to transfer or the transferor court determines that any filed objection lacks merit; and

(ii) the transferee court agrees to the transfer.

(C) The transferee court must, within 20 days after receiving notice from the transferor court of its intent to transfer, file a letter in the transferor court explaining whether it agrees with the transfer.

(3) Notice to Supreme Court and the Office of Court Administration. If the transferor court transfers an appeal under (1) or (2), the transferor court must notify the Supreme Court and the Office of Court Administration of the transfer.

(d) *Transfer by the Supreme Court.*

(1) If the transferor court and transferee court do not agree on whether the appeal should be transferred, then the transferor court must forward to the Supreme Court either:

(A) the party's motion to transfer, any briefing, the transferee court's letter under (c)(1)(C), and a letter explaining the transferor court's decision on the motion; or

(B) a letter from the transferor court that explains its reasons for requesting transfer and that notes any party objections and the transferee court's letter under (c)(2)(C).

(2) Unless exceptional circumstances require additional time, the documents in (1) must be submitted to the Supreme Court within 20 days after receipt of the transferee court's letter under (c)(1)(C) or (c)(2)(C).

(3) After receipt of all relevant documents, the Supreme Court will consider and decide the motion or request by the transferor court to transfer.

Notes and Comments

Comment to 2024 change: Rule 27a is adopted to implement Texas Government Code Section 73.001. Paragraph (b)(1) limits the applicability of the transfer process in Rule 27a to the appeals described in Section 73.001(c). And paragraph (b)(2) makes clear that Rule 27a does not apply to "good cause" transfers under Section 73.001(a), which are handled under the Policies for Transfer of Cases Between Courts of Appeals adopted in Misc. Dkt. No. 06-9136.

Consistent with Section 1.15 of the Fifteenth Court of Appeals' enabling legislation, Rule 27a only applies to appeals perfected on or after September 1, 2024. *See* Act of May 21, 2023, 88th Leg., R.S., ch. 459 (S.B. 1045). It does not apply to appeals pending in the courts of appeals that were filed between September 1, 2023, and August 31, 2024, and of which the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction under Texas Government Code Section 22.220(d). On September 1, 2024, those appeals should be transferred immediately to the Fifteenth Court of Appeals.

***

Rule 32. Docketing Statement

32.1. Civil Cases

Promptly upon filing the notice of appeal in a civil case, the appellant must complete and file in the appellate court ~~a~~the ~~d~~Docketing ~~s~~Statement approved by the Office of Court Administration or another document that includes the same information.~~that includes the following information:~~

~~(a) (1) if the appellant filing the statement has counsel, the name of that appellant and the name, address, telephone number, fax number, if any, and State Bar of Texas identification number of the appellant's lead counsel; or~~

~~(2) if the appellant filing the statement is not represented by an attorney, that party's name, address, telephone number, and fax number, if any;~~

~~(b) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing;~~

~~(c) the trial court's name and county, the name of the judge who tried the case, and the date the judgment or order appealed from was signed;~~

~~(d) the date of filing of any motion for new trial, motion to modify the judgment, request for findings of fact, motion to reinstate, or other filing that affects the time for perfecting the appeal;~~

~~(e) the names of all other parties to the trial court's judgment or the order appealed from, and:~~

~~(1) if represented by counsel, their lead counsel's names, addresses, telephone numbers, and fax numbers, if any; or~~

(2) if not represented by counsel, the name, address, and telephone number of the party, or a statement that the appellant diligently inquired but could not discover that information;

(f) the general nature of the case — for example, personal injury, breach of contract, or temporary injunction;

(g) whether the appeal's submission should be given priority, whether the appeal is an accelerated one under Rule 28.1 or another rule or statute, and whether it is a parental termination or child protection case or an appeal from an order certifying a child to stand trial as an adult, as defined in Rule 28.4;

(h) whether the appellant has requested or will request a reporter's record, and whether the trial was electronically recorded;

(i) the name, mailing address, telephone number, fax number, if any, email address, and Certified Shorthand Reporter number of each court reporter responsible for preparing the reporter's record;

(j) whether the appellant intends to seek temporary or ancillary relief while the appeal is pending;

(k) if the appellant filed a Statement of Inability to Afford Payment of Court Costs in the trial court:

(1) the date that the Statement was filed;

(2) the date of filing of any motion challenging the Statement;

(3) the date of any hearing on the appellant's ability to afford costs; and

(4) if the trial court signed an order under Texas Rule of Civil Procedure 145, the court's findings regarding the appellant's ability to afford costs and the date that the order was signed;

(l) whether the appellant has filed or will file a supersedeas bond; and

(m) any other information the appellate court requires.

Notes and Comments

Comment to 2024 change: Rule 32.1 is amended to remove the list of requirements of what information must be included in the docketing statement in favor of a form approved by the Office of Court Administration.

***

Rule 39. Oral Argument; Decision Without Argument

***

39.8. Clerk's Notice

The clerk must send to the parties—at least 21 days before the date the case is set for argument or submission without argument—a notice telling the parties:

(a) whether the court will allow oral argument or will submit the case without argument;

(b) the date of argument or submission without argument;

(c) if argument is allowed~~, the time allotted for argument; and~~:

(1) the time allotted for argument; and

(2) the location of the argument or instructions for joining the argument electronically, the court's designated contact information, and instructions for submitting exhibits; and

(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court.

A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date. Once issued, the court may amend the notice with less than 21 days before the case is set for argument or submission.

Notes and Comments

Comment to 2024 change: Rule 39.8 is amended to clarify requirements for notices and to clarify the court's ability to amend notices.

Tab W

From: Tracy Christopher
To: Rulescomments
Cc: Deborah Young; Hillary Rolfes
Subject: 15th COA
Date: Tuesday, February 6, 2024 3:44:53 PM

To the members of the Supreme Court:

I have reviewed the 15th COA rules and I am still not exactly sure how a case would arrive at the 15th court of appeals.
Are you expecting the original courts of appeals to always make that transfer (and not the district clerk or the parties by their filing)?
For example, an appeal is filed with the Harris County trial clerk and they then send it to us. And then we will review and transfer it to the 15th if appropriate? If I am correct, I think you should state this in a comment.

We will not be able to tell whether or not the case does or does not transfer to the 15th until we see the pleadings–the information in the notice of appeal would be insufficient.
At a minimum, it would be good to have the appealing party state in the notice of appeal that the case should or should not transfer to the 15th.

I would also ask for the court's guidance on the two issues that I flagged at the Supreme Court Advisory Meeting.
Should we transfer the entire case to the 15th court with a multi-party case where only one party's case belongs in the 15th?
Should we transfer the entire case to the 15th court when one cause of action belongs in the 15th and one cause of action is excluded (example–breach of contract and wrongful termination)?

Thank you for your consideration.

Tracy Christopher
Chief Justice, 14th Court of Appeals
Houston, TX 77002
[redacted]

From: Tracy Christopher
To: Rulescomments
Subject: 15th COA
Date: Wednesday, February 7, 2024 11:26:43 AM

One other potential change:
For cases already in the business court–the notice of appeal should be filed with the "business court clerk in Austin."
I think 25.1 should reference that

Tracy Christopher
Chief Justice, 14th Court of Appeals
Houston, TX 77002
[redacted]

From: Charlie Eldred
To: Rulescomments
Subject: Comment to Preliminarily Approved Amendment to Texas Rule of Appellate Procedure 25.1(d)(9)
Date: Tuesday, March 5, 2024 8:02:50 PM
Attachments: 20240305 Eldred Letter to Supreme Court re 25.1(d)(9).docx

Please see attached.

Charles K. Eldred
Texas State Bar No. 00793681
charlie.eldred@gmail.com
(512) 923-7809

March 5, 2024

The Chief Justice and Justices of the Supreme Court of Texas
via rulescomments@txcourts.gov

Re: Comment to Preliminarily Approved Amendment to Texas Rule of Appellate Procedure 25.1(d)(9)

To whom it may concern:

I submit the following comment to the preliminarily approved amendments to the Texas Rules of Appellate Procedure related to the Fifteenth Court of Appeals, dated February 6, 2024. Specifically, I suggest the following edit to preliminarily approved subsection 25.1(d)(9):

(9) state whether the appeal involves a matter:

(A) brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education;

(B) brought by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct; ~~or~~

(C) in which a party to the proceeding challenges the constitutionality or validity of a state statute or rule and the attorney general is a party to the case~~.~~; or

(D) in which a party appeals from an order or judgment of the business court or an original proceeding related to an action or order of the business court. In such cases, the party shall also state whether the Supreme Court has concurrent or exclusive jurisdiction.

This proposed subsection (d) would implement Texas Government Code Section 22.220(d)(3), which provides, "The Court of Appeals for the Fifteenth Court of Appeals District has exclusive intermediate appellate jurisdiction over the following matters arising out of or related to a civil case: … any other matter as provided by law," and Texas Government Code Section 25A.007(a), which provides, "Notwithstanding any other law and except … in instances when the supreme court

has concurrent or exclusive jurisdiction, the Fifteenth Court of Appeals has exclusive jurisdiction over an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court."

Thank you for your consideration.

Sincerely,

/s/ Charles K. Eldred
Charles K. Eldred, Texas Bar No. 00793681

From: Becky Walker
To: Rulescomments
Subject: Misc Docket 24-9005
Date: Tuesday, February 6, 2024 2:47:24 PM

Hi there,

I wanted to voice some thoughts about the proposed rules of appellate procedure for the Fifteenth Court of Appeals. The rules provide a 20-day deadline for the 15th COA to agree or disagree to the transfer. What would happen in the event the 15th COA misses the deadline without weighing in? Would the transferor court treat that as a disagreement and forward the necessary info to the Supreme Court? Or could the transferor court treat it as tacit consent by inaction and go ahead and transfer the case? Some guidance may be helpful.

Additionally, if the transferor and the transferee court cannot agree on whether to transfer, and the transferor court forwards everything to the Supreme Court, is the case abated on the transferor's docket until the Supreme Court rules on the transfer? Or would the transferor court be required to treat the case as active? Would the parties be permitted to file additional motions/brief the case while waiting to hear about whether the case will transfer? It seems like it would be hard on the parties to brief the case if they do not yet know which court's precedent will be relevant.

I also thought that the rules of appellate procedure (32.1) could include a link to the OCA's website where the relevant docketing statement could be found to make it easier for parties and pro se litigants. If not the rule itself, then perhaps the comment to the rule.

Thank you.

Best,

Becky Walker

Tab X

Supreme Court of Texas

Misc. Docket No. 24-9004

Preliminary Approval of Rules for the Business Court

ORDERED that:

1. In accordance with the Act of May 25, 2023, 88th Leg., R.S., ch. 380 (H.B. 19, codified at TEX. GOV'T CODE ch. 25A), the Court invites public comments on proposed new Texas Rules of Civil Procedure 352-359 and on amendments to Texas Rule of Civil Procedure 2, Canon 6 of the Code of Judicial Conduct, and Texas Rules of Judicial Administration 2, 3, 4, 6.1, and 7.

2. The amendments to Texas Rule of Civil Procedure 2, Canon 6 of the Code of Judicial Conduct, and the Texas Rules of Judicial Administration are demonstrated in redline form. New Texas Rules of Civil Procedure 352-359 are demonstrated in clean form.

3. Comments on the proposed new and amended rules should be submitted in writing to rulescomments@txcourts.gov by May 1, 2024.

4. The Court will issue an order finalizing the rules after the close of the comment period. The Court may change the rules in response to public comments. The Court expects all new and amended rules to take effect on September 1, 2024.

5. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

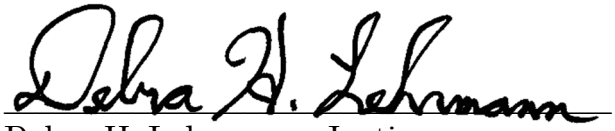
   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

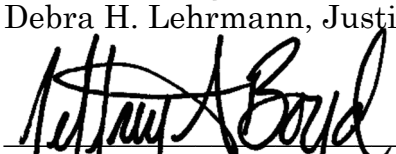
   d. submit a copy of this Order for publication in the *Texas Register*.

Dated: February 6, 2024.

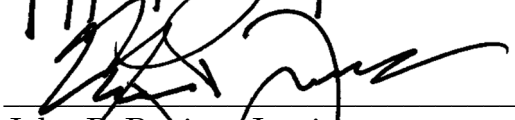
Nathan L. Hecht, Chief Justice



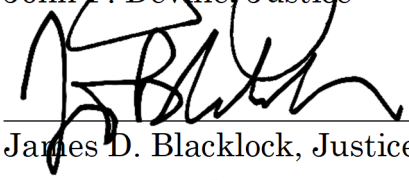
Debra H. Lehrmann, Justice



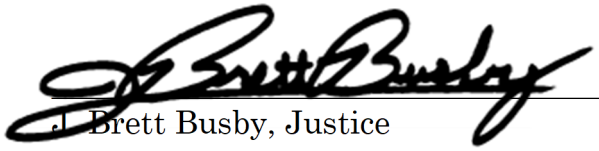
Jeffrey S. Boyd, Justice



John P. Devine, Justice



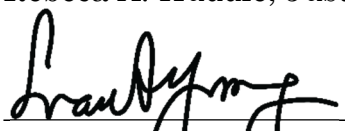
James D. Blacklock, Justice



J. Brett Busby, Justice

Jane N. Bland, Justice

Rebeca A. Huddle, Justice



Evan A. Young, Justice

TEXAS RULES OF CIVIL PROCEDURE

RULE 2. SCOPE OF RULES

These rules ~~shall~~ govern the procedure in the justice, county, ~~and~~ district, and business courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. ~~Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.~~

Notes and Comments

Comment to 2024 change: Rule 2 is revised to modernize the rule and clarify that the Texas Rules of Civil Procedure govern the procedures in the business court.

***

PART III – RULES OF ~~PROCEDURE FOR THE COURTS OF APPEALS~~PRACTICE IN THE BUSINESS COURT

***

RULE 352. THE BUSINESS COURT GENERALLY

Chapter 25A, Government Code, and Parts I, II, III, and VI of these rules govern the business court. If there is any conflict between Parts I, II, and VI and Part III, Part III controls.

Notes and Comments

Comment to 2024 change: Part III of these rules is adopted to implement Texas Government Code Chapter 25A.

RULE 353. FEES FOR BUSINESS COURT ACTIONS

The Office of Court Administration and the business court must publish a schedule of business court fees. Parties must pay the fees as specified in the schedule, except the business court must waive fees for inability to afford payment of court costs, consistent with Rule 145, and may otherwise waive fees in the interest of justice.

Notes and Comments

Comment to 2024 change: Rule 353 is adopted to implement Texas Government Code Section 25A.018.

RULE 354. ACTION ORIGINALLY FILED IN THE BUSINESS COURT

(a) *Pleading Requirements.* For an action originally filed in the business court, an original pleading that sets forth a claim for relief—whether an original petition, counterclaim, cross-claim, or third party claim—must, in addition to the pleading requirements specified in Part II of these rules, plead facts to establish the business court's authority to hear the action. An original petition must also plead facts to establish venue in a county in an operating division of the business court.

(b) *Clerk Duties*. The business court clerk must assign the action to a division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

(c) *Challenges.*

(1) To Venue. A motion challenging venue must comply with Rules 86 and 87.

(2) To Authority. A motion challenging the business court's authority to hear an action must be filed within 30 days of the movant's appearance.

(d) *Transfer or Dismissal.*

(1) Venue Transfer. If the business court determines, on a party's motion, that the division's geographic territory does not include a county of proper venue for the action, the business court must:

(A) if an operating division of the business court includes a county of proper venue, transfer the action to that division; or

(B) if there is not an operating division of the business court that includes a county of proper venue, at the request of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.

(2) Authority. If the business court determines, on a party's motion or its own initiative, that it does not have the authority to hear the action, the business court must:

(A) if the determination was made on its own initiative, provide at least 10 days' notice of the intent to transfer or dismiss and an opportunity to be heard on any objection; and

(B) at the request of the party filing the action:

(i) transfer the action to a district court or county court at law in a county of proper venue; or

(ii) dismiss the action without prejudice to the parties' claims.

Notes and Comments

Comment to 2024 change: Rule 354 is adopted to implement Texas Government Code Sections 25A.006(a)-(c) and 25A.020(a)(2). Texas Government Code Section 25A.004 specifies the business court's authority to hear an action.

RULE 355. ACTION REMOVED TO THE BUSINESS COURT

(a) *Notice of Removal Required.* A party to an action originally filed in a district court or county court at law may remove the action to the business court by filing a notice of removal with:

(1) the court from which removal is sought; and

(2) the business court.

(b) *Notice Contents.* The notice must:

(1) state whether all parties agree to the removal;

(2) plead facts to establish:

(A) the business court's authority to hear the action; and

(B) venue in a county in an operating division of the business court; and

(3) contain a copy of the district court's or county court at law's docket sheet and all process, pleadings, and orders in the action.

(c) *Notice Deadline.*

(1) When Agreed. A party may file a notice of removal reflecting the agreement of all parties at any time during the pendency of the action.

(2) When Not Agreed. If all parties have not agreed to remove the action, the notice of removal must be filed:

(A) within 30 days after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action; or

(B) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action, within 30 days after the date the application is granted, denied, or denied by operation of law.

(d) *Effect of Notice.* A notice of removal to the business court is not subject to due order of pleading rules. Filing a notice of removal does not waive a defect in venue or constitute an appearance waiving a challenge to personal jurisdiction.

(e) *Clerk Duties.* On receipt of a notice of removal, the clerk of the court from which removal is sought must immediately transfer the action to the business court. The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

(f) *Remand.*

(1) When Required. If the business court determines, on motion or its own initiative, that removal was improper, the business court must remand the action to the court from which the action was removed.

(2) Motion to Remand.

(A) A party may file a motion to remand the action in the business court based on improper removal. Except as provided in (B), the motion must be filed within 30 days after the notice of removal is filed.

(B) If a party is served with process after the notice of removal is filed, the party seeking remand must file a motion to remand within 30 days after the party enters an appearance.

(3) On Business Court's Own Initiative. The business court must provide the parties 10 days' notice of its intent to remand on its own initiative and an opportunity to be heard on any objection.

Notes and Comments

Comment to 2024 change: Rule 355 is adopted to implement Texas Government Code Section 25A.006(d)-(g), (i)-(j) and Section 25A.020(a).

RULE 356. ACTION TRANSFERRED TO THE BUSINESS COURT

(a) *Transfer Request.* On its own initiative, a court may request the presiding judge for the administrative judicial region in which the court is located to transfer an action pending in the court to the business court if the business court has the authority to hear the action. In this rule, the "regional presiding judge" means the presiding judge for the administrative judicial region in which the court is located.

(b) *Notice and Hearing.* The court must notify all parties of the transfer request and, if any party objects, must set a hearing on the transfer request in consultation with the regional presiding judge. The regional presiding judge must self-assign to the court, conduct a hearing on the request, and rule on the request.

(c) *Transfer.* The regional presiding judge may transfer the action to the business court if the regional presiding judge finds the transfer will facilitate the fair and efficient administration of justice. A party may challenge the regional presiding judge's denial of a motion to transfer by filing a petition for writ of mandamus in the court of appeals district for the requesting court's county.

(d) *Remand.* A party may seek remand from the business court under Rule 355 within 30 days after transfer of the case.

(e) *Clerk Duties.* The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

Notes and Comments

Comment to 2024 change: Rule 356 is adopted to implement Texas Government Code Section 25A.006(k).

RULE 357. EFFECT OF DISMISSAL OF AN ACTION OR CLAIM

If the business court dismisses an action or claim and the same action or claim is filed in a different court within 60 days after the dismissal becomes final, the applicable statute of limitations is suspended for the period between the filings.

RULE 358. APPEARANCE AT BUSINESS COURT PROCEEDINGS

Rule 21d governs remote proceedings in the business court, except:

(a) the business court must not require a party or lawyer to appear electronically for a proceeding in which oral testimony is heard absent agreement of the parties; and

(b) the business court must not allow or require a participant to appear electronically for a jury trial.

Notes and Comments

Comment to 2024 change: Rule 358 is adopted to implement Texas Government Code Section 25A.017.

RULE 359. WRITTEN OPINIONS IN BUSINESS COURT ACTIONS

(a) *When Required.* A business court judge must issue a written opinion:
(1) in connection with a dispositive ruling, on the request of a party; and

(2) on an issue important to the jurisprudence of the state, regardless of request.

(b) *When Permitted.* A business court judge may issue a written opinion in connection with any order.

Notes and Comments

Comment to 2024 change: Rule 359 is adopted to implement Texas Government Code Section 25A.016.

***

TEXAS CODE OF JUDICIAL CONDUCT

Canon 6: Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts,

(f) statutory county courts, ~~and~~

(g) statutory probate courts~~.~~, and

(h) the business court.

***

TEXAS RULES OF JUDICIAL ADMINISTRATION

Rule 2. Definitions

In these rules:

a. "Chief Justice" means the Chief Justice of the Supreme Court.

b. "Presiding Judge" means the presiding judge of an administrative region.

c. "Administrative region" means an administrative judicial region created by Section 74.042 of the Texas Government Code.

d. "Statutory county court" means a court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but not including statutory probate courts as defined by Section 3(ii) of the Texas Probate Code.

e. "Business court" means a court created by Section 25A.002 of the Texas Government Code.

Rule 3. Council of Presiding Judges

a. There is hereby created the Council of Presiding Judges, composed of the Chief Justice as chairman and the ~~nine~~ eleven presiding judges of the administrative regions.

***

Rule 4. Council of Judges

a. There is hereby created in each of the administrative regions a Council of Judges, composed of the Presiding Judge as Chairman, judges of the district courts, ~~and~~ statutory county courts, and business court within the region, senior judges, and former district and statutory county court judges residing in the region who have qualified to serve as judicial officers under the provisions of Section 74.055 of the Texas Government Code.

b. The Presiding Judge shall call at least one meeting each year of the Council of Judges of the administrative region, at a time and place designated by the Presiding Judge, for consultation and counseling on the state of the dockets and the civil and criminal business in the district and statutory county courts of the administrative region and arranging for the disposition of cases and

other business pending on the court dockets. At the meeting, the Council shall study and act upon the matters listed in Rule 3.e and such other matters as may be presented to the meeting by the judges in attendance.

c. The Council of Judges shall adopt rules for the administration of the affairs of the ~~district and statutory county~~ courts within the administrative region, including, but not limited to, rules for:

(1) management of the business, administrative and nonjudicial affairs of the courts;

(2) docket management systems to provide the most efficient use of available court resources;

(3) the reporting of docket status information to reflect not only the numbers of cases on the dockets but also the types of cases relevant to the time needed to dispose of them;

(4) meaningful procedures for achieving the time standards for the disposition of cases provided by Rule 6;

(5) such other matters necessary to the administrative operations of the courts; and

(6) judicial budget matters.

d. The expenses of judges attending meetings of the Council of Judges may be paid from funds provided by law.

***

Rule 6. Time Standards for the Disposition of Cases.

Rule 6.1 District and Statutory County Courts.

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

***

Rule 7. Administrative Responsibilities.

A district court,~~or~~ statutory county court, or business court judge must:

(a) diligently discharge the administrative responsibilities of the office;

(b) rule on a case within three months after the case is taken under advisement;

(c) if an election contest or a suit for the removal of a local official is filed in the judge's court, request the presiding judge to assign another judge who is not a resident of the county to dispose of the suit;

(d) on motion by either party in a disciplinary action against an attorney, request the presiding judge to assign another judge who is not a resident of the administrative region where the action is pending to dispose of the case;

(e) request the presiding judge to assign another judge of the administrative region to hear a motion relating to the recusal or disqualification of the judge from a case pending in his court; and

(f) to the extent consistent with due process, consider using methods to expedite the disposition of cases on the docket of the court, including:

(1) adherence to firm trial dates with strict continuance policies;

(2) the use of teleconferencing, videoconferencing, or other available means in lieu of personal appearance for motion hearings, pretrial conferences, scheduling, and other appropriate court proceedings;

(3) pretrial conferences to encourage settlements and to narrow trial issues;

(4) taxation of costs and imposition of other sanctions authorized by the Rules of Civil Procedure against attorneys or parties filing frivolous motions or pleadings or abusing discovery procedures; and

(5) local rules, consistently applied, to regulate docketing procedures and timely pleadings, discovery, and motions.

***

Tab Y

From: Carlos R. Soltero
To: Rulescomments
Cc: Carlos R. Soltero
Subject: Business Courts Rules
Date: Monday, February 19, 2024 5:21:15 PM

Comment is to Proposed Rule 358(b).

I get it. Policy preference for in-person jury trials. However, I would suggest adding the following at the end:

"absent extraordinary circumstances" or "absent good cause."

Justification for suggestion: There may be disability issues as well as a myriad of circumstances that might warrant a person or more participating remotely. That technically feasible alternative should not be permanently and always foreclosed merely because of the very, very understandable default rule (which I agree with) that ordinarily, everyone should be in person for a jury trial in business courts.

Carlos R. Soltero
Shareholder | Business Litigation
P: 737.202.4873 | C: 512.422.1559
CSoltero@MaynardNexsen.com | vCard

2500 Bee Caves Road
Building 1, Suite 150
Austin, Texas 78746

MAYNARDNEXSEN

delete the e-mail and any attachments to it. Thank you.