SCAC MEETING AGENDA
Friday, June 28, 2024
In Person at State Bar of Texas Building
1414 Colorado St.
Austin, TX 78701

FRIDAY, June 28, 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 April 5, 2024 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. REMOTE PROCEEDINGS RULES

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

A. June 24, 2024 Memo re: Remote Proceedings Task Force Suggestions on Subpoenas
B. February 13, 2024 Letter re: Proposed Amendments to Federal Rules of Civil Procedure 43 and 45
C. October 28, 2021 Memo re: Subpoenas

V. 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

D. March 26, 2024 Memo re: Uniform Interstate Depositions and Discovery Act
E. Uniform Interstate Depositions and Discovery Act
F. V.T.C.A. Civil Practice and Remedies Code § 20.002
G. Proposed Amendments to TRCP 201.2

VI. COURT INTERPRETER COST

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

H. March 28, 2024 Memo re: Interpreter Costs
I. V.C.T.A. Gov't Code § 57.001 Definitions
J. V.C.T.A. Gov't Code § 57.002 Appointment of Interpreter; Payment of Interpreter Costs
K. Proposed Replacement TRCP 183
L. Proposed Amendments to TRCP 145

VII. 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

M. June 25, 2024 Memo re: TRCP 42

Tab A

Memorandum

To: Supreme Court Advisory Committee

From: Rule 167-206 Subcommittee

Date: June 24, 2024

Re: Remote Proceeding Task Force suggestions on subpoenas

The Supreme Court asked us to review a Remote Proceeding Task Force memorandum governing subpoenas. The subcommittee met and discussed the memorandum, along with a proposed memorandum for a Federal Rule change to subpoenas. The 2013 amendments to the Federal Rules were designed to allow nationwide service of subpoenas to allow trial or deposition testimony remotely —notwithstanding the 100-mile limit of subpoena range. Some courts questioned whether the rules adequately captured that idea, leading to the current proposal. The purpose of the Task Force proposed amendments were to also authorize state-wide subpoenas for remote depositions or testimony.

After reviewing both memos, our subcommittee agrees with this change for Texas and proposes the following amendments to our rules.

176.2 Required Actions.
A subpoena must command the person to whom it is directed to do either or both of the following:
(a) attend and give testimony at a deposition, hearing, or trial, which attendance may be in person, by telephone, or by other remote means at a deposition and, with court permission, at a hearing or trial;
(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

176.3 Limitations.
(a) Range. A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2).

(b) Notwithstanding that limitation, a subpoena from the court in which the case is filed may be served at any place in the State of Texas to command a person to appear by telephone or remotely at a location that is no more than 150 miles from where the person resides or is served.

(~~b~~ c) Use for discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

A minor suggestion is made to the following rule:

176.6 Response.
(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the ~~place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

And changes are suggested for Rule 500.8

RULE 500.8. SUBPOENAS
(a) Use. A subpoena may be used by a party 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 person in a county that is more than 150 miles from where the person resides or is served.

(b) Notwithstanding that limitation, a subpoena from the court in which the case is filed may be served at any place within the State of Texas to command a person to appear by telephone or remotely at a location that is not more than 150 miles from where the person resides or is served.

We agreed with the Task Force that tackling the production of documents in a remote deposition was better left to the parties.

We had a robust discussion of alternative methods to serve subpoenas (such as by certified mail or by electronic media or email as provided for in Rule 106) but ultimately the committee did not recommend a change.

Tab B

HAGENS BERMAN

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February 13, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure

Dear Secretary Byron:

We respectfully submit the enclosed proposal to amend Rules 43(a) and 45(c) of the Federal Rules of Civil Procedure for the consideration of the Advisory Committee on Civil Rules.

The proposed changes (i) make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured, and (ii) clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held.

The proposed amendments effectuate a long overdue modernization of civil trial practice and promote the just, speedy, and inexpensive determination of civil actions promised by Rule 1. They also resolve a growing split among federal district courts as to the applicability of Rule 45(c)'s 100-mile limit to testimony via live contemporaneous transmission under Rule 43(a)—a question first considered by a court of appeals last July in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). There, the Ninth Circuit concluded that, "[w]hile technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed," which is an issue "for the Rules Committee and not for [a] court." *Id.* at 1046–47.

This proposal does not seek to change the preference for live, in-person trial testimony that is a longstanding value of our legal tradition. But there is little dispute among lawyers and judges

that testimony via contemporaneous live transmission better promotes the truth-seeking goal of trials than videotaped deposition testimony, particularly with recent advances in videoconferencing technology. But, contrary to these uncontroversial principles, courts continue to interpret Rules 43 and 45 and their Advisory Committee notes as requiring them to conduct trials in which juries are subjected to hours (if not days) of testimony presented in the form of spliced, disjointed video clips from depositions taken during the discovery phase. Replacing deposition testimony with testimony via live contemporaneous transmission (from a location remote from the trial court but otherwise within the limitations of Rule 45(c)) for witnesses whose physical presence at trial cannot be obtained will greatly enhance the truth-seeking function of our civil justice system, reduce the costs and increase the efficiency of civil litigation, and promote justice by maximizing access to evidence.

The proponents of these amendments are listed below. For the convenience of the Committee, all communications can be directed to the undersigned at tom@hbsslaw.com, copying racheld@hbsslaw.com.

Respectfully submitted,

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PROPOSED AMENDMENTS TO RULES 43 AND 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE

EXECUTIVE SUMMARY

This proposal seeks to modify Rules 43 and 45 of the Federal Rules of Civil Procedure to: (1) ensure that courts can require witnesses unable or unwilling to testify live in person at trial to testify live via contemporaneous transmission under Rule 43(a), and (2) clarify that the place of compliance for subpoenas for live trial testimony via contemporaneous transmission is the location from which the testimony is transmitted, not the courthouse where the trial is conducted. The specific proposed textual changes are set forth in the next section.

It is axiomatic that live witness testimony is essential to the truth-seeking mission of trial. There is no real debate that jurors' ability to evaluate witness demeanor and credibility is best served by the presentation of live witnesses in open court subject to real-time cross-examination in the physical presence of the jury. But courts and litigants also have long recognized that, when a witness cannot be physically present at trial, the next best option is for that witness to testify live via contemporaneous transmission. Indeed, some courts have questioned whether there is any meaningful difference between in-person and remote testimony, particularly in light of advancements in videoconferencing and courtroom technology necessitated by the COVID-19 pandemic. Testimony by deposition, in contrast, not only undermines juror interest and engagement, but it is often taken during the discovery phase of the case, when the litigants often have not yet narrowed the case to the triable issues. Yet Rule 43 and its accompanying Advisory Committee notes continue to favor the presentation of pre-recorded deposition video over live testimony via contemporaneous transmission.

The Advisory Committee sought to remedy this with the 2013 amendments to Rule 45 permitting nationwide service of subpoenas. Read in tandem with Rule 43(a), the amended version of Rule 45(c) was intended to empower courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location. However, since the 2013 amendments went into effect, federal courts have reached starkly different conclusions about the place of compliance for subpoenas for trial testimony via contemporaneous transmission, with a significant and growing minority of courts concluding that the 1996 amendments to Rule 43(a) preclude them from ordering remote trial testimony from witnesses outside Rule 45's 100-mile limit. The confusion has created costly uncertainties for litigants, unnecessarily burdened trial courts with time-consuming disputes, and enabled litigants to game the Federal Rules to shield inculpatory witnesses from trial. The proposed amendments, if implemented, would eliminate this confusion, enhance the truth-seeking mission of trials, and promote more efficient, cost-effective, and just civil litigation.

PROPOSED TEXTUAL CHANGES

RULE 43

The proposed amendments to Rule 43(a) below maintain the gold standard of live, in-person trial testimony, but promote the use of live testimony via contemporaneous submission, rather than deposition testimony, as the default alternative.

> (a) *In Open Court*. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. ~~For good cause in compelling circumstances and with appropriate safeguards,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, ~~may~~must ~~permit testimony~~require witnesses to testify in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

RULE 45

The proposed amendments to Rule 45(c) below clarify that the "place of compliance" for subpoenas for testimony via contemporaneous transmission is the location from which that testimony is transmitted, not the location of the courthouse where the transmitted testimony will be received.

> (1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
>
> > (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> >
> > (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
> >
> > > (i) is a party or a party's officer; or
> > >
> > > (ii) is commanded to attend a trial and would not incur substantial expense~~.~~; or
> >
> > (C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for the transmission complies with 45(c)(1)(A) or (B).

BACKGROUND & POINTS IN SUPPORT OF PROPOSED AMENDMENTS

A. Rule 43(a) should make live trial testimony by contemporaneous transmission, not prerecorded deposition video, the alternative to live, in-person trial testimony.

1. With modern videoconferencing technology, live testimony via contemporaneous transmission offers the same benefits as in-person testimony.

The "inherent goal of our system of justice established by our forefathers" is to ensure "the 'powerful force of truth-telling.'"[1] It is universally recognized that this goal is best served through the presentation of live, in-person testimony.[2] As the Advisory Committee's notes to the 1996 amendments to Rule 43(a) emphasize, "The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."

But courts and practitioners have long recognized that, when a witness cannot be physically present in the courtroom, testimony by contemporaneous video transmission satisfies many of the goals of in-person testimony, providing an opportunity for live cross-examination and enabling the factfinder to evaluate the witness's demeanor and credibility in real time.[3] And this is more true now than ever: the COVID-19 pandemic spurred dramatic improvements to videoconferencing technology and accelerated federal courts' already

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[1] *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 12-cv-64, 2014 WL 107153, at *6 (W.D. La. Jan. 8, 2014) (quoting Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment); *see also In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

[2] *See Actos*, 2014 WL 107153, at *5 ("Ideally, all witnesses would appear in Open Court and testify before the trier of fact . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("[L]ive, in-person testimony, is optimal for trial testimony."); Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten.").

[3] *See Warner v. Cate,* No. 12-cv-1146, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) ("Because a witness testifying by video is observed directly with little, if any, delay in transmission, . . . courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings."); *Actos*, 2014 WL 107153, at *8 ("[U]se of 'live' contemporaneous transmission grants the trier of fact—here, the jury—the added advantage inherent in observing testimony in open court that is *truly contemporaneous* and part of the whole trial experience, [and] thus better reflects the *fluid dynamic* of the trial they are experiencing, and, better serves the goal of 'truth telling.'"); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) *(*"The use of videoconferencing . . . will not prejudice Defendants. Each of the witnesses will testify in open court, under oath, and will face cross-examination. . . . With videoconferencing, a jury will also be able to observe the witness'[s] demeanor and evaluate his credibility in the same manner as traditional live testimony."); *Sallenger v. City of Springfield*, No. 03-cv-3093, 2008 WL 2705442, at *1 (C.D. Ill. July 9, 2008) ("Video conferencing allows the jury to view the witness as he testifies, and thus, it satisfies many of the goals of in person testimony . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("By allowing for contemporaneous transmission, the Court allows the jury to see the live witness along with his 'hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,' and, thus, satisfies the goals of live, in-person testimony . . . ." (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)).

"consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices,"[4] requiring them to become more adept at and comfortable with remote proceedings and improve the technological capacities of courtrooms. Numerous federal courts seamlessly conducted entire trials remotely during the pandemic.[5] Indeed, technological advancements have led many courts to question whether there is any practical difference between live testimony and contemporaneous video transmission.[6]

2. Trial testimony via contemporaneous transmission unquestionably better serves the fact-finding mission of trial than pre-recorded deposition video.

At minimum, "there is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition."[7] In 1939, Judge Learned Hand remarked that "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand," and that to hold otherwise "is not to help the reform of procedure, but to introduce an irrational and unfair exception, until deposition become competent regardless of the accessibility of the deponents at trial."[8] Federal

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[4] Charles A. Wright et al., 9A *Federal Practice and Procedure* § 2414 (4th ed. 2008 & 2022 Supp.).

[5] *See* Christopher Robertson, *The Jury Trial Reinvented*, 9 Tex. A&M L. Rev. 109, 120–21 (2021).

[6] *See Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) ("[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses' 'live' versus 'livestreamed' testimony . . . ."); *Lopez*, 748 F. Supp. 2d at 480 ("With videoconferencing, a jury will . . . be able to observe the witness's demeanor and evaluate his credibility in the same manner as traditional live testimony."); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("[T]o prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other."); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 ("*Kirkland* Mandamus Pet. Resp.") ("Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference."). Interestingly, in one study of remote jury trials, some mock jurors "felt it was easier to judge witness credibility" when the witness testified remotely "because they had a closer view of the witness rather than looking across a courtroom." Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

[7] *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021); *see also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video "preferable to a year-old video deposition"); *Actos*, 2014 WL 107153, at *8 (concluding that live witness testimony via contemporaneous transmission "more fully and better satisfy the goals of live, in-person testimony" than deposition video); *Swedish Match*, 197 F.R.D. at 2 ("The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are . . . preferable to reading his deposition into evidence."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) ("Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a "viable, and even refreshing, alternative" to the "droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone").

[8] *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Hand, L.).

courts have echoed this sentiment for decades.[9] Witness testimony presented in the form "spliced, edited, and recompiled clips of deposition that took place over multiple days"[10] results in an "unavoidable esthetic distance"[11] that reduces jurors' comprehension, engagement, and interest and impairs their ability to evaluate witness credibility. As one court aptly commented:

> To best fulfill its fact-finding duties, a jury should be engaged and highly sensitive to each witness. As this Court knows all too well, the deposition, whether read into the record or played by video has the opposite effect. It is a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom.[12]

Parties forced to present testimony from key witnesses through dated and immutable depositions may also be prejudiced. Depositions are usually taken during the discovery phase and thus may not address what are ultimately the critical factual issues for trial. And trials are "dynamic, ever evolving process[es]" with "inevitable, unexpected developments and shifts"[13] to which static deposition testimony is ill-suited to respond.

B. Rule 45(c) should unambiguously empower trial courts to issue subpoenas for trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location.

1. The 2013 amendments to Rule 45 sought to allow nationwide service of subpoenas, including for Rule 43 live trial testimony via contemporaneous transmission.

The 2013 amendments removed the geographics limits of Rule 45(b)(2) to allow service of subpoenas "at any place within the United States."[14] Accordingly, trial courts may issue a nationwide subpoena commanding "a person to attend a trial, hearing, or deposition" within

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[9] *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."); *Mazloum v. D.C. Metro. Police Dept.*, 248 F.R.D. 725, 728 (D.D.C. 2008) (urging the parties to reach an arrangement allowing for a key witness to testify live at trial because "tediously reading deposition excerpts into the record" would be "highly unsatisfactory"); *Paul v. Int'l Precious Metals Corp.*, 613 F. Supp. 174, 179 (S.D. Miss. 1985) (finding videotaped deposition "particularly unappealing" and an inadequate substitute for the live testimony of a key witness); *Kolb v. Suffolk Cnty.*, 109 F.R.D. 125, 129 (E.D.N.Y. 1985) ("Clearly, testimony by deposition is less desirable than oral testimony and should be used as a substitute only under very limited circumstances."); *B.J. McAdams, Inc. v. Boggs*, 426 F. Supp. 1091, 1105 (E.D. Pa. 1977) ("A party should not be forced to rely on 'trial by deposition' rather than live witnesses.").

[10] *Mullins v. Ethicon, Inc.*, No. 12-cv-2952, 2015 WL 8275744, at *2 (S.D.W. Va. Dec. 7, 2015).

[11] *Actos*, 2014 WL 107153, at *8.

[12] *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

[13] *Actos*, 2014 WL 107153, at *8.

[14] Fed. R. Civ. P. 45 & advisory committee's note to 2013 amendment.

"100 miles of the person of where the person resides, is employed, or regularly transacts business in person."[15]

The Advisory Committee intended the amended version of Rule 45 to be read with Rule 43(a) to allow courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any location within 100 miles of the witness's location. It squarely addressed this issue in its responses to public comments to the proposed 2013 amendments. One of the comments, from a lawyer in Hawaii, observed the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses with a "transient presence in paradise" to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a).[16] The Discovery Subcommittee agreed that a Rule 45 subpoena "is properly issued for this [very] purpose"—to compel a witness outside the trial court's subpoena power to testify at trial via Rule 43 contemporaneous transmission from "a place within the limits imposed by Rule 45," i.e., within 100 miles of the witness's location.[17] The Advisory Committee concurred and determined that its note to the 2013 amendment should "confirm this plain reading of the revised Rule 45 text."[18] The note was therefore revised to state, "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)."[19] The note also makes clear that Rule 45(c)'s geographic limits were intended to protect witnesses from the burden of *traveling* more than 100 miles[20]—a concern not implicated by testimony remotely transmitted under Rule 43(a).

In recommending adoption of the 2013 amendments in full, the Committee on Rules of Practice and Procedure "concurred" with all the Advisory Committee's Rule 45 recommendations, including its "clarify[ing]" note "confirm[ing] that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the *distant* witness to attend and testify within the geographical limits of Rule 45(c)."[21]

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[15] Fed. R. Civ. P. 45(c)(1).

[16] Paul Alston, Comment to Committee on Rules of Practice and Proc. Regarding Revisions to Fed. R. Civ. P. 45 (Jan. 25, 2012), https://www.uscourts.gov/file/16846/download.

[17] Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), https://www.uscourts.gov/file/15074/download.

[18] *Id.*

[19] Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment.

[20] *Id.* ("Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer *to travel* more than 100 miles . . ." (emphasis added)); *id.* ("Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required *to travel* more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur 'substantial expense.'" (emphasis added)).

[21] Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure at 21, 23 (Sept. 2012), https://www.uscourts.gov/file/14521/download (emphasis added).

2. Since the 2013 amendments, federal courts have split on whether Rule 45 permits them to issue subpoenas for trial testimony via contemporaneous transmission to witnesses located more than 100 miles from the trial court.

Since the 2013 amendments, a majority of federal courts have—as the Advisory Committee intended—interpreted Rule 45(c)'s 100-mile limit to apply to the place from which remote testimony is transmitted.[22] For example, in *Walsh*, the District of Massachusetts observed that the 100-mile limit of Rule 45(c), as amended, "restricts the place of *compliance* with the subpoena, not the location of the court from which the subpoena issues."[23] The court concluded, based on "the plain language of Rules 43 and 45 and their accompanying Advisory Committee notes," that it could "issue a subpoena under Rule 45, upon a finding of good cause and compelling circumstances, for a witness to provide remote testimony from any place within 100 miles of her residence, place of employment, or place where she regularly conducts business."[24] Similarly, in *3M Combat Arms Earplug Products Liability Litigation*, the Northern District of Florida held that Rules 43(a) and 45 were to be read in "tandem" to permit a party to "use a Rule 45 subpoena to compel remote testimony by a witness from anywhere so long as the place of compliance (where the testimony will be given by the witness and not where the trial will take place) is within the geographic limitations of Rule 45(c)."[25]

However, a growing minority of courts have held that Rule 45(c)'s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court.[26] In so holding, these courts have often relied exclusively on the Advisory Committee's notes to Rule 43 without considering its notes to

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[22] *See, e.g.*, *Walsh v. Tara Constr., Inc.*, No. 19-cv-10369, 2022 WL 1913340, at *2 (D. Mass. June 3, 2022); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. 16-17039, 2021 WL 6202422, at *3 (E.D. La. July 26, 2021); *Off. Comm. of Unsecured Creditors v. Calpers Corporate Partners LLC*, No. 18-cv-68, 2021 WL 3081880, at *3 (D. Me. July 20, 2021); *United States v. $110,000 in U.S. Currency*, No. 21-cv-981, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *3–4 (N.D. Fla. May 28, 2021); *Int'l Seaway Trading Corp. v. Target Corp.*, No. 20-mc-00086, 2021 WL 672990, at *4–5 (D. Minn. Feb. 22, 2021); *In re Newbrook Shipping Corp.*, 498 F. Supp. 3d 807, 815 (D. Md. 2020), *vacated on other grounds by* 31 F.4th 889 (4th Cir. 2021); *Redding v. Coloplast Corp.*, No. 19-cv-1857, slip op. at 3 (M.D. Fla. Aug. 28, 2020); *Diener v. Malewitz*, No. 18-cv-85, 2019 WL 13223871, at *7 (D. Wyo. Oct. 18, 2019); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541, slip op. at 5–6 (N.D. Cal. Aug. 31, 2018); *Xarelto*, 2017 WL 2311719, at *4–5; *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, MDL No. 11-2244, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 9, 2016); *Actos*, 2014 WL 107153, at *8–10.

[23] 2022 WL 1913340, at *2.

[24] *Id.*

[25] 2021 WL 2605957, at *3–4.

[26] *See, e.g.*, *Moreno v. Specialized Bicycle Components, Inc.*, No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022); *Singh v. Vanderbilt Univ. Med. Ctr.*, No. 17-cv-400, 2021 WL 3710442, at *2 (M.D. Tenn. Aug. 19, 2021); *Ashton Woods Holdings LLC v. USG Corp.*, No. 15-cv-1247, 2021 WL 8084334, at *1 (N.D. Cal. Apr. 5, 2021); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785, 2021 WL 2822535, at *4–6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020); *Roundtree v. Chase Bank USA, N.A.*, No. 13-cv-239, 2014 WL 2480259, at *1 (W.D. Wash. June 3, 2014); *Lin v. Horan Cap. Mgmt., LLC*, No. 14-cv-5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014).

the 2013 amendments to Rule 45. In *Black Card*, for instance, the District of Wyoming concluded that "a full reading of Rule 43 and the committee notes"—including their instructions that the "good cause" standard "is anticipated for witnesses who are already expected to attend the trial" and "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena"—demonstrated that "subpoenas for live video testimony under Rule 43 are subject to the same geographic limits as a trial subpoena under Rule 45."[27] The *Moreno* and *EpiPen* decisions, similarly, were predicated only on the notes to the 1996 amendments to Rule 43.[28]

3. The Ninth Circuit's 2023 *Kirkland* decision underscores the urgent need for clarification of Rules 43 and 45.

The need for clarifying amendments has grown more critical in the wake of the recent *In re Kirkland* decision,[29] the first from a United States Court of Appeals to address the interplay between Rule 45(c)'s 100-mile limit and subpoenas for trial testimony via contemporaneous transmission under Rule 43(a).

In *Kirkland*, the Ninth Circuit considered a petition from John and Poshow Ann Kirkland for a writ of mandamus directing the United States Bankruptcy Court for the Central District of California to quash trial subpoenas directing them to testify via contemporaneous submission from their homes in the U.S. Virgin Islands. The Ninth Circuit found that the petition "present[ed] a novel issue involving the interplay between two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted," but one that was "likely to evade direct appellate review."[30]

In its response to the petition, the bankruptcy court agreed that mandamus jurisdiction was necessary to resolve two "conflicting lines of authority" with "equally plausible interpretations" of Rules 43 and 45 and urged the Ninth Circuit to side with the majority of courts concluding that Rule 45(c)'s 100-mile limit does not apply to witnesses ordered to testify by means of contemporaneous transmission under Rule 43.[31] Citing its own experience conducting trials with testimony taken exclusively by remote video transmission, the bankruptcy court argued that "[t]echnology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference" and that remote video testimony allows juries "to assess the demeanor and credibility of the [remote] witnesses to the same extent as would have possible had [they] been

[27] 2020 WL 9812009, at *2–3.

[28] *See Moreno*, 2022 WL 1211582, at *1–2; *EpiPen*, 2021 WL 2822535, at *4.

[29] 75 F.4th 1030, 1051–52 (9th Cir. 2023).

[30] *Id.* at 1036.

[31] *Kirkland* Mandamus Pet. Resp. at 2–3.

physically present in the courtroom."[32]

The Ninth Circuit disagreed, concluding that "neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the 'place of compliance' under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely."[33] The Ninth Circuit dismissed the Advisory Committee's notes to the 2013 amendments to Rule 45 because "it is the text of the rules that control, and 'the [n]otes cannot . . . change the meaning that the Rules would otherwise bear'"[34] and reasoned that the term "trial" as used in Rule 45 necessarily meant "a specific event that occurs in a specific place: where the court is located," regardless of where or how the witness may "appear."[35] While the Ninth Circuit acknowledged that "technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted," it concluded that "the rules defining the federal subpoena power have not materially changed" and it was "bound by the text of the rules."[36] The issue, therefore, was "one 'for the Rules Committee and not for [a] court.'"[37]

C. The proposed amendments ensure more efficient, cost-effective, and fair civil trials.

1. The proposed amendments maximize access to evidence in multidistrict litigation, which is rarely confined to the jurisdiction of a single federal district court.

The need for trial testimony via contemporaneous transmission is arguably most acute in multidistrict litigation, which has become the primary vehicle for the resolution of complex civil cases and is designed for the efficient management of large numbers of similar claims that often involve multiple parties and evidence dispersed nationwide. In such cases, witnesses

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[32] *Id.* at 4-5. The bankruptcy court also cited a 2022 survey it conducted on "hearings or trials conducted by videoconference," in which 65% of respondents stated they had not experienced "any problems with remote hearings or trials in the past" and only 1 of 287 reported encountering any issues with remote cross-examination. *Id.* at 5.

[33] *Kirkland*, 75 F.4th at 1044.

[34] *Id.* at 1043 (alterations in original) (quoting *Tome v. United States*, 513 U.S. 150, 168, (1995) (Scalia, J., concurring)).

[35] *Id.* at 1043–44; *see also id.* at 1045 ("[T]here is no indication that Rule 45's reference to attending 'a trial' was intended to refer to anything other than the location of the court conducting the trial."). In reaching this conclusion, the Ninth Circuit did not consider the body of cases concluding that Rule 77(b) expressly permits a fully virtual civil jury trial with no fixed location. *See, e.g.*, *Le v. Reverend Dr. Martin Luther King, Jr. Cnty.*, 524 F. Supp. 3d 1113, 1115 (W.D. Wash. 2021) (construing Rule 77 as allowing a fully virtual civil jury trial with no fixed location because "Rule 77(b) sets forth the caveat 'so far as convenient,' which is in stark contrast to the imperative 'must,' used in connection with 'open court'" and therefore "offers the flexibility to conduct trials in 'non-traditional ways'" (quoting *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n*, 470 F. Supp. 735, 738 (E.D. Mich. 2020))); *see also id.* at 1116 ("Nothing about a virtual jury trial is inconsistent with the principles underlying Rules 43(a) and 77(b).").

[36] *Kirkland*, 75 F. 4th at 1046.

[37] *Id.* at 1047 (quoting *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003)).

relevant to all parties' claims and defenses are unlikely to be confined to a single federal district. Geographic limitations on MDL courts' ability to subpoena testimony via contemporaneous transmission can therefore unfairly handicap plaintiffs, who must make a no-win forum selection choice at the outset when the identities and locations of key trial witnesses are unknown. Such limits also undermine the purpose of bellwether trials, which are intended to present the best evidence to juries to obtain outcomes representative for all underlying actions. Without access to critical witness testimony, verdicts in bellwether trials are inaccurate predictors of the merits of the remaining claims, undermining their ability to facilitate productive settlement discussions and global resolutions of claims.

2. The proposed amendments minimize, if not eliminate, litigants' ability to exploit the Rules to unfairly immunize adverse witnesses and evidence from jury consideration.

Rule 45's 100-mile limit can be exploited by litigants to unfairly shield adverse evidence from trial in several ways. Defendants may take advantage of plaintiffs' lack of knowledge regarding the identity and location of essential witnesses by urging the JPML to centralize the litigation in a jurisdiction outside the 100-mile range of those witnesses. Litigants can also hand-pick the witnesses within their control whose testimony will be most favorable to their claims or defenses, forcing the opposing party to rely on inferior deposition testimony for witnesses outside the 100-mile limit at trial, thereby hindering that party's ability to effectively present its best evidence to the jury.[38] Litigants can even intentionally relocate critical witnesses outside the subpoena reach of the trial court. The proposed amendments would minimize, if not eliminate, such gaming tactics.[39]

3. The proposed amendments will save time and money for both litigants and courts.

Resolving disputes over deposition designations is time consuming and a wasteful drain of judicial resources. As explained in the *Manual on Complex Litigation*, "[u]nless the parties can reach substantial agreement on the form and content of the videotape to be shown to the jury,

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[38] *See, e.g.*, *3m Combat Arms Earplug*, 2021 WL 6327374, at *5 (concluding that defendants sought a tactical advantage by preventing two witnesses essential to the case from testifying live at trial just after one of them made statements contradicting his prior testimony); *Vioxx*, 439 F. Supp. 2d at 643 (finding that the defendant's refusal to produce a witness "possess[ing] information highly relevant to the plaintiff's claims" and "damaging to [the defendant's] position" for trial was "for a purely tactical advantage," namely, "to eliminate any unpredictability and limit [the witness's] trial testimony to his 'canned' deposition testimony"); *Wash. Pub. Power Supply*, 1998 WL 525314, at *2 ("Defendants do not claim they cannot get witnesses to appear voluntarily [at trial] for 'live' testimony. They rely instead on the tactical advantage they have in not being required to do so, while at the same time indicating that they intend to call the same witnesses in person [in] their own case.").

[39] Litigants faced with an order requiring witnesses to testify via contemporaneous transmission have also been known to thereafter produce the at-issue witness in person for trial. *See Wash. Pub. Power Supply*, 1998 WL 525314, at *2; *accord* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 Geo. L.J. 81 (1990).

the process of passing on objections can be so burdensome and time-consuming as to be impractical for the court."[40] Live testimony by contemporaneous transmission, on the other hand, "ensure[s] efficient use of judicial resources" because it relieves the court "of the burden of reviewing voluminous transcripts of multi-day depositions, analyzing hours of edited videos submitted for trial, and then ruling on objections to those videos."[41]

Promoting the use of testimony by contemporaneous transmission would also provide courts with greater precision and flexibility in trial scheduling, avoiding the constraints of individual witness availabilities and travel schedules. Litigants would benefit from the reduced costs of witness travel. And assurance that witnesses outside the 100-mile limit could be compelled to testify remotely at trial, if necessary, would likely reduce the number and attendant costs of depositions taken during discovery.

[40] *Manual for Complex Litigation (Fourth)* § 12.333.

[41] *Mullins*, 2015 WL 8275744, at *2; *see also Actos*, 2014 WL 107153, at *6 (criticizing the defendants' inability to secure the in-person attendance of important witnesses at trial, which "result[ed] in the parties still taking discovery depositions" and "a large number of motions" needing resolution on the eve of trial and "the parties' continu[ing] to present disputed video depositions for evidentiary resolution" and declaring that "this Court simply will not be able to rule on the very large number of additional video transcripts and objections that would be required it the Plaintiffs were not permitted to use the procedures established in Rules 43 and 45 to present live testimony at trial via contemporaneous transmission").

Tab C

Memorandum

Date: October 28, 2021

To: Remote Proceedings Task Force

From: **Subcommittee on Subpoenas**
Chief Justice Tracy Christopher
Mr. Quentin Smith – Chair
Hon. Mollee B. Westfall
Ms. Teri Workman

Re:

The Remote Proceedings Task Force asked our subcommittee to analyze how to make discovery from third parties by subpoenas more amenable to a remote environment, and, in doing so, address rules or obstacles that may be altered to promote that goal. In conducting our review, we primarily analyzed Texas Rules of Civil Procedure 176, 199, 205, and 500.8. We also analyzed Texas Civil Practice & Remedies Code Section 22.002.

This memorandum addresses our findings and attaches as Appendix A, proposed alterations to certain rules in the Texas Rules of Civil Procedure to make discovery from third parties by subpoenas more amenable to remote proceedings. After our discussions, our subcommittee identified four main areas that we needed to consider in this undertaking: (1) the 150-mile limitation on subpoenas; (2) the notice and appearance requirements at depositions, hearings, and trials; document production at a remote deposition; (3) document production in connection with a remote proceeding subpoena; and (4) enforcing compliance of remote proceeding subpoenas and electronic service.

1. The 150-Mile Limitation on Subpoenas

Allowing subpoenas for remote proceedings to be effective beyond 150 miles of the court would help promote the use of remote proceedings. Given that a remote proceeding should not require any party to travel (or at least travel less than 150 miles), there is not an undue burden placed on the person subject to a subpoena for a remote proceeding. Allowing parties to subpoena people more than 150 miles away would require a modification of Rule 176.3. Our proposed change is to carve out remote proceedings from the 150-mile limitation by stipulating that the place for compliance is in the county where the subpoenaed

person resides.[1] We propose limiting the applicability of subpoenas for remote proceedings to those persons who are in the State of Texas at the time of service.

2. The Notice and Appearance requirements at Depositions, Hearings, and Trials

Rule 176.2 does not prohibit subpoenas for remote proceedings or expressly state that attendance must be in person. Nonetheless, for the sake of clarity, we suggested a modification to Rule 176.2(a) to expressly allow for remote depositions and, if a court permits, remote appearances at a hearing or trial.

3. Document Production and Remote Proceedings

One of the key issues that arose is the production of documents at a virtual deposition. After discussing several ways to address this by rule, we realized that there is no perfect solution. Instead, we decided not to propose an alteration to any rule to specifically address documents at a virtual deposition, despite potential problems, because this is currently an issue that parties appear to be addressing without additional clarity in the rules. Our rationale in reaching this conclusion is that it is difficult to address the production of electronic documents at an in-person deposition under the current rules and people have been having virtual depositions throughout the COVID-19 pandemic seemingly without a rule addressing document production. Moreover, production of electronic documents is also an issue at in-person depositions and no rule addresses that dilemma. Therefore, our recommendation would be to stay silent and allow the parties to work together to reach a solution. To the extent the parties are unable to resolve a particular issue, trial court judges are more than capable of providing a solution for the parties.

4. Remote Subpoena Enforceability and Electronic Service

Two open items that remain in making subpoenas more amenable to remote proceedings relate to service of subpoenas. Rule 176.5 requires in-person service. Therefore, it does not allow for electronic service of subpoenas or service by certified mail. To make this possible, we would need to modify Rule 176.5 to be consistent with the recently amended rules that allow service of a petition by electronic mail and social media. We have not currently made this suggested revision because it is unclear whether it would be good policy to allow litigants to serve subpoenas on third parties by electronic means. Nonetheless, even if electronic service is not adopted, we do believe that parties should be allowed to serve subpoenas by certified mail.

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[1] We also note that Tex. Civ. Prac. & Rem. Code § 22.002 references the 150-mile limitation; however, the language of that statute is more permissive rather than limiting. *See id.* ("A witness who is represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed in the suit.").

Related to service is the requirement that a party pay a subpoenaed person $10 with the subpoena to make it enforceable. If a party does not pay $10 to the subpoenaed person at the time of service, then the serving party cannot enforce the subpoena under Rule 1786.8(b). Even if the rules change to permit electronic service or service by certified mail, we believe that the rules addressing the payment of the fee for enforcement should remain unchanged. Our view is that it is best to let entrepreneurial litigants figure out how to solve that particular compliance issue rather than alter existing rules, which may create other unintended consequences. Additionally, altering the payment requirement could potentially require a change to a statute, Section 22.001 of the Texas Civil Practice & Remedies Code.[2]

[2] Tex. Civ. Prac. & Rem. Code § 22.001(a) ("Except as provided by Section 22.002, a witness is entitled to 10 dollars for each day the witness attends court. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled."); Tex. Civ. Prac. & Rem. Code § 22.001(b) ("The party who summons the witness shall pay that witness's fee for one day, as provided by this section, at the time the subpoena is served on the witness.").

Appendix A

RULE 176

176.1 Form.

Every subpoena must be issued in the name of "The State of Texas" and must:

(a) state the style of the suit and its cause number;

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

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

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

(e) state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2;

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

(g) state the text of Rule 176.8(a); and

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

176.2 Required Actions.

A subpoena must command the person to whom it is directed to do either or both of the following:

(a) attend and give testimony at a deposition, hearing, or trial, which attendance may be in person, by telephone, or by other remote means at a deposition and, with court permission, at a hearing or trial;

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

176.3 Limitations.

(a) Range. A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2). Notwithstanding anything else in this Rule, a person required to appear by telephone or other remote means is deemed to be appearing in the county where the subpoenaed person resides.

(b) Use for discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

176.4 Who May Issue.

A subpoena may be issued by:

(a) the clerk of the appropriate district, county, or justice court, who must provide the party requesting the subpoena with an original and a copy for each witness to be completed by the party;

(b) an attorney authorized to practice in the State of Texas, as an officer of the court; or

(c) an officer authorized to take depositions in this State, who must issue the subpoena immediately on a request accompanied by a notice to take a deposition under Rules 199 or 200, or a notice under Rule 205.3, and who may also serve the notice with the subpoena.

176.5 Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or 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 witness's attorney of record.

(b) Proof of service. 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.

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the ~~place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. 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.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena - before the time specified for compliance - written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

176.5 Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or 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 witness's attorney of record.

(b) Proof of service. 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.

Commented [TC1]: During the pandemic people did not want to open the door to a person serving a subpoena.
Should we consider an alternative to personal service?
We can now serve lawsuits by email–why not a subpoena?
Future discussion?

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at in ~~the place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. 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.

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(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena - before the time specified for compliance - written objections to producing any or all of the designated materials.

A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

(e) Protective orders. A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b)--before the time specified for compliance--either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

(f) Trial subpoenas. A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, may object or move for protective order before the court at the time and place specified for compliance, rather than under paragraphs (d) and (e).

176.7 Protection of Person from Undue Burden and Expense.

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, protection from disclosure of privileged material or information, 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.

176.8 Enforcement of Subpoena.

(a) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

(b) Proof of payment of fees required for fine or attachment. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without 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.

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

199.1 Oral Examination; Alternative Methods of Conducting or Recording.

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

(b) Depositions by telephone or other remote electronic means. A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions.

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

199.2 Procedure for Noticing Oral Depositions.

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

(b) Content of notice.

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

(2) Time and place. The notice must state a reasonable time and place for the oral deposition. The place may be in:

(A) the county of the witness's residence;

(B) the county where the witness is employed or regularly transacts business in person;

(C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);

(D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or

(E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.

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

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

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

199.3 Compelling Witness to Attend.

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

199.4 Objections to Time and Place of Oral Deposition.

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

199.5 Examination, Objection, and Conduct During Oral Depositions.

(a) Attendance.

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

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

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

(b) Oath; examination. Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.

(c) Time limitation. No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation.

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

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

(f) Instructions not to answer. An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer

must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(g) Suspending the deposition. If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

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

199.6 Hearing on Objections.

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

RULE 205

205.1 Forms of Discovery; Subpoena Requirement.

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

(a) an oral deposition;

(b) a deposition on written questions;

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

(d) a request for production of documents and tangible things under this rule.

205.2 Notice.

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery.

A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

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

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

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

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

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

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

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

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

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

RULE 500.8. SUBPOENAS

(a) Use. A subpoena may be used by a party 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 person 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 justice 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 a 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 sheriff or constable of the State of Texas, 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 witness'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. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a 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.

Tab D

Memorandum

To: Supreme Court Advisory Committee

From: Rules 167-206 Subcommittee

Date: March 26, 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 E

§ 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 F

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,

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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.

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Tab G

Current TRCP 201.2 mirrors Civil Practice and Remedies Code § 20.002

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

§ 20.002. Testimony Required by Foreign Jurisdiction
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.

The Uniform Interstate Deposition and Discovery Act only covers the interstate component of this rule as set out in the definitions. It would not cover another country. However, once the court adopts this procedure, Civil Practice and Remedies Code § 20.002, will be repealed. Revising the current rule 201.2 for foreign jurisdictions only is problematic, as it would require us to honor all "mandate, writ or commission" from all foreign countries—regardless of any conventions. While actually allowed under current rule 201.2, there are no reported cases on true foreign depositions. Perhaps we ought to limit it to those foreign countries who have signed onto the Hague convention?

Rule 201.1 also combines other states and foreign countries and could be simplified.

Here is a draft of new rule 201.2 (adopting the uniform act) and new rule 201.3 limiting depositions to those countries that have adopted the Hague Convention.

201.2 Depositions in Texas for Use in Proceedings in Other States

(a) 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.

(b) Issuance of Subpoenas
(1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county 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.
(2) 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.
(3) A subpoena under subsection (2) 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 who *has appeared and* is not represented by counsel.

(c)Service of Subpoena.
A subpoena issued by a clerk of court under Section (b) must be served in compliance with Rule 176.

(d)Deposition, Production, and Inspection.
Texas Rules of Civil Procedure, Rules 190-200 and Texas Rules of Evidence, Rules 500-511 generally apply to subpoenas issued under Section (b).

(e)Application to Court.

An application to a court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section (b) must comply with Rule 176 and be submitted to the court in the county in which discovery is to be conducted.

Comment

By the adoption of this rule, the Supreme Court adopts the Uniform Interstate Deposition and Discovery Act. 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.

201.3. Depositions in Texas for Use in Proceedings in Foreign Countries
If a judicial authority of any foreign country that is a signator to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters or any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad issues a letter of request that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.

Tab H

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 I

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 § 57.001

§ 57.001. Definitions

Effective: September 1, 2023
Currentness

In this subchapter and for purposes of Subchapter B:

(1) "Certified court interpreter" means an individual who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or Section 21.003, Civil Practice and Remedies Code, or is qualified in accordance with the communication access realtime translation services eligibility requirements established by the Office of Deaf and Hard of Hearing Services of the Health and Human Services Commission, to interpret court proceedings for a hearing-impaired individual.

(2) "Department" means the Department of Assistive and Rehabilitative Services.

(3) "Commissioner" means the commissioner of the Department of Assistive and Rehabilitative Services.

(4) "Hearing-impaired individual" means an individual who has a hearing impairment, regardless of whether the individual also has a speech impairment, that inhibits the individual's comprehension of proceedings or communication with others.

(5) Repealed by Acts 2013, 83rd Leg., ch. 42 (S.B. 966), § 3.01(4).

(6) Repealed by Acts 2013, 83rd Leg., ch. 1223 (S.B. 1620), § 4.

(7) "Court proceeding" includes an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution.

(8) "Communication access realtime translation" or "**CART**" means the immediate verbatim translation of the spoken word into English text by a certified **CART** provider.

(9) "Certified **CART** provider" means an individual who holds a certification to provide communication access realtime translation services at an advanced or master level, including:

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(A) a level I through level V certificate of competency issued by the Texas Court Reporters Association;

(B) a certified realtime reporter, certified realtime captioner, or other equivalent certified **CART** provider certificate of competency issued by the National Court Reporters Association; or

(C) a certificate of competency issued by another certification association selected by the department.

Credits

Added by Acts 2001, 77th Leg., ch. 1139, § 1, eff. Sept. 1, 2001. Amended by Acts 2005, 79th Leg., ch. 614, § 1, eff. Sept. 1, 2005; Acts 2013, 83rd Leg., ch. 42 (S.B. 966), § 3.01(4), eff. Sept. 1, 2014; Acts 2013, 83rd Leg., ch. 1223 (S.B. 1620), §§ 1, 4, eff. June 14, 2013; Acts 2023, 88th Leg., ch. 861 (H.B. 3474), § 9.005, 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. 614 substituted "Department of Assistive and Rehabilitative Services" for "Texas Commission for the Deaf and Hard of Hearing" in subd. (1); rewrote subds. (2) and (3); and added subd. (7). Subdivisions (2) and (3) formerly read:

"(2) 'Commission' means the Texas Commission for the Deaf and Hard of Hearing.

"(3) 'Executive director' means the executive director of the Texas Commission for the Deaf and Hard of Hearing."

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."

2013 Legislation

Acts 2013, 83rd Leg., ch. 42 (S.B. 966) repealed subsec. (5) which prior thereto read:

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"(5) 'Licensed court interpreter' means an individual licensed under Subchapter C by the Texas Commission of Licensing and Regulation to interpret court proceedings for an individual who can hear but who does not comprehend English or communicate in English."

Acts 2013, 83rd Leg., ch. 1223 (S.B. 1620) added subds. (8) and (9), and repealed subd. (6), which prior thereto read:

"(6) 'Real-time captioning' means transcribing the spoken words of an oral proceeding to simultaneously project the words on a screen."

2023 Legislation

Acts 2023, 88th Leg., ch. 861 (H.B. 3474), § 9.005, amended (1) as follows:

"(1) 'Certified court interpreter' means an individual who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or Section 21.003, Civil Practice and Remedies Code, or is qualified in accordance with the communication access realtime translation services eligibility requirements established by the Office of Deaf and Hard of Hearing Services of the Health and Human Services Commission, ~~certified under Subchapter B by the Department of Assistive and Rehabilitative Services~~ to interpret court proceedings for a hearing-impaired individual."

Acts 2023, 88th Leg., ch. 861 (H.B. 3474), § 9.005, amended (9) as follows:

"(9) 'Certified **CART** provider' means an individual who holds a certification to provide communication access realtime translation services at an advanced or master level, including:

"(A) a level I through level V certificate of competency issued by the Texas Court Reporters Association;

"(B) a certified realtime reporter, certified realtime captioner, or other equivalent certified **CART** provider certificate of competency issued by the National Court Reporters Association; or

"(C) a certificate of competency issued by another certification association selected by the department."

Notes of Decisions containing your search terms (0)
View all 1

V. T. C. A., Government Code § 57.001, TX GOVT § 57.001
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.

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Tab J

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):

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(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.

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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."

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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:

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"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.

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Tab K

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.

Tab L

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 M

Memorandum on Residual Funds
In Class Action Suits

June 25, 2023

Subcommittee on Rule 16 - 165a

1. The Committee discussion on what to do with unclaimed funds in Texas class actions suits eventually evolved into two visions, one articulated by Judge Robert Schaffer and one articulate by Pete Shenkkan.

2. Judge Schaffer suggested that the decision of how to allocate funds should be made by the trial court, not in a rule of procedure [36048], based on input from the parties [36049]. He would rule out escheating to the State.

3. Pete Schenkkan strongly urged that Rule 42 be amended to provide and that the undistributed or unclaimed funds go to the Texas Access to Justice Foundation. [36051] Pete pointed out that Tex. Civ. Prac. & Rem. Code Section 26.001, et seq., requires the Court to adopt rules to provide for the fair and efficient resolution of class actions. He suggested that all counsel knowing that funds would be going as directed by the Rule would simply the settlement of class actions and remove the appearance of favoritism toward class counsel and their charities or the defendant and its charities or the judge and his or her charities. Pete went on to say that cy pres was a concept that in not obligatory and applies in one part of the wills-and-probate context and that the Supreme Court could decide what constitutes cy pres. [36052] Pete's said "[m]y respectful suggestion is the concept here is as close as possible to helping people who can't, in fact, afford to pay lawyers to litigate cases that are otherwise meritorious."

4. Chairman Babcock put the question to a vote. The Schaffer model received 13 votes. The Schenkkan model received 12 votes. Three persons voted for something other than these two options. [Transcript 36069]

5. If the Supreme Court chooses to let the trial courts decide who will receive unclaimed funds, there are several things that the Supreme Court may wish to consider. One is whether to require a hearing, and whether evidence should be presented on the record about the possible or chosen recipient of funds.[1] This would give class members the opportunity to

[1] The Illinois statute defines eligible organizations to receive cy pres funds, and describes certain criteria that must be met: the entity must have existed and be tax exempt for three or more years with a principal purpose of promoting or providing services, and would be eligible

object to the disposition of unclaimed funds separately from the overall settlement. Another is whether to require notice to select organizations in every case, such as the Access to Justice Foundation or the Texas Bar Foundation, to allow them to appear and to make a case for receiving funds. Another is to require notice to the public of the hearing, perhaps similar to the notice requirement under Rule 76a, so other non-profit organizations can appear and make their case. The experience around the country has shown that some trial courts uncritically accept the settling parties' suggestion of who will receive unclaimed funds. There are some cases where the funds went to entities far removed from the harm giving rise to the class action, or to recipients who were uncomfortably close to a class counsel or the trial court. Appellate courts applying the abuse-of-discretion standard seldom genuinely review the merits of the decision of the trial court. To maintain some degree of supervision over the disposition of funds, the Supreme Court could lay out by Rule, comment, or case law, criteria to guide the trial courts and to empower appellate courts to conduct meaningful appellate review.

6. If the Supreme Court decides to amend Rule 42 to specify approved recipients or a class of recipients, it avoids the problem of review of the class action lawyers and court by limiting the scope of their decisions in a rule rather than on a case-by-case basis. In specifying recipients, the Supreme Court could select one recipient, or two, or specified recipients while allowing others that meet general criteria, like charitable and tax exempt and minimum length of existence.

7. Another option not discussed in the Advisory Committee's meetings is for the Supreme Court to prompt the creation of a new foundation, dedicated to the sole purpose of receiving and distributing unclaimed class action funds, with necessary staff paid out of state funds or settlement proceeds, and board members appointed by the Court who represent different aspects of the communities of interest, be they legal needs, poverty, rehabilitation, language training, education, and more. This option moves the fact-finding and decision-making out of the legal framework and into an administrative framework where more voices can more easily be heard about how best to apply these funds.

8. The SCAC is divided on a recommendation. After many meetings and much talk, the vote came down to two proposals on who decides who receives unclaimed funds: the trial court or the Supreme Court. If the Supreme Court decides, it could by rule or Order specify criteria for recipients, or it could delegate the decision to an organization that operates in an administrative fashion. At the April 5, 2024 meeting, representatives of both the Access to Justice Foundation and the Texas Bar Foundation offered to assume the responsibility of allocating unclaimed funds. A more inclusive approach would be to direct such funds to a new foundation created for this purpose, with a wider scope of concern that would include both of those Foundations as well as others.

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funding under the Equal Justice Act.

9. Possible rules would be:

(1) Trial court, with unrestrained discretion

> Rule 43(j). Residual Funds. When a class action is resolved by litigation or settlement, the trial court shall provide for the distribution of funds that cannot feasibly be distributed to class members, or that have not been claimed by class members before a set deadline.

(2) Trial court discretion, with parameters

> Rule 43(j). Residual Funds.
>
> > (1) When a class action is resolved by litigation or settlement, the court shall provide for the distribution of funds that cannot feasibly be distributed to class members, or that have not been claimed by class members before a set deadline.
> >
> > (2) The court may decide the conditions for distribution and the recipients of such distributions, based on equitable considerations, considering the nature of the harm alleged in the class action, the recommendations of the parties to the class action, and the proposed uses of the residual funds by the recipients.
> >
> > (3) The court shall set a hearing to receive evidence and hear argument regarding the distribution of residual funds, and such notice shall be given to all members of the class, to the Texas Bar Foundation, and to the Texas Access to Justice Foundation, as well as members of the public in the manner described in Rule 76a.3. The hearing shall be open to the public, and parties present may with the permission of the court make statements on the matters under consideration.
> >
> > (4) The recipient of residual funds must be a charitable non-profit entity, which must submit to the court a proposed use of the funds, and the award must require that the entity make public the receipt and use of the residual funds it receives, demonstrating that the funds were used in accordance with the proposal made to the court.
> >
> > (5) The court shall issue a written order specifying the terms for the distribution of residual funds, and which shall include findings and conclusions reflecting the basis for the court's decision.
> >
> > (6) The order is appealable as an interlocutory appeal by any class member,

and by a preferred provider[2] identified by the Supreme Court from time to time.

(3) The Supreme Court decides 100%

Rule 43(j). Residual Funds.

(1) When a class action is resolved by litigation or settlement, the court shall provide for the distribution of funds that cannot feasibly be distributed to class members, or that have not been claimed by class members before a set deadline.

(2) All residual funds shall be distributed to a non-profit foundation recognized by the Supreme Court as a preferred provider.

(4) The Supreme Court decides 50%

Rule 43(j). Residual Funds.

(1) When a class action is resolved by litigation or settlement, the court shall provide for the distribution of funds that cannot feasibly be distributed to class members, or that have not been claimed by class members before a set deadline.

(2) One-half of all residual funds shall be distributed to a preferred provider; the other one-half shall be distributed as agreed between the parties, subject to notice to class members and a right to object, and subject to the discretion of the court.

(3) The court shall issue a written order specifying the terms for the distribution of residual funds, and which shall include findings and conclusions reflecting the basis for the court's decision.

(4) The order is appealable as an interlocutory appeal by any class member, and by a preferred provider identified by the Supreme Court from time to time.

[2] "Preferred Provider" means an entity included on a list promulgated by the Texas Supreme Court as being -pre-approved to receive residual funds.