

**SCAC Meeting Agenda**  
**Friday, March 7, 2025**  
**9:00 a.m.**

**Location:** Indeed Tower  
Vinson & Elkins LLP  
200 W. 6th St., Ste. 2500 Austin, TX 78701

**I. Welcome from Chief Justice Tracy Christopher**

**II. Status Report from Justice Jane Bland**

Justice Bland will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the December 6, 2024 meeting.

**III. Comments from Justice Evan Young**

**IV. Prohibiting the Central Docket**

*Judicial Administration Subcommittee:*

*Hon. Bill Boyce – Chair*  
*Kennon Wooten – Vice Chair*  
*Hon. Nicholas Chu*  
*Hon. Tom Gray*  
*Michael A. Hatchell*  
*Prof. Lonny S. Hoffman*  
*Macey Reasoner Stokes*  
*Hon. Maria Salas-Mendoza*

**A. February 28, 2025 Memo re: Central-Docketing System**

1. February 7, 2025 Referral Letter from the Supreme Court of Texas
2. February 14, 2025 Article re: Judge Christine Hortick Just Got Help in her Bid to Change a Key Bexar County Court Policy
3. Comments Submitted to the Judicial Administration Subcommittee
4. Data Reported by Administrative Judicial Region

5. February 26, 2025 Letter from the Office of the District Judges re: Docketing System, Civil and Family Courts of Travis County

## **V. Artificial Intelligence**

### *1-14c Subcommittee:*

*Robert L. Levy – Chair*

*John H. Kim – Vice Chair*

*Hon. Harvey Brown*

*Marcy Hogan Greer*

*Constance H. Pfeiffer*

- B. March 3, 2025 Memo re: Update on Review of Potential Amendments to the Texas Rules Related to Artificial Intelligence
  1. August 8, 2024 Memo re: Review of Potential Rule Amendments to Address Artificial Intelligence
  2. October 28, 2024 Memo re: Update on Potential Rule Amendments to Address Artificial Evidence
  3. Winter 2024 State Bar Litigation Section Report The Advocate vol. 109
  4. December 1, 2024 Memo re: Report of the Advisory Committee Evidence Rule

## **VI. Procedural Rules for the State Commission on Judicial Conduct**

### *Judicial Administration Subcommittee:*

*Hon. Bill Boyce – Chair*

*Kennon Wooten – Vice Chair*

*Hon. Nicholas Chu*

*Hon. Tom Gray*

*Michael Hatchell*

*Prof. Lonny S. Hoffman*

*Macey Reasoner Stokes*

*Hon. Maria Salas-Mendoza*

- C. February 28, 2025 Memo re: Revisions to Procedural Rules for the State Commission on Judicial Conduct
  - 1. Procedural Rules for the State Commission on Judicial Conduct
  - 2. September 16, 2024 Referral Letter from the Supreme Court of Texas
  - 3. 2023 Annual Report from the State Commission on Judicial Conduct

## **VII. Eliminating Pre-Grant Merits Briefing**

### *Appellate Subcommittee:*

*Hon. Bill Boyce – Chair*

*Constance H. Pfeiffer – Vice Chair*

*Prof. Elaine A. G. Carlson*

*Prof. William V. Dorsaneo III*

*Hon. David Keltner*

*Hon. Emily Miskel*

*Richard B. Phillips, Jr.*

*Macey Reasoner-Stokes*

*Charles R. Watson, Jr.*

- D. February 28, 2025 Memo re: Petition for Review Practice
  - 1. Memo re: Potential Changes in Petition for Review Process
  - 2. Memo re: Notes on Potential Reforms to the Petition for Review Process
  - 3. Martha Newton's 2015 Review of Discretionary Review Process by State Courts of Last Resort

# Tab A



## M E M O R A N D U M

TO: Supreme Court Advisory Committee (“Committee”)  
FROM: Rules of Judicial Administration Subcommittee (“Subcommittee”)<sup>1</sup>  
IN RE: Central-Docketing System  
DATE: February 28, 2025

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In the attached referral letter dated February 7, 2025 (Exhibit 1), the Supreme Court of Texas (“Court”) asked the Committee to (1) “study the replacement of the central-docketing system used by some counties with a statewide requirement that each case be assigned to a particular judge[.]” and (2) “propose draft rule amendments according to this objective.”<sup>2</sup> Based on the article attached as Exhibit 2, coupled with Chief Justice Blacklock’s State of the Judiciary remarks on February 26, 2025, the Subcommittee understands that the Court is considering whether central-docketing systems promote “the efficient and uniform administration of justice in various courts[.]” and, if not, whether rule amendments are required to replace such systems. *See* Tex. Const. art. V, § 31(a) (“The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.”). The Subcommittee understands that there may also be an interest in assessing how central-docketing systems impact the ability to collect judge-specific productivity data in Texas.

This memorandum begins with a summary of key features of central-docketing systems, to guide the Committee’s analysis. Next, it contains an overview of the legal underpinnings of central-docketing systems. It then summarizes information collected to date about how these systems are working and provides an assessment of their potential replacement with a statewide case-assignment system. Information gathering is ongoing and expected to be furthered by the Committee’s initial discussion during its meeting on March 7, 2025. To that end, the final section of this memorandum sets forth topics designed to facilitate a robust discussion.

In studying the issues at hand, the Subcommittee has taken no position as to whether the central-docketing system should be replaced with a statewide requirement that each case be assigned to a particular judge. The Subcommittee has invited all comments, without regard to the position of the commenters, and it has agreed to anonymize comments to the extent requested, to ensure that commenters will feel comfortable providing candid feedback. Additionally, the Subcommittee has strived to obtain all the feedback it could, within the limited time allocated. This memorandum is intended to summarize and provide accurate, currently available information.

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<sup>1</sup> Retired Judge Lora Livingston is serving as a guest Subcommittee member for purposes of the assignment that is addressed in this memorandum. Judge Livingston served on the 261st Judicial District Court in Travis County, Texas between 1999 and 2022. For approximately nine of those years, she served as the Travis County Local Administrative District Judge and, in that capacity, assisted with overseeing and managing the Travis County Central Docket System.

<sup>2</sup> As reflected in footnote 1, the term “Central Docket System” is used in Travis County.

## I. Key Features of Central-Docketing Systems

A central-docketing system generally allows any judge working within the system to exchange benches with other judges who are also working within the system and, relatedly, allows judges to hear and decide portions of cases, without the cases being assigned to a particular judge. In a central-docketing system, however, all cases are assigned to a particular *court* upon filing.

Another key feature of a central-docketing system is the use of a master calendar. Two main methods of trial-court administration nationwide are (1) the individual-calendar system and (2) the master-calendar system. With the former, a case is generally assigned to a specific judge upon filing and remains with that judge for its duration. Case calendaring, in turn, is done on an individual, judge-by-judge basis. In contrast, with the master-calendar system, while a case may be assigned to a specific court upon filing, matters arising throughout the life of the case may be heard by several different judges who operate within the body of courts covered by the calendar in question (e.g., all judges in the Travis County civil district courts). A master-calendar judge and/or court administrator assesses matters as they are filed and set for hearings and, depending on how much time each matter needs, directs them to the judges who can decide them.

Nationwide, “[m]any courts, especially those in urban areas with comparatively large civil caseloads, employ a master calendar system.” National Center for State Courts (NCSC), *Civil Justice Initiative: A Guide to Building Civil Case Management Teams*, [cji-guide-teams.pdf](#) (2017). In Texas, Travis and Bexar Counties operate central-docketing systems that use master calendars. Courts in smaller counties—including Angelina County (Lufkin)—also use master calendars to manage cases over which different courts have concurrent jurisdiction. *See, e.g.*, Order for Exchange of Benches for the 159th and 217th Judicial District Cts., *available at* [https://www.angelinacounty.net/files/pdf/dcrt/dcrt\\_order\\_exchange\\_benches.pdf](https://www.angelinacounty.net/files/pdf/dcrt/dcrt_order_exchange_benches.pdf). And, on a more basic level, anytime a court system provides a docket for cases without regard to the judges assigned to those cases—e.g., a plea docket, an uncontested docket, an agreed-order docket, an emergency docket, an emergency-response docket, or an ancillary docket—a master calendar is effectively used for that docket. In other words, in many instances, hybrid systems exist in courts.

As evidenced by the foregoing, a central feature of any central-docketing system is the ability of judges to exchange benches and hold court for each other. Thus, in studying this system’s contemplated replacement, the Subcommittee assessed the bases for the judicial discretion at issue.

## II. Legal Underpinnings of Central-Docketing Systems

As a preliminary matter, the Texas Constitution allows Texas district court judges to exchange districts and hold court for each other. Section 11 of Article V provides as follows:

***And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. . . .***

Tex. Const. art. V, § 11 (emphasis added).<sup>3</sup> This language has been construed as granting district courts broad discretion to hear each other's cases. *See, e.g., In re Schmitz*, 285 S.W.3d 451, 454 (Tex. 2009) (orig. proceeding) (“Texas law allows judges to sit for one another whenever they choose.” (citing Tex. Const. art. V, § 11)); *Pinnacle Gas Treating, Inc. v. Read*, 160 S.W.3d 564, 566 (Tex. 2005) (“The Texas Constitution provides that ‘[t]he District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law.’ Tex. Const. art. V, § 11. No formal order is needed for an exchange or transfer to take place.”); *In re U.S. Silica Co.*, 157 S.W.3d 434, 439 (Tex. 2005) (same); *In re Houston Lighting & Power Co.*, 976 S.W.2d 671, 673 (Tex. 1998) (stating that “[t]rial courts have broad discretion to exchange benches” (quoting *European Crossroads’ Shopping Ctr., Ltd. v. Criswell*, 910 S.W.2d 45, 52 (Tex. App.—Dallas 1995, writ denied), and citing Tex. Const. art. V, § 11)).

Chapter 24 of the Texas Government Code, in turn, addresses the exchange of benches among district-court judges, as well as other features of a central-docketing system, as follows:

Sec. 24.003. TRANSFER OF CASES; EXCHANGE OF BENCHES.

(a) ***This section applies only to counties with two or more district courts.***

(b) ***Unless provided otherwise by the local rules of administration, a district judge in the county may:***

- (1) except as provided by Subsection (b-1), transfer any civil or criminal case or proceeding on the court's docket, other than a case governed by Chapter 155, Family Code, to the docket of another district court in the county;
- (2) ***hear and determine any case or proceeding pending in another district court in the county without having the case transferred;***
- (3) ***sit for another district court in the county and hear and determine any case or proceeding pending in that court;***
- (4) ***temporarily exchange benches with the judge of another district court in the county;***
- (5) try different cases in the same court at the same time; and
- (6) occupy the judge's own courtroom or the courtroom of another district court in the county.

(b-1) Notwithstanding the local rules of administration, a district judge may not transfer any civil or criminal case or proceeding to the docket of another district court without the consent of the judge of the court to which it is transferred.

(c) If a district judge in the county is sick or otherwise absent, another district judge in the county may hold court for the judge.

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<sup>3</sup> This language has remained substantively unchanged since the Texas Constitution was adopted in 1876. *See* Tex. Const. of 1876, art. V, § 11 (“And the district judges may exchange districts or hold courts for each other, when they may deem it expedient, and shall do so when directed by law.”), *available at* [Article V: Judicial Department - Constitution of Texas \(1876\) - Tarlton Law Library at Tarlton Law Library](#) (last visited Feb. 27, 2025).

***(d) A district judge in the county may hear and determine any part or question of any case or proceeding pending in any of the district courts, and any other district judge may complete the hearing and render judgment in the case or proceeding. A district judge may hear and determine motions, including motions for new trial, petitions for injunction, applications for the appointment of a receiver, interventions, pleas in abatement, dilatory pleas, and all preliminary matters, questions, and proceedings, and may enter judgment or order on them in the court in which the case or proceeding is pending without transferring the case or proceeding. The district judge in whose court the matter is pending may proceed to hear, complete, and determine the matter, or all or any part of another matter, and render a final judgment. A district judge may issue a restraining order or injunction that is returnable to any other district court.***

(e) A judgment or order shall be entered in the minutes of the court in which the case is pending.

***(f) This section does not limit the powers of a district judge when acting for another judge by exchange of benches or otherwise.***

Tex. Gov't Code § 24.003 (emphasis added). Authorizations set forth in Section 24.003 are carried over to Rule 330(e) of the Texas Rules of Civil Procedure, which reads as follows:

Where in such county there are two or more district courts having civil jurisdiction, the judges of such courts may, in their discretion, exchange benches or districts from time to time, and may transfer cases and other proceedings from one court to another, and any of them may in his own courtroom try and determine any case or proceeding pending in another court without having the case transferred, or may sit in any other of said courts and there hear and determine any case there pending, and every judgment and order shall be entered in the minutes of the court in which the case is pending and at the time the judgment or order is rendered, and two (2) or more judges may try different cases in the same court at the same time, and each may occupy his own courtroom or the room of any other court. The judge of any such court may issue restraining orders and injunctions returnable to any other judge or court, and any judge may transfer any case or proceeding pending in his court to any other of said courts, and the judge of any court to which a case or proceeding is transferred shall receive and try the same, and in turn shall have power in his discretion to transfer any such case to any other of said courts and any other judge may in his courtroom try any case pending in any other of such courts.

Tex. R. Civ. P. 330(e).<sup>4</sup>

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<sup>4</sup> As a point of reference, it may also be helpful for the Committee to know that Section 24.017 of the Government Code applies in judicial districts composed of more than one county and provides as follows:

A district judge who is assigned to preside in a court of another judicial district or is presiding in exchange or at the request of the regular judge of the court may, in the manner provided by this

Next, Chapter 74 of the Government Code addresses local administrative judges' duties, including with respect to the docketing and hearing of cases, expeditious movement of court caseloads, efficient operation of the court system, and effective administration of justice.

Sec. 74.092. DUTIES OF LOCAL ADMINISTRATIVE JUDGE.

(a) ***A local administrative judge, for the courts for which the judge serves as local administrative judge, shall:***

(1) ***implement and execute the local rules of administration, including the assignment, docketing, transfer, and hearing of cases;***

(2) appoint any special or standing committees necessary or desirable for court management and administration;

(3) promulgate local rules of administration if the other judges do not act by a majority vote;

(4) recommend to the regional presiding judge any needs for assignment from outside the county to dispose of court caseloads;

(5) ***supervise the expeditious movement of court caseloads, subject to local, regional, and state rules of administration;***

(6) provide the supreme court and the office of court administration requested statistical and management information;

(7) set the hours and places for holding court in the county;

(8) supervise the employment and performance of nonjudicial personnel;

(9) supervise the budget and fiscal matters of the local courts, subject to local rules of administration;

(10) ***coordinate and cooperate with any other local administrative judge in the district in the assignment of cases in the courts' concurrent jurisdiction for the efficient operation of the court system and the effective administration of justice;***

(11) if requested by the courts the judge serves, establish and maintain the lists required by Section 37.003 and ensure appointments are made from the lists in accordance with Section 37.004;

(12) perform other duties as may be directed by the chief justice or a regional presiding judge; and

(13) establish a court security committee to adopt security policies and procedures for the courts served by the local administrative district judge that is composed of:

(A) the local administrative district judge, or the judge's designee, who serves as presiding officer of the committee;

(B) a representative of the sheriff's office;

(C) a representative of the county commissioners court;

(D) one judge of each type of court in the county other than a municipal court or a municipal court of record;

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section for the regular judge, hear, determine, and enter the orders, judgments, and decrees in a case that is pending for trial or has been tried before the visiting judge.

Tex. Gov't Code § 24.017(d).

- (E) a representative of any county attorney's office, district attorney's office, or criminal district attorney's office that serves in the applicable courts; and
- (F) any other person the committee determines necessary to assist the committee.

....

Tex. Gov't Code § 74.092 (emphasis added).

Chapter 74 also addresses the exchange of benches (primarily among courts other than district courts), as follows:

Sec. 74.121. TRANSFER OF CASES; EXCHANGE OF BENCHES.

(a) The judges of constitutional county courts, statutory county courts, justice courts, and small claims courts in a county may transfer cases to and from the dockets of their respective courts, except that a case may not be transferred from one court to another without the consent of the judge of the court to which it is transferred and may not be transferred unless it is within the jurisdiction of the court to which it is transferred. ***The judges of those courts within a county may exchange benches and courtrooms with each other so that if one is absent, disabled, or disqualified, the other may hold court for him without the necessity of transferring the case. Either judge may hear all or any part of a case pending in court and may rule and enter orders on and continue, determine, or render judgment on all or any part of the case without the necessity of transferring it to his own docket.*** A judge may not sit or act in a case unless it is within the jurisdiction of his court. Each judgment and order shall be entered in the minutes of the court in which the case is pending.

(b)(1) The judge of a statutory county court may transfer a case to the docket of the district court, except that a case may not be transferred without the consent of the judge of the court to which it is being transferred and may not be transferred unless it is within the jurisdiction of the court to which it is transferred.

(2) Notwithstanding Subdivision (1), ***in matters of concurrent jurisdiction, a judge of a statutory county court in Midland County and a judge of a district court in Midland County may exchange benches and courtrooms with each other and may transfer cases between their dockets in the same manner that judges of district courts exchange benches and transfer cases under Section 24.003.***

....

Tex. Gov't Code § 74.121 (emphasis added).

Additionally, Chapter 74 provides authority for county- and district-court judges to hear and decide matters that are pending in courts other than their designated courts, as follows:

Sec. 74.094. HEARING CASES. (a) ***A district or statutory county court judge may hear and determine a matter pending in any district or statutory county court***

***in the county regardless of whether the matter is preliminary or final or whether there is a judgment in the matter. The judge may sign a judgment or order in any of the courts regardless of whether the case is transferred. The judgment, order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter.*** The authority of this subsection applies to an active, former, or retired judge assigned to a court having jurisdiction as provided by Subchapter C.

***(b) The judges shall try any case and hear any proceeding as assigned by the local administrative judge.***

(c) The clerk shall file, docket, transfer, and assign the cases as directed by the local administrative judge in accordance with the local rules.

....

Tex. Gov't Code § 74.094 (emphasis added).

Also of note, when the Texas Legislature created the business court during the last legislative session, it provided this pertinent authorization: “To promote the orderly and efficient administration of justice, the business court judges may exchange benches and sit and act for each other in any matter pending before the court.” Tex. Gov't Code § 25A.009. Five business-court divisions—the First, Third, Fourth, Eighth, and Eleventh Divisions—have been operational since September 1, 2024, and each such division has two judges; thus, ten business-court judges are currently able to exchange benches and sit and act for each other in any matter pending before the business court. If the remaining six divisions—the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions—become operational, six additional business-court judges will be able to exchange benches and sit and act for each other in any matter pending before the business court. In other words, this statutory framework envisions 16 judges, working in a judicial district comprised of all 254 counties of Texas, exchanging benches and sitting and acting for each other. *See id.* § 25A.003(a) (“The judicial district of the business court is composed of all counties in this state.”). The Subcommittee is not aware of the business-court judges planning to implement a system akin to a central-docketing system, but the statutory framework seemingly allows for that to happen.

Finally, it bears mentioning that courts have recognized the central-docket(ing) system. *See, e.g., 1 Fox 2 Prods., LLC v. Mercedes-Benz USA, LLC*, No. 03-20-00101-CV, 2021 WL 81865, at \*4 (Tex. App.—Austin Jan. 7, 2021, no pet.) (mem. op.) (“It is now well settled that district courts may operate central-docket systems . . . .”); *Republic Cap. Group, LLC v. Roberts*, No. 03-17-00481-CV, 2018 WL 5289573, at \*1 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op.) (“[D]istrict courts are authorized to operate on central-docket systems . . . .” (citing Tex. Const. art. V, § 11; Tex. R. Civ. P. 330(e); *In re Schmitz*, 285 S.W.3d at 454)); *Salazar v. Dickey*, No. 04-08-00022-CV, 2010 WL 307852, at \*2 (Tex. App.—San Antonio Jan. 27, 2010, pet. denied) (mem. op.) (“The Texas Constitution allows a central docket system like the one in Bexar County.”).

Having determined that central-docketing systems are legally authorized, the next question that arises is whether they nonetheless should be replaced with a statewide requirement that each

case be assigned to a particular judge. This question, in turn, prompted the Subcommittee to strive to assess how the formalized central-docketing systems are working in Travis and Bexar Counties.<sup>5</sup>

### **III. How Central-Docketing Systems Work in Travis and Bexar Counties**

The following summaries are intended to convey key aspects of how the centralized-docketing systems work in Travis and Bexar Counties. These summaries were developed based on the knowledge of Subcommittee members, independent research, comments submitted to the Subcommittee (attached as Exhibit 3), and feedback from current and former judges in Texas. The Subcommittee is grateful to everyone who made time to provide comments and other feedback. The Subcommittee benefited greatly from this meaningful involvement of the broader community.

#### **A. Travis County**

As a starting point, it is important to understand that a hybrid system is in place for cases filed in civil district courts. The system allows complex and high-conflict cases to be assigned to specific judges and requires assignment of certain administrative matters to specific judges. Local R. Civ. P. and R. of Decorum of District Cts. of Travis Cnty. (hereinafter “Travis Cnty. Local R.”) 2.6, 10. Such assignments endure for the entire duration of the cases at issue. The hybrid system also includes a submission docket, under which parties may submit certain matters—“uncontested matters that do not require oral testimony” and “friendly suits and agreed divorces accompanied by sworn written testimony that has been filed with the District Clerk”—either to (1) the judge who has been assigned to the case, if assignment has occurred under Local Rule 2.6 or 10, or (2) “the [c]ourt in which the case is filed (i.e., the [c]ourt shown in the style of the case.” Travis Cnty. File No. GN-61-121012 (Standing Order for Submission Procedures in Civil and Family Cases). Anecdotal evidence indicates that approximately 30 percent of the matters handled by Travis County’s civil district court judges are determined by either (1) the court number where the case is filed (submission matters) or (2) specialized assignments for reasons of complexity, subject matter (administrative appeals), or conflict. In addition, Travis County employs the one-judge-one-family model for all child-welfare cases.

Local Rule 1.3 describes how the Central Docket functions, as follows:

The District Clerk will file cases by distributing them equally, on a rotating basis, among the District Courts. However, pursuant to the operation of the Travis County Central Docket, hearings and trials are assigned to available judges without regard to the court in which the case is filed. Therefore, unless a case is specially assigned to a particular judge pursuant to Local Rule 2.6 or 10.2, each hearing or trial in a case may be heard by any judge. For all matters, therefore, the District Court number identified in the style of the case does not mean the judge of that court will conduct the hearings or trial.

Travis Cnty. Local R. 1.3.

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<sup>5</sup> As a reminder, however, components of central-docketing systems—e.g., the exchanging of benches among judges and the use of master calendars for certain dockets—exist in other counties throughout Texas. See Section I above.



If a litigant wants a setting in a Travis County district court, they call the Travis County Court Administrator’s Office or go online to select a date and time and announce how much time is needed for the setting. The Court Administrator then assigns the matters among the available judges to maximize the number of hearings and trials reached. The assignments are made by the end of the week before scheduled hearings or trials, at the latest. If hearings pass or take less time than announced, the Court Administrator reassigns matters to enable judges to reach more cases.

The Court Administrator issues and posts online (1) weekly docket settings, which allow the litigants to know which judge will hear their matters during the following week; (2) a Future Settings Report Summary, which is “[a] summary of all cases set on the Central Docket, organized by day and docket type[,]” that “shows the number of cases on each docket and the number of hours those cases are announced for”; (3) a Non-Jury Future Settings Report, which “[l]ists all cases set for a non-jury docket including information on the type of case and for how long each case is expected to last”; and (4) a Jury Future Settings Report, which “[l]ists all cases set for a jury docket and includes the number of days for which the case has been announced.” Travis Cnty. Civil Cts. Dkts., <https://www.traviscountytexas.gov/courts/files/dockets/civil>. This information allows litigants to get a general understanding of when their matters are likely to be heard. People can also call the Court Administrator’s Office for information and guidance relating to settings.

To account for the fact that different judges may decide various matters in a single case, the Travis County civil district court judges use an electronic docket-notes system that enables all of them to see the notes of any judge who has presided over any matter in the case. This system is designed to reduce the risk of uninformed judges and of inconsistent rulings in a case.

The Travis County civil county courts—County Courts at Law 1 and 2—also maintain a hybrid docket. By way of example, their local rules provide, in pertinent part, as follows:

All civil cases shall be filed in rotation in County Courts at Law 1 and 2, except for Applications for Protective Orders pursuant to the Family Code, which shall be filed in Court 4.

....

Cases may be set with the Judicial Aide or Judicial Executive Assistant for Court 1 or 2.

....

Courts 1 and 2 shall maintain a central docket. The fact that a case was filed in a court, or that pre-trial matters were heard by a court, does not mean all proceedings will be in that same court.

....

If a Judge has heard preliminary, pre-trial, or other related matters in a complex case, the Judge may retain that case through final disposition.

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Local R. Civ. P. and R. of Decorum of District Cts. of Travis Cnty. 2.1, 2.2, 2.3.

Recently released data show that the highest clearance rates for cases in Texas are in the Third Administrative Judicial Region, where Travis County is the largest portion. *See Exhibit 4* (showing data reported by Administrative Judicial Region).<sup>6</sup> Current, county-specific data show that Travis County has a 94% clearance rate for civil cases and a 93% clearance rate for family-law cases, for the reporting period of March 2024 to December 2024. *See <https://public.tableau.com/app/profile/oca.data.research.division/viz/CourtLevelMonthlyReportsDashboard/ReportingStatus>* (last visited Feb. 27, 2025). In other words, available data indicate this hybrid system yields an efficient administration of justice in Travis County.

Anecdotal evidence indicates that litigants usually can be heard in civil and family matters within three to four weeks and will be heard sooner if the hearing involves an emergency. It also indicates that most cases go to jury trial within a year or two of filing. An emergency (or duty) judge is available every non-holiday weekday from 9:00 a.m. to 5:00 p.m. to hear emergency matters. And every Wednesday, from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., the civil district courts have an Agreed Order Docket, which enables litigants to submit agreed orders and get them signed on the day of submission.

The Subcommittee has received comments for and against the Central Docket. All comments received as of the date this memorandum was finalized are included in *Exhibit 3*. Additionally, the Travis County civil district and county court judges submitted a letter for the Committee's consideration, and that letter is attached as *Exhibit 5* to this memorandum.

## **B. Bexar County**

For the Bexar County civil district courts, there are two generalized centralized dockets: “(a) the Nonjury Docket administered by the Presiding Civil District Judge [‘Presiding Judge’], or (b) the Jury Monitoring Docket administered by the Monitoring Civil District Judge [‘Monitoring Judge’].” Bexar County Civil District Cts. Local R. (hereinafter “Bexar Cnty. Local R.”) 1. As a general matter, each of the 14 district-court judges are assigned to one-month periods of service as Presiding Judge, and they are assigned to three-month periods of service as Monitoring Judge. No single judge serves in the two roles simultaneously. The judges who are not assigned to either role at any given time are designated, in numerical order, to assist one docket or the other.

The local rules address the judges' allocation to the civil court dockets, as follows:

The civil district judges rotate monthly as Presiding Judge. Each week a fixed number of judges, as determined by the Civil District Judges, are assigned to assist the Presiding Judge with the nonjury docket. The other judges are assigned to try jury cases (and nonjury trials of more than two days or as referred by the Presiding Judge). The judges trying jury cases assist the Presiding Judge with nonjury matters from 8:30 to 9:30 and resume their jury trials at 9:30. When the jury docket for the week has been completed, the available judges assist the Presiding Judge for the rest of the week.

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<sup>6</sup> These data points were reported pursuant to Senate Bill 2384, which passed during the last legislative session.

Bexar Cnty. Local R. 2. “The Presiding Civil District Court [‘Presiding Court’] hears all nonjury matters, including pretrial matters in cases set for jury trial (except for motion filed the week before the trial setting), with the exception of issues allocated to the Monitoring Judge under Rule 4.” Bexar Cnty. Local R. 3. Local Rule 3A sets forth the procedure that is sometimes referred to colloquially as “cattle call.” It provides that, “[e]ach morning, and most afternoons, the Presiding Judge calls several dockets[,]” and that “[s]ettings on all dockets are handled by the Presiding Civil District Clerk: 210-335-2000.” Bexar Cnty. Local R. 3A. It also lays out five separate dockets and what can be heard at each one of the dockets. *See id.* Local Rules 3B and 3C then lay out the announcements processes for Presiding Court. *See* Bexar Cnty. Local R. 3B–3C.

The Presiding Judge not only handles all assignments of the nonjury docket, but is also akin to the duty judge in Travis County—dealing, for example, with walk-ins and emergencies. The Monitoring Judge does many of the same things with respect to jury trials—they decide who gets to have a jury trial based on who is assigned to the monitoring docket. The monitoring docket is usually done within a matter of hours in a day, and the Monitoring Judge is generally not handling walk-ins (unless there are cases that were inappropriately assigned to the Presiding Court). The Monitoring Judge is also expected to assist the Presiding Judge when the Monitoring Judge is done calling the docket, and the Monitoring Judge may get a trial themselves (and they may have to start trials later each day because of their Monitoring Judge responsibilities).

Like Travis County, Bexar County has a mechanism for removing complex cases from the central docket. Local Rule 4E reads as follows:

The Monitoring Judge has the discretion to remove a case from the central docket for assignment to one judge for all further pretrial matters and trial on the merits. A motion and hearing in Monitoring Court is required even if all parties agree. If the motion is granted, the Monitoring Judge will use a predetermined random procedure to determine which judge will preside over the case to its conclusion.

Similar to Travis County’s agreed-order docket, Bexar County provides a docket for uncontested matters—the “walk-up” docket. *See* Bexar Cnty. Local R. 3A, 7. Additionally, Bexar County offers three specialty dockets—tax, cost, and expunction. *See* Bexar Cnty. Local R. 3A.5.

On the county-court side, the designated county court of law judges who run civil cases also run a form of a centralized docket. The criminal, juvenile, and probate judges all run their own dockets—i.e., they are not part of a formal centralized-docket system.

Anecdotal evidence indicates that hearings can get set quickly in Bexar County, with as little as three days’ notice. The process is generally lawyer-driven. Lawyers do not have to call the clerk to set hearings; after conferring with the other side, they can simply file a notice of hearing that designates the proper docket for the matter. If lawyers need to confer on the day the hearing is set, their announcements at the call of the Presiding Docket will be “please mark us conferring.” The lawyers then meet with each other and frequently announce “an agreed order to come,” or “we have an agreed reset.” If a case is not reached, it generally can be reset to the next day or two.

Anecdotal evidence also indicates that there have been times when judges have not pulled their weight. When that happens, the centralized-docket system allows other judges to step up to assist. Collectively, the judges can find a way to work around the lack of productivity, if need be.

The above-referenced region-specific data show a lower clearance rate for cases in the Fourth Administrative Judicial Region (where Bexar County is located), as compared with the Third Administrative Judicial Region (where Travis County is located). See [Exhibit 4](#). Data for Bexar County specifically was not readily available as of the date this memorandum was completed. The Subcommittee will strive to get this data before the March 7 meeting.

The Subcommittee has received comments for and against the Bexar County central-docketing system. Overall, the comments about this system are relatively few in number; however, this fact should not be construed as reflective of a lack of interest in this topic among lawyers in Bexar County. More likely than not, this is instead simply a product of the compressed timeframe for submitting comments to the Subcommittee. All comments received to date are included in [Exhibit 3](#). The Subcommittee is also eager to receive input from Committee members.

Finally, for the sake of completeness, the Subcommittee advises the Committee that Bexar County District Judge Christine Vasquez-Hortick recently filed a petition for writ of mandamus challenging Bexar County’s centralized-docketing system after she attempted unsuccessfully to opt out of the system. She named as Respondents Judge Jackie Valdes, acting in her capacity as the Local Administrative Judge for the District Courts of Bexar County, and Judge Sid Harle, in his capacity as Regional Administrative Judge for the Fourth Administrative Judicial Region. The Fourth Court of Appeals denied the petition on January 15, 2025 and denied a motion for panel rehearing on January 30, 2025. For more information, see the filings and entries at [Case Detail](#) (Case No. 04-24-00872-CV). As of the date this memorandum was completed, available information indicates that Judge Vasquez-Hortick has not filed a petition for writ of mandamus with the Court. In the article attached as [Exhibit 2](#), she is quoted as saying: “Although I am opposed to participating in the centralized docket as it is administered currently in Bexar County, I do believe that there are elements of the system that are efficient and that the likely best solution is a hybrid system[.]” That same article provides that Chief Justice Blacklock has made it clear that this legal challenge played no part in the Court’s request that is the subject of this memorandum.

### **III. Discussion Points for Committee Consideration**

Considering the foregoing—coupled with the Court’s request for the Committee to study the replacement of the central-docketing system used by some counties with a statewide requirement that each case be assigned to a particular judge and propose draft rule amendments according to this objective—the Subcommittee seeks input on the following topics on March 7:

- What are the pros and cons of the central-docketing systems in Travis and Bexar Counties? On balance, do these systems appear to promote or undermine efficiency?
- How should the term “central-docketing system” be defined in this context? Relatedly, if it is defined broadly—e.g., to refer to the ability of judges to exchange benches and

hear and decide portions of cases for each other—could there be unintended consequences of eliminating the system, such as the elimination of emergency dockets and plea dockets? Would the elimination of those dockets decrease the efficiency of the administration of justice in our State and/or reduce access to justice in our State?

- To the extent that central-docketing systems impact the ability to track each judge's individual productivity, would replacing the formalized systems in Travis and Bexar Counties resolve the issue, or would the issue persist, in part due to the ongoing ability of judges to exchange benches and hear and decide portions of cases for each other? Relatedly, considering that SB 293 and HB 1761 would amend the Government Code to require district court judges to report their hours to the Presiding Judges of the Administrative Judicial Regions, should the Committee wait and see whether this legislative session yields statutory requirements for judge-specific productivity data?
- Can the contemplated replacement of the central-docketing system occur through rulemaking alone, or does it require constitutional and statutory amendments?
- If the replacement occurred via rulemaking, what would be the best placement for one or more rules addressing the replacement (understanding that amendments to existing Rule 330(e) of the Texas Rules of Civil Procedure would be required)?
- For any proposed rule eliminating the central-docketing system, should there be clear exceptions to allow for a continued exchange of benches for certain purposes (e.g., to account for recusal, disqualification, sickness, emergencies, and/or anything else)?

We look forward to having a robust discussion with the full Committee on March 7.

# EXHIBIT 1



# The Supreme Court of Texas

CHIEF JUSTICE  
JAMES D. BLACKLOCK

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

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EXECUTIVE ASSISTANT  
NADINE SCHNEIDER

DIRECTOR OF PUBLIC AFFAIRS  
AMY STARNES

February 7, 2025

Chief Justice Tracy E. Christopher  
Chair, Supreme Court Advisory Committee  
14th Court of Appeals  
301 Fannin, Room 245  
Houston, Texas 77002

Re: Referral of Rules Issues

Dear Chief Justice Christopher:

Thank you for your willingness to serve as chair of the Advisory Committee. The Supreme Court asks the Committee to study and make recommendations on the following matters.

**Eliminating Pre-Grant Merits Briefing.** The Court requests that the Committee study the elimination of the Court's current practice of requesting merits briefing before granting a petition for review. The Court further requests that the Committee propose draft rule amendments accomplishing this objective.

**Prohibiting the Central Docket.** The Court requests that the Committee study the replacement of the central-docketing system used by some counties with a statewide requirement that each case be assigned to a particular judge. The Court further requests that the Committee propose draft rule amendments accomplishing this objective.

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

Sincerely,

A handwritten signature in black ink, appearing to read "J. Blacklock", written over a white background.

James D. Blacklock  
Chief Justice

# EXHIBIT 2



JUST IN

25m ago

## Another small earthquake recorded in South Texas



NEWS

# Judge Christine Hortick just got help in her bid to change a key Bexar County court policy

In Bexar County, civil cases don't stay with the same judge all the way through. Hortick thinks that wrong, inefficient and unfair to litigants.

By **Patrick Danner**, Staff writer

Feb 14, 2025

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State District Judge Christine Hortick  
 Courtesy of the Hortick Campaign

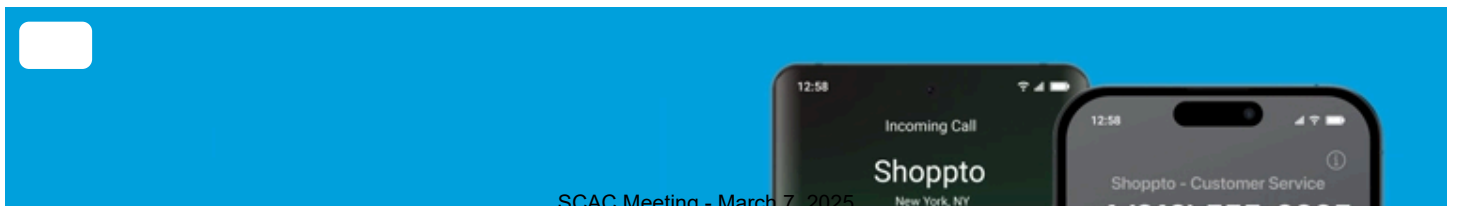
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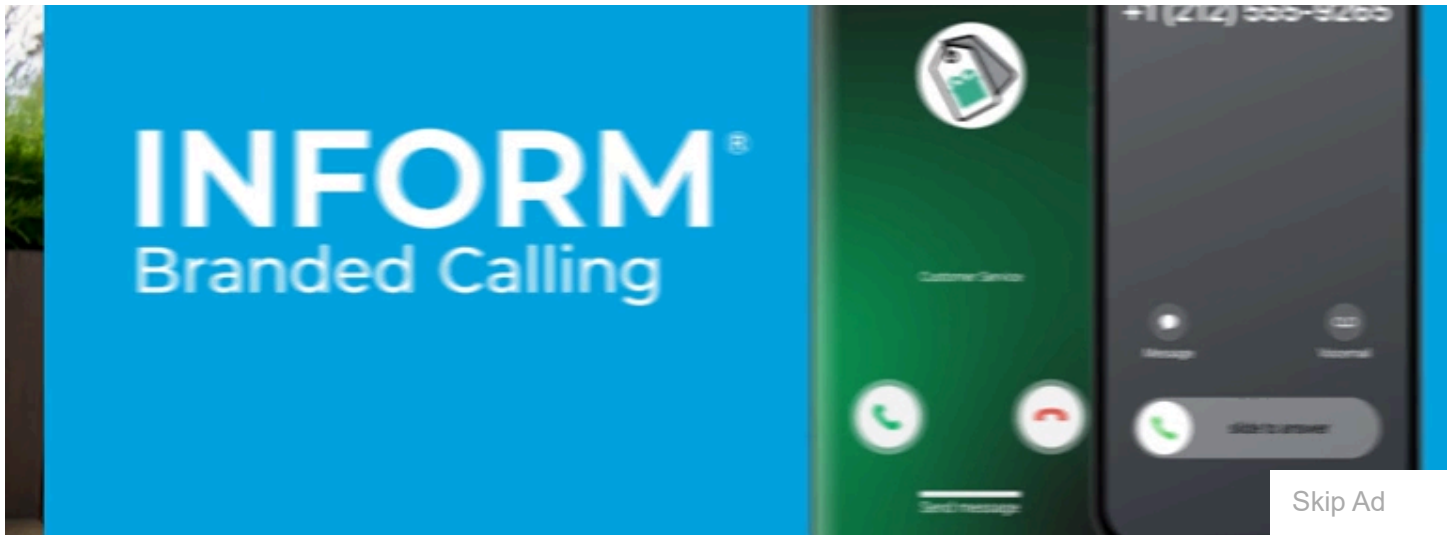
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Everlit

Judge Christine Hortick's running challenge to Bexar County's system for scheduling hearings in civil cases has gotten a boost from an unexpected source — the Texas Supreme Court.





0:05 / 0:30



Under that 63-year-old system, pretrial hearings are assigned to different judges rather than staying with the same one all the way through. Hortick has criticized the system as inefficient and costly because attorneys have to rehash the basics when a pretrial issue is assigned to a judge unfamiliar with the case.

The system also risks “retraumatizing” the parties, especially when children are compelled to “relive” the details of disputes, the judge has said.

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Hortick wants cases assigned to her 225th District Court to remain there until resolution. That's how it's done in most other Texas counties. But for months, she got no traction in her legal fight against Bexar County's system, a rare rebellion by a judge against her superiors.

Now, however, the Supreme Court has weighed in on the broader issue. The state's high court has asked its advisory committee "to study the replacement of the central-docketing system used by some counties with a statewide requirement that each case be assigned to a particular judge."

Supreme Court Chief Justice Jimmmy Blacklock made the request in a Feb. 7 letter to Tracy Christopher, chair of the Supreme Court Advisory Committee and chief justice of the 14th Court of Appeals in Houston.

The high court wants the committee to "propose draft rule amendments accomplishing this objective," Blacklock wrote. The San Antonio Bar Association emailed a copy of the letter to its members Thursday.

The request has created a stir in the legal community in Bexar County, where the civil district courts have operated with a Presiding Court system since 1962.

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Under the system, when a civil case is filed in state district court, it is randomly assigned to one of the 14 judges. Pretrial hearings, however, are scheduled on a central docket run by a Presiding Court judge, who typically assigns the hearings to other jurists.

**READ MORE:** [Judge Christine Hortick's bid to pull out of Bexar court system denied by 4th Court of Appeals](#)

Hortick, a Democrat elected in 2022, said she was pleased the high court is addressing "legitimate drawbacks" of the centralized docket.

"It could not come at a better time," she said, adding that she's in favor of allowing individual judges to make their own decisions on which system to operate under.

"Although I am opposed to participating in the centralized docket as it is administered currently in Bexar County, I do believe that there are elements of the system that are efficient and that the likely best solution is a hybrid system," she said.

## Hortick's appeal

Blackcock issued the letter a day after the 4th Court of Appeals denied Hortick's request to rehear her motion to opt out of Bexar County's centralized system. She asked for the rehearing after [a three-judge panel ruled last month](#) that she is "not entitled to the relief sought."

Hortick has been [trying to pull out of the Presiding Court system](#) since last summer. Her superiors — [Judge Jacqueline "Jackie Valdés](#), the local administrative judge, and [Senior District Judge Sid Harle](#), who presides over the multicounty 4th Judicial Administrative Region — essentially ordered her to back down. Hortick complied with their directive but [mounted a legal challenge](#).

Now that her appeal to the 4th Court of Appeals has failed, she's preparing to file a similar appeal with the Supreme Court.

"I stand by my decision to decision to bring my concerns with the system forward through legal proceedings," she said. "It has been challenging, but was necessary. Utilizing additional rules to create a more efficient system, one that addresses as many as needs of litigants as possible, has always been my objective. Whether that objective is met by the 225th District Court exiting the centralized docket here in Bexar County or by new rules implemented by the Texas Supreme is of little consequence to me. My priority is that a solution be implemented."

## Long-running 'concerns'

Hortick's battle played no part in the Supreme Court's desire to replace the centralized docketing system, Blacklock said in an emailed statement to the San Antonio Express-News.

"The Texas Supreme Court has a constitutional duty to promote 'the efficient and uniform administration of justice in the various courts,'" he said. "The Court asked the Advisory Committee to study the matter in response to longstanding concerns, expressed by many lawyers and judges over the years, that the central docket used by some counties may not promote 'the efficient and uniform administration of justice in various courts.'"

He added, "These concerns long predate Judge Hortick's recent actions."

The advisory committee assists the court in the review and development of rules of administration and procedure for Texas courts.

Last summer, in response to Hortick’s protests, her bosses created a task force to improve the Presiding Court system. Judges Nadine Nieto and Angelica Jimenez are co-chairs. Hortick and 15 lawyers serve as members. One of those lawyers is Steve Chiscano, the San Antonio Bar Association’s immediate past president.

“It is important to note that our Committee began its work long before Chief Justice Blacklock requested input from the Supreme Court Advisory Committee on central dockets, such as our Presiding Court System or the similar system used by the Travis County District Courts,” Chiscano said in an email.

“While Chief Justice Blacklock’s letter does not identify any particular issue regarding central dockets, I am hopeful that the results of our Committee’s work will be helpful to the distinguished Justices of the Texas Supreme Court and their Advisory Committee and allay whatever concerns they may have.”

Hortick was elected to the bench in fall 2022 to fill a seat left open by Peter Sakai, who stepped down to run successfully for Bexar County judge. Civil district court judges are elected to four-year terms. Hortick, a graduate of the University of Massachusetts-Boston and St. Mary’s University School of Law, previously had been in private practice.



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Feb 14, 2025



**Patrick Danner**  
SENIOR REPORTER



Patrick Danner is a business reporter for the San Antonio Express-News. He can be reached at [pdanner@express-news.net](mailto:pdanner@express-news.net).

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### NEWS

## As Hegseth looks to restore Confederate names, is Fort Cavazos next?



# EXHIBIT 3

[REDACTED]

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**Sent:** Tuesday, February 18, 2025 3:20 PM  
**To:** bboyce@adjtlaw.com; Kennon Wooten  
**Subject:** Feedback re central-docketing system

**EXTERNAL**

Hello Bill and Kennon.

[REDACTED]

I oppose any rule that would prohibit the use of a central-docketing system. I have practiced personal injury trial law, on both sides of the docket, for 48 years. I started my practice in Dallas, which did not have a central docket. I moved to Austin in 1986 and have practiced with the Travis County central docketing system since then, while continuing to handle cases in counties without a central docket. Austin is blessed with a tremendous judiciary and a very competent office of court administration. The central-docketing system works well here. There is no need to mandate a cookie-cutter “one case – one judge” court system state-wide. There is no need to fix what is not broken.

There are numerous benefits to the central docketing system used in Travis County, including -

- it is a hybrid system which allows complex cases to be assigned to a specific judge for discovery and trial;
- it is a lawyer-driven docket that has the flexibility to allow motions to be heard timely and jury trials to occur within 8 months of filing a case;
- it is predictable in that if your case has a decent line number, you will go to trial on that setting;
- there is a duty judge available every day; and
- Family law and CPS dockets do not interfere because specific judges are assigned to those dockets.

I request that your subcommittee and the full committee push back against the Court’s apparent antipathy toward the central-docketing system and advise the Court that a rule prohibiting that

system state-wide is not needed and would not promote a more efficient way to resolve lawsuits.

[REDACTED]

[REDACTED]

[REDACTED]

**Sent:** Sunday, February 23, 2025 11:41 AM  
**To:** Kennon Wooten  
**Subject:** Comment Re Central Dockets

**EXTERNAL**

I favor the elimination of the Bexar County central docket system. I have a statewide litigation practice in both state and federal courts, but most of my practice now is in the Western and Southern Districts and in Bexar County. Every ruling from the Bexar County central docket process was almost certainly made by a judge who had no knowledge of the case or its history until the motion was assigned from Presiding Court minutes before the hearing. By design the system reduces judicial responsibility for rulings. In my opinion the Harris County model is far better.

--

[REDACTED]



February 24, 2025

Dear Chief Justice Christopher,

This letter is written in response to Chief Justice Blacklock’s February 7, 2025 letter as it pertains to the request to study the replacement and eradication of the central-docketing system used by certain Texas counties. The Family Law Section of the Austin Bar Association hopes you will consider our collective views and experiences of the central docket in Travis County, Texas, particularly as contrasted with surrounding counties that assign cases to one judge only.

Travis County’s central docket allows for a greater number of cases to be heard each day by utilizing all available judges rather than limiting cases to a single assigned judge. This prevents backlog, optimizes court resources, and ensures that cases are adjudicated in a timely manner.

In Travis County, our family law clients can usually obtain a setting to resolve their disputes within two weeks’ time. In case of an emergency, there is a Duty Judge with a dedicated docket each week to handle such matters, which are typically handled same-day. The central docket’s efficiency becomes clear when unassigned cases—cases so far down the docket that it appears a reset may be necessary—actually end up getting heard that day as judges finish other hearings and become available.

The Travis County Court Administrator’s Office consistently manages the Central Docket in a way that affords our clients timely access to justice with an urgency that we do not experience in the surrounding counties that assign cases to only one judge. In those counties it can take several months to obtain a hearing date. Even then, the trials are often set on the same day as several other cases, which can result in multiple resets. In some Texas courts, cases are known to be reset four or more times resulting in an untenable waste of time and money.

Another detrimental docket management measure employed by some courts is to severely limit the amount of court time for family law hearings and trials. This includes, for example, requirements that temporary orders hearings be limited 20 minutes, or that trials involving complex child custody and property division issues be limited to 3 hours. Travis County’s central docket not only allows attorneys to get cases to trial much sooner, but to have the time reasonably needed to fully present the issues affecting the families we represent.

Family law cases often require temporary orders hearings to address time-sensitive and intolerable conditions such as: being cut off from access to community funds, suffering physical and/or emotional abuse, or being stuck in shared living arrangements that are unsuitable for the parties’ children. The ability to get into court quickly for a temporary orders hearing is a bulwark against the bullying that occurs when there is an imbalance of power, financial or otherwise, between the parties, and it tends to drive settlement negotiations because parties are more likely to settle when they know a court date is imminent. An unexpected benefit of the central docket is that not knowing which judge will hear the case often leads to lawyers and clients being more pragmatic in reaching an agreement. For high-conflict cases our experience has been that the Travis County District Judges will often accommodate a request to “keep the case,” and may make such a decision *sua sponte*.

The idea that Travis County’s central docket could be taken from Texans is alarming. Its removal would drastically increase case backlogs, hinder access to justice, and force lawyers and litigants into unnecessary delays. It would be a disservice to the judicial system, the legal profession, and—most importantly—to the Texas families and individuals who depend on timely access to justice.

Thank you for your time and consideration. We welcome the opportunity to further discuss the benefits of the Travis County central docket.

Respectfully submitted,

Austin Bar Association,  
Family Law Section Members

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 8:59 AM  
**To:** Kennon Wooten  
**Subject:** Bexar County Central Docketing System

**Importance:** High

**Follow Up Flag:** Flag for follow up  
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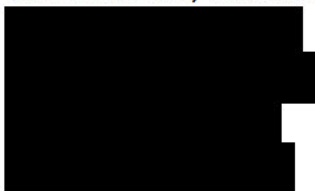
**EXTERNAL**

Kennon –

Please do not eliminate our Bexar County Centra Docketing System. Bexar County Local Rule 4.E.3. provides an effective manner to remove a case from the central docketing system. This allows the run of mill and smaller matters to be heard swiftly and efficiently. Rule 4.E.3 is as follows:

**Complex Cases.** The Monitoring Judge has the discretion to remove a case from the central docket for assignment to one judge for all further pretrial matters and trial on the merits. A motion and hearing in Monitoring Court is required even if all parties agree. If the motion is granted, the Monitoring Judge will use a predetermined random procedure to determine which judge will preside over the case to its conclusion.

John C. Howell  
Allen, Stein and Durbin, P.C.  
6243 IH10 West, Suite 700  
San Antonio, TX 78201



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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 3:09 PM  
**To:** Kennon Wooten  
**Subject:** Central Docket

**EXTERNAL**

As a trial judge for 20 years, and prior to that an attorney representing clients in the trial courts of Travis County, one of the best things about the Courts in Travis county is the central docket. It allowed 10 judges to stand ready on any given day to do all the work pending before the court. As such we got things done. It allowed us to focus on best practices for family law, child welfare and juvenile justice in a way that was unique and praised around the state for its efficiency and best practices - specifically for one judge/one family review and allowing for a unified method of handling these bulk dockets. Such predictable handling of these bulk dockets allowed the DA's office, CPS's office, juvenile public defender, CASAs, attorneys representing children and parents in child welfare courts and traditional family law practitioners' more consistency and they knew how best to prepare their cases for a predictable docket. For example, in other counties in Texas, the courts do not consolidate these cases into one docket so they are scattered between numerous elected judges with no coordination of dockets and with dockets being overlapping and making conflicting demands on the litigants and their attorneys. I have observed these dockets in other courts that do not consolidate these dockets and the result is delay, expense and trauma on the litigants.

On the Central docket, the attorneys usually know if a case is set it will actually go. Also cases get concluded more quickly - all types of cases, including trials. If transparency is needed to track what each judge does in a day or week, surely technological tools can accomplish that without getting rid of a true treasure for the Travis County court system.

Thank you for your consideration and your work on this project.

Sincerely,  
Darlene Byrne

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 9:58 AM  
**To:** Kennon Wooten  
**Subject:** central docket

**EXTERNAL**

Kennon, I favor the central docket. I've practiced in Dallas and Harris Counties from time to time where judges are assigned. The disadvantage as I see it, is the luck of the draw is still there, it's just permanent in the assigned system. The uncertainty of the central docket assignment for trial keeps one side or the other from anticipating an advantage. It encourages settlement. Also, as others have pointed out, the central docket makes it more likely that a judge will be available when needed. Finally, at least in Travis County, it keeps the judges talking to each other and encourages some uniformity in procedures and rulings. Thank you for your consideration.

Henry Moore, Attorney  
Board Certified, Personal Injury Trial Law & Insurance Law



[REDACTED]  
Commissioners House at Heritage Square  
2901 Bee Caves Rd., Suite C, Austin, TX 78746  
[REDACTED] [REDACTED]



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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:39 PM  
**To:** Kennon Wooten  
**Subject:** RE: Central Docket

EXTERNAL

[REDACTED]

I have been practicing a gazillion years and have essentially only practiced in Travis County so I have nothing to compare central v. not central docket to.

I am on a specialized docket much of the time (CPS), but for trial we depend on the central docket. The way CPS cases work is that one district judge and one associate judge hear all the cases (barring a conflict which is unusual). Because we have statutorily required hearings at specific intervals, these judges receive more information on a case than most judges do before a merits setting. They have court reports to review, visitation plans, sometimes home studies and parts of psychological and psychiatric evaluations. At each hearing, they are reviewing what CPS and CASA report on the parents and children

The central docket and its functioning ensures that we get our cases heard timely and fairly. The judge we are assigned to has not heard any of the evidence or information that has been already presented to the CPS judges in whatever form. The central docket also ensures that we have to prepare for trial as if we will get the most unsympathetic judge on the bench because we just don't know. It also requires lawyers to explain what law governs and why we should prevail. I get that this is a common issue for all cases, but in CPS cases there is a stark learning curve educating judges who are unfamiliar with them.

If we had each CPS case assigned to some random judge at the beginning of each case, our systemic docket would implode. Scheduling is complicated enough when there are two judges who handle the vast majority of CPS hearings. It would be beyond imaginable to have 9. I can go more into this, but we regularly switch ADAs, parents' attorneys, child's attorneys and CASAs. We are often in court multiple days on multiple cases. The attorneys fees would likely increase exponentially to get away from a systemic docket as it really is the most efficient. (Not to mention my clinic's ability to take cases would be negatively impacted).

On a public policy level, I think how we do things in Travis County work very well. We have judges who are experts in CPS law and hear cases up until trial. And the other judges hear our trials. That also ensures that a judge at a merits setting is not influenced by what hearsay is admitted during an informal hearing.

Thanks for letting me explain better.

[Lori K. Duke](#)

She|her|hers

Co-Director|Children's Rights Clinic|University of Texas School of Law  
727 East Dean Keeton|Austin, TX 78705



[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:49 PM  
**To:** Kennon Wooten  
**Cc:** Quentin Jameson; Andrea Bergia; Clare Mattione  
**Subject:** Central Docket Issue

**EXTERNAL**

Hi Kennon,

I hope you are doing well, and that you had a nice weekend.

The central docket has worked for as long as I've been a lawyer in Travis County. It has proven to be far more efficient and faster than other counties' docketing systems, which is particularly important in family law. Family law matters are dynamic and the best interests of the children and preservation of property sometimes require immediate judicial intervention. Counties without a central docket simply cannot offer that level of quick access to the courts or the time required for complicated hearings. I agree that we sometimes need one judge to hear all of the pre-trial motions, specifically temporary orders, so that the court can better understand the full story and identify bad actors. However, I've had several judges preferentially set difficult matters in their court to ensure that one judge was monitoring the case and that litigants were not able to take advantage of the central docket system. So, Travis County has already successfully addressed this issue.

I hope this is helpful, and I am happy to write something more in-depth (been in trial prep/trial this week so short on time). I appreciate your help with this, and please let me know how I can help with this issue going forward. I will happily make myself available after trial ends on March 7 to provide additional insight.

Thank you,

**Lisa Danley**

Attorney  
Danley|Bergia, PLLC  
111 Congress Avenue, Ste. 500  
Austin, Texas 78701  
[REDACTED]

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**From:** [REDACTED]  
**Sent:** Thursday, February 20, 2025 12:10 PM  
**To:** Kennon Wooten  
**Subject:** Central Docket Study

**EXTERNAL**

Hi Kennon.

I write to express my support for the Travis County Central Docket system; and I oppose a statewide prohibition against central dockets.

In my view, the strength of the central docket is its ability to offer timely hearings and trials to litigants. Parties are almost always able to obtain timely hearing dates, and the judges and court administrator have great flexibility to move hearings from court to court depending on availability, such as when a hearing cancels at the last minute. If we were to go to an assigned-judge docket, I can picture a courthouse where one court has parties waiting all morning or afternoon to have something heard, while other courtrooms are vacant because hearings passed or canceled. I find the central docket to be the most effective use of judicial resources.

I know one knock against the central docket is the need to educate any judge seeing the case for the first time. In my view, that is actually a strength of the system—there are no preconceived notions on the part of the hearing judge, and lawyers can and should be able to think on their feet and constantly improve their presentations and analysis of their cases.

My \$0.02.

Thank you for serving on the sub-committee.

Andrew MacRae  
[REDACTED]

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:56 PM  
**To:** Kennon Wooten  
**Subject:** Comment on Proposed Rule Changes

**EXTERNAL**

Hi Kennon,

I hope you're doing well. I just saw the email on the proposed rule changes. I'm on the fence about eliminating pre-grant merits briefing at the Texas Supreme Court, but I do think that an order prohibiting the central docket may be beneficial. I think for the benefits that a central docket brings (mainly getting a hearing faster), I think it causes a myriad of other problems. Many (if not most cases) would benefit from repeatedly being in front of the same judge so that the Court can become familiar with the matter as a case evolves. From an appellate/mandamus standpoint, I've also seen problems arise from discovery motions that first go before one judge, but after further discovery or a slight change of issues, go before another judge. This switching does not appear barred by the local rules because it doesn't concern rehearing the same order, but often puts issues in front of a new judge that would have benefited from hearing the earlier discovery disputes. I also think there is merit to a judge who hears a summary judgment motion or Daubert motion (or anything that might affect trial) being the same judge who hears trial.

So those are my thoughts on that. On the SCOTX issue, as much as I hate fully briefing a case that then gets denied, I also recognize sometimes the Court benefits from full briefing before determining whether the case should be granted review. However, if reducing full briefing to only cases that are granted review made the Court better able to grant review for more cases (which may result from having to consider less briefing on the merits), then I'd be for it.

Hope all is well.

Zach

Zachary H. Bowman | Partner  
Wright Close & Barger, LLP  
One Riverway, Suite 2200  
Houston, Texas 77056

[REDACTED]





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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:31 PM  
**To:** Kennon Wooten  
**Cc:** [REDACTED]  
**Subject:** Comment re proposed Central Docket prohibition

**EXTERNAL**

Dear Ms. Wooten,

Thank you for accepting comments regarding the proposed prohibition of central docketing. Having been a litigator practicing in Travis County for the past eight years, I would caution against forcing the Travis and Bexar County courts to overhaul their current systems. From my experience, Travis County central docketing efficiently serves both litigants and the justice system. I ask that the feedback and opinions of Travis and Bexar Counties and attorneys practicing therein be given strong consideration in this decision.

Warmly,



**Leigh A. Joseph**  
Attorney

901 S. MoPac Expressway  
Bldg. 1, Suite #300  
Austin, Texas 78746

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, February 25, 2025 9:44 AM  
**To:** Kennon Wooten  
**Subject:** Comments about proposed change to central docketing system

**Follow Up Flag:** Flag for follow up  
**Flag Status:** Completed

**EXTERNAL**

Hi Kennon,

I practice in Travis County and wanted to emphasize how much I support the rule change eliminating central-docket systems and requiring cases to be assigned to a particular judge. The current system here in Travis County and others that utilize a similar docket is ripe with inefficiency and abuse.

Almost every time I go before a judge on a particular motion, I have to spend time educating the judge on the matter before the court as well providing a procedural history and how that is relevant to the motion. This would not be necessary if each case was assigned to a specific judge because that judge would already be familiar with the case and its procedural history. Assigning each case to one judge would significantly decrease the shenanigans attorneys pull since they know each time they go before the court, the motion or controversy will likely be before a judge who has woefully unfamiliar with the case. Attorneys can take one position on a matter before one judge on a particular motion and then take completely polar opposite position before another judge on a different motion. Even worse is when a case goes to trial and the judge presiding over the trial has had no involvement in the case, which, again, allows attorney to abuse the situation by arguing matters or taking liberties that simply would not be possible if one judge had presided over the case the entire time.

The ultimate goal is to see that justice is done. The current central docket system does not serve that purpose. I urge the Court to replace the central docket system with a statewide requirement that each case be assigned to a civil judge.



Jared Grisham • Senior Attorney  
2801 Via Fortuna, Suite 300, Austin, TX 78746



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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 3:30 PM  
**To:** rulescomments@txcourts.gov  
**Cc:** Kennon Wooten  
**Subject:** Comments on February 7th Referral of Rules

**EXTERNAL**

To Whom it Concerns:

I am a practicing attorney in Travis County, Texas. I have reviewed the letter from Chief Justice Blacklock to Chief Justice Christopher dated February 7, 2025, requesting the Supreme Court Advisory Committee to conduct a study and make recommendations concerning a central docket system.

I must express concerns related to this study, and respectfully request that the Committee draw its attention to the concerns of my colleagues who practice specifically in the area of cases involving Child Protective Services. As the Committee is well aware, this body of cases is governed by unique laws and deadlines, and the central docket system offers adaptability so that a large caseload can be dealt with as demand requires, meeting not only statutory deadlines but also serving the overarching interest that cases be resolved efficiently to ensure stability, security, and resolution in the best interests for the children involved.

I heartily thank the Committee for its attention to these concerns:

- Given the applicable deadlines and the frequent occurrence of multiple cases with deadlines on the same day, if they are assigned to the same judge, what would be the solution?
- Would cases, when filed, go to a particular court from start to finish - and would this mean we would no longer have a dedicated CPS judge?
- If they keep all our trials with the CPS judge, there is no way our one district judge can handle all trials. What's the plan if we have multiple jury trials? multiple bench trials, multiple contested hearings that an AJ can't hear? Does that mean more judges specifically assigned to hear CPS cases?
- Child urgencies and emergencies. Will a Judge assigned to CPS case as just a portion of their docket be able to give the immediate attention and Court time many cases require throughout the case – sometimes at several points?

With sincere gratitude,

Nancy Nicolas  
Texas SBN 24057883



[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:01 PM  
**To:** Kennon Wooten  
**Subject:** Comments on Proposal to Prohibit Central Docket

EXTERNAL

I worked for 10 years in Dallas and the Dallas County state courts and have worked for the past 5 years in Travis County.

When asked, I tell people that the difference between the two is that justice is being served in Travis County because of the Central Docket.

My experience in Dallas County was that it took much longer to get hearings set, orders issued, and to get to trial. To set a hearing, you have to email the court coordinator. You then get a handful of dates, or maybe even one, that is months away. Judges then take months to rule and sign orders, even on discovery matters, which delays the whole case. In my experience, you couldn't expect to get to trial in less than 3-4 years.

In contrast, in Travis County, you can get a hearing in two weeks and have many more options for that hearing, meaning it is more likely to work for both sides. The Judges rule and issue orders much quicker. I've gotten to trial within a year on a commercial dispute. Under the Central Docket, parties are getting to resolution much faster and cases are being decided on the merits, not just because of costs and burden of engaging in years of litigation.

I do, however, think the Travis County Central Docket is too confusing and too hard to navigate for people unfamiliar with it, so I understand their frustrations. There needs to a clear explanation of all the steps you must take to to set a hearing and information about who to contact if you have questions.

Thank you,

Katie Dolan-Galaviz

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:08 PM  
**To:** Kennon Wooten  
**Subject:** Comments Regarding Proposed Rule Changes

**EXTERNAL**

Hi Kennon,

Please consider this comment in any position the ABA takes or communicates to the Texas Supreme Court.

I value the central docket system in Travis County, as do my clients.

I have a business litigation primarily. Over 75% of my practice is in the state courts of Travis County, substantially with clients who are small or mid-sized businesses that do not employ inside general counsel. To a person, they appreciate the value the Travis County central docket gives them. My clients do not feel the need to negotiate arbitration agreements and pay for private dispute resolution just to have the promise of a fast resolution to a legal dispute, and they can budget their expenses accordingly. Likewise, when they find themselves in a dispute, they have a much better experience on the central docket than on those dockets in surrounding counties, because they can count on their cases moving forward as quickly as the parties can do so. Delays are inevitable, but much easier to manage when caused by the parties, not the courts themselves.

The efficiency of the central docket system increases lawyers' – and citizens' – access to justice, and should be expanded in any county where the population allows its implementation, not prohibited.

Chase



Chase C. Hamilton, Partner  
Richards Rodriguez & Skeith LLP  
611 West 15<sup>th</sup> Street | Austin, TX 78701



[REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 4:57 PM  
**To:** Kennon Wooten  
**Subject:** Comments to Proposed Rule Changes

**EXTERNAL**

One of the advantages to the Central Docket is that it is relatively easy to get a hearing scheduled. In the counties where you are assigned to a judge (especially if they also have a criminal docket) it is much more difficult. Perhaps a compromise would be to keep the central docket format in those counties that have it, but make it easier to get a case specially assigned to a judge. We do complex commercial litigation, and it is time consuming and a waste of judicial resources for us to have to educate the judge at nearly every hearing. Being assigned to a particular judge would expedite the litigation process significantly. The simpler cases could be on the central docket because they are not so fact intensive.

---

**Katherine J. Walters, Esq.**  
Richie & Gueringer, P.C.  
1111 West 6<sup>th</sup> St., Bldg. A, Suite 330  
Austin, TX 78703

[REDACTED]

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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Thursday, February 20, 2025 2:02 PM  
**To:** Kennon Wooten  
**Subject:** For SCAC: Comments regarding potential ending of central docket system

**EXTERNAL**

Dear Ms. Wooten:

In my family law practice in Austin, I practice primarily in Travis County, also handling some cases in Hays and Williamson Counties. In my more than twenty years of practice, I have found that the central docket system in Travis County promotes the efficient resolution of cases. When I set a case for hearing or trial in Travis County, I can generally be assured that the case will be heard on the day that it is set. I have had the experience over the years in Hays and Williamson Counties, where cases are assigned to one judge, of waiting for hours to be heard and either not being reached or having unexpectedly limited time to present issues to be heard. Waiting all day to be heard and then either being turned away or rushed can be inordinately expensive for litigants. I have also had the experience in those counties of having to schedule court settings many weeks or months further out than in Travis County.

It may be asserted that the central docket system requires litigants to spend needless time explaining a case to a different judge each time. I have not found that to be the case. For most family law cases, the maximum number of court proceedings is two, usually in front of different judges anyway: a temporary orders hearing before an associate judge and a final trial before a district judge.

The central docket system in Travis County works well. If the system changes to one case, one judge, I fear that litigants in Travis County will have a more difficult time getting their cases timely resolved. Timely resolution is crucial in family law cases, particularly for children.

If there is anything else I may provide, please let me know. Thank you.

Mary Evelyn McNamara

*Board Certified – Family Law – Texas Board of Legal Specialization  
Fellow, American Academy of Matrimonial Lawyers*



**MARY EVELYN McNAMARA**

1209 West 5th Street, Suite 200  
Austin, Texas 78703



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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 3:03 PM  
**To:** Kennon Wooten  
**Cc:** rulescomments@txcourts.gov  
**Subject:** FW: Submit Comments About Proposed Rules Changes

**EXTERNAL**

Kennon,

I am in favor of getting rid of the central docket. Too often than not Judges know nothing about the case, and Judges seem less interested in cases where they learn the facts the day of the hearing. We waste a lot of valuable time to re-inform Judges about the facts. I think cases are more likely to settle, when the parties know who the Judge is on a particular case, and how they have ruled in the past on similar fact patterns.

-Trey

Respectfully,

Oscar B. Jackson III (Trey)  
Attorney at Law  
Law Office of Oscar B. Jackson III, PLLC  
3445 Executive Center Dr., Suite 101  
Austin, Texas 78731

[REDACTED]

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**From:** Austin Bar Association <noreply@m.atxbar.membercentral.org>  
**Sent:** Monday, February 24, 2025 2:52 PM  
**To:** [REDACTED]  
**Subject:** Submit Comments About Proposed Rules Changes

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 10:08 AM  
**To:** Kennon Wooten  
**Subject:** FW: Texas Supreme Court asks for a study to replace the central-docketing system

**Follow Up Flag:** Flag for follow up  
**Flag Status:** Completed

**EXTERNAL**

Hi Kennon, long time no see! Hope you are doing well.

I am writing regarding the below study regarding the central docketing system. As you know, I am currently engaged in the practice of general civil and business litigation. In my practice area, educating the court on the complexities of a case each time there is a hearing with a different judge can be time-consuming and costly for the clients. This is because some of the complex cases require more hearings to address jurisdictional, discovery, dispositive and other motions. The central docketing system sometimes also can generate an air of uncertainty and wariness of the court system for our clients—we regularly field anxiety-ridden calls from clients wanting to know who our assigned judge is and whether they will be able to absorb the nuances of the case within the course of a relatively short hearing.

That said, there are times when a litigant's preference for having a single judge deciding a case from start to finish is simply outweighed by efficiency concerns. To the extent that the Texas Supreme Court wishes to allay the impact of uncertainty on litigants, I would urge the Court to consider a balancing of the interests as opposed to wholesale elimination of the central docketing system. Having practiced for many years across Texas and in other counties without central docketing systems, I have found little to no difference between the central docketing system as opposed to assignment to a particular judge in smaller venues. However, in larger venues, efficiency is key to managing the volume of cases. I would urge the subcommittee to consider the impact of such a decision on different types of cases, as not all are equal. For example, given the large number of criminal and DFPS cases, it may make sense to retain the central docketing system for efficiency while providing a more relaxed structure for special assignment of more complex matters.

Thank you for the important work you are doing, and let me know if I can provide any helpful information.

Best regards,  
Melissa

Melissa Carr  
Partner  
DuBOIS BRYANT & CAMPBELL  
303 Colorado, Suite 2300  
Austin, TX 78701





[REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 9:30 AM  
**To:** Kennon Wooten  
**Cc:** Catherine Hanna  
**Subject:** Fw: Texas Supreme Court asks for a study to replace the central-docketing system

**EXTERNAL**

Kennon,

Just wanted to weigh in on the study looking at potential replacement of the Travis County Central Docketing system. As you know, I have been litigating cases in state and federal courts all over Texas for 34 years. The Central Docket in Travis County is the best system and forum for resolution of civil cases in Texas. There are a number of reasons this is true:

1. You can always get a hearing on the Central Docket. Our system is much faster than other courts where individual assignment often means waiting weeks or months for court availability.
2. There is a system and procedure in place in Travis County for special settings in cases that need a single judge to have continuing jurisdiction over a given matter.
3. The online "submission" docket and the weekly "agreed order" in-person docket in Travis County make it very easy to get agreed orders entered quickly.

My general view is "if it ain't broke don't fix it." There is no empirical evidence indicating any backlog of civil cases in Travis County or pendency of motions for excessive periods of time that warrant any change. Doing away with the Central Docket in Travis County would be a mistake.

Thanks for your work on this issue.

**David L. Plaut**  
211 East 7th St., Suite 600  
Austin, Texas 78701



**HANNA & PLAUT LLP**  
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**Law Offices of Sara E. Saltmarsh**  
**11782 Jollyville Road, Suite 202**  
**Austin, Texas 78759**



Christophers  
14th Court of Appeals  
301 Fannin, Room 245  
Houston, Texas 77002

Re: Proposed Elimination of Central Settings Dockets in Texas Courts

Dear Chief Justice Christopher,

I am writing this letter in opposition to the proposed elimination of central settings dockets in Texas courts.

I have practiced for almost thirty-eight years in Texas courts, including Travis, Williamson, Hays, Bastrop, Comal, Caldwell, Burnet, Bell, Llano, and Gonzales counties. The majority of my trial work, including hundreds of hearings, has been in Travis County, Texas on the central settings docket.

The Travis County District Courts have by far the most efficient system of court administration that I have experienced. The Travis County central settings docket serves the residents of Travis County well by providing swift access to hearings and sufficient time to allow litigants' cases to be heard.

In counties where a case is assigned to a particular judge, litigants experience delays in obtaining settings and are often given time limitations which are inadequate to allow evidence to be fully presented. I have represented clients who have started a hearing in the time allotted by the Court and then had to wait more than a month to complete the hearing.

Family law cases comprise the majority of the civil litigation docket in Travis County, in varying percentages depending on the time period. My understanding is that the percentage of pending family law cases in Travis County may be as high as 70% of civil litigation cases. For many Texans, their family case may be their only exposure to the court system, and they have a right to expect due process, fair treatment, and respect from their judges.

The central settings docket in Travis County allows judicial efficiency, as a case can be assigned to any judge who is available. Cases which are further down on the

docket are put on standby and are assigned by the Court Administrator to judges as they complete their assigned cases and become available.

In counties where an individual judge schedules cases with no backup settings, judges often conclude their day if cases settle or conclude early. On a central settings docket, that judge would be assigned another case to make full use of the judge's time and best use of taxpayer dollars.

Please do not eliminate central settings dockets. The Travis County central settings docket is a model of efficiency, with hard-working district judges and associate judges. The attorneys who practice in Travis County support and appreciate the central settings docket.

Thank you.

Best regards,



Sara E. Saltmarsh,

*Family Law, Collaborative Law, Mediation, and Arbitration*

Board Certified in Family Law, Texas Board of Legal Specialization, Since 1992

Member, State Bar of Texas and The Florida Bar  
AV-rated, Martindale Hubbell

Adjunct Professor, University of Texas School of Law

President, Collaborative Divorce Austin

Director, SBOT Collaborative Law Council

Texas Super Lawyers

Member, International Academy of Collaborative Professionals

Member, Texas Academy of Family Law Specialists

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, February 25, 2025 2:43 PM  
**To:** Kennon Wooten  
**Subject:** Opposition to Prohibiting Central Dockets

**EXTERNAL**

Ms. Wooten,

My name is Elliott Beck and I have been licensed to practice law in Texas since 2011. I am writing to you to strongly oppose a rule prohibiting central dockets. My experience with the central docket in Travis County has been very positive. It increases access to justice by greatly reducing the amount of time it takes to obtain a hearing. Litigants have more control of their cases because they, not the court, set their hearings. It also eliminates the risk that a single, under-performing judge can stall every case on their docket.

I understand that some are critical of central dockets because it makes understanding and litigating complex matters more difficult, but matters such as these can be specially assigned to a single judge, which eliminates that concern.

Please feel free to contact me if you have any questions or would like to discuss further.

Thank you,  
Elliott Beck



[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:58 PM  
**To:** Kennon Wooten  
**Cc:** rulescomments@txcourts.gov  
**Subject:** Proposal to ban Central Dockets

**EXTERNAL**

I am writing to comment on the proposed ban on Central Docket systems in Texas Courts.

First, let me say **that there has been insufficient information publicized about this proposal**. I only learned about it by email within the last few days. I went to the Texas Courts website, and could find nothing about it. I did a Google search, and found only one article, from the San Antonio newspaper, which reported that Chief Justice Blacklock is apparently supporting the call by a local Judge in Bexar County to opt out of the Central system.

I write in support of the Central Docket system. I have practiced for nearly forty-eight years in Texas Courts all over the State. During that time, I have tried at least fifty cases to a jury verdict, and attended many more hearings. My home County is Travis County, where there is a Central system. It is different from the one in Bexar County, although Bexar County also has a central system. However, I practiced and tried cases in such varied places as Bastrop County, Bexar County, Burnet County, Dallas County, Harris County, Potter County, Williamson County and many others.

In my opinion and experience, the Central Docket system for civil cases, at least as set up in Travis County, has several significant advantages. First, it provides for a very efficient use of judicial resources. It does this by making sure that every judge has a full docket **every day**. It also allows for judicial time off, while keeping the Courthouse open through the availability of other judges.

At the same time, it assures that every litigant has an opportunity to be heard promptly. In a regular docket system, there is not usually an opportunity to be heard quickly (for example, on a TRO, or other emergency matter) without spending a very large amount of time trying to get a hearing, while a Central system affords that opportunity. Similarly, jury trials can be predictably scheduled within six or so months on the Travis County Central Docket system, as opposed to a year or more out in an individual docket system. Non-jury trials can be scheduled even more quickly.

A central Docket system minimizes the amount of time that lawyers spend waiting for other cases or matters to be heard. In other Counties, I have spent many hours waiting for a fifteen

minute hearing. In Travis County, I have never spent more than two hours waiting, and usually much less.

With the Central Docket system, there is a greatly diminished opportunity to play to the personality of a particular judge. With a Central Docket, you do not know who your judge is until you show up for court on the day of your hearing, or at the Docket Call for a jury trial. That means you have to make your preparations as clean and thorough as possible, because you have to be prepared for all eventualities, and whatever judge you may draw. At the same time, Central Dockets allow for the formulation of general rules governing such things as Voir Dire, Motions in Limine, and the like, which dramatically shortens the pre-trial process.

My first recommendation to the Court is that you publicize this proposed Rule change much more thoroughly before you consider implementing it. My second is that you commission a comparative report considering the efficiencies of the central system versus an individual system, as well as the lawyer satisfaction with the competing systems in the counties where they exist.

Stephen G. Nagle, Attorney

Bd. Cert. since 1985

4131 Spicewood Springs Rd., Ste. O-3, Austin, Texas 78759



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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:36 PM  
**To:** Kennon Wooten  
**Cc:** rulescomments@txcourts.gov  
**Subject:** Proposed elimination of the Travis County central docket

**EXTERNAL**

Please consider these comments as the Texas Supreme Court considers prohibiting the central docket system in Travis and Bexar Counties.

The current system works well to enable litigants to move their cases efficiently and consistently. I practice primarily in Travis County and our judges are dedicated to moving dockets, responding to motions and needs, and respecting the orders and decisions of their colleagues on the bench. Our court administrator, Warren Vavra, does a masterful job of juggling schedules and dockets; he and the courts represent a cooperative and responsive effort to handle lawsuits efficiently. I recognize that there are pros and cons to a central docket vs an assigned-judge-per-case docket, but Travis County has the best of both worlds. When my firm has had two complex cases, interrelated with some parties and issues in common and some unique to each case, we required the consistency of one judge that could preside over both cases. The administrative judge assigned a specific judge to both cases, and she heard all dispositive motions and discovery battles. When that level of assignment is not required, we are able to rotate from judge to judge, using the skills and time of whichever judge is available to move cases forward. Our judges respect each other and expect litigants to respect the decisions of a ruling judge; if a rehearing is required, our judges coordinate as needed to avoid gamesmanship or inconsistent rulings.

I've seen colleagues who file and non-suit and refile a new case until they get their case assigned to a preferred judge; that nonsense is not possible with the Travis County central docket.

Our system works. It is flexible enough to shepherd cases, consolidate or assign when needed, and flow from court to court in the majority of cases. Our cases are not arbitrarily assigned to a judge that may not have the time or resources to manage additional workload. The Texas Supreme Court is authorized by Tex. Gov't Code Sec. 73.001 to transfer cases from one court of appeals to another for good cause. Travis and Bexar county employ the same concept, albeit much less formally, to equalize case loads, to select judges with unique experience for certain cases, and to ensure that litigants receive timely and responsive justice. It's not broken. Please don't fix it.

**Judy Kostura**  
Partner



[REDACTED]



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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, February 25, 2025 2:15 PM  
**To:** Kennon Wooten  
**Cc:** Patty Arnold  
**Subject:** Proposed rule prohibiting central dockets

**Follow Up Flag:** Flag for follow up  
**Flag Status:** Completed

**EXTERNAL**

Assignment of cases is a matter of legitimate local control: there is no compelling State interest in uniformity on this issue. Counties should be free to adopt whatever system that county's judges feel is best for their circumstances. A one-size-fits-all approach makes sense on some matters (such as coding for type of case when a lawsuit is filed), but not for assignment of cases for pre-trial hearing and trial.

There are as many, if not more, problems with an assigned docket than a central system. A judge may have personal or family health issues that limit the time a judge can spend on work; some judges develop a reputation for taking matters under advisement for long periods of time; judges also develop a reputation for bias. In the latter event, in an assigned system a litigator may feel the only choice available to protect a client is to dismiss and refile, which is wasteful of resources.

Also, some counties may want to allow judges to specialize—for example, on administrative type matters or child custody. Forcing all judges to hear every type of case would work against particular judges developing expertise in a narrow area.

The rationale for assigning cases to a single court is based on the premise that one hearing builds on the next. That is sometimes the case, but often it is not. Bottom line—there are pro's and con's both ways.

I understand from a news article that this proposal has been floated by a particular judge. If it was such a good idea, why wasn't that judge able to persuade her peers? We entrust these judges with wide discretion in handling and deciding cases—why take away discretion in deciding the best system for assigning cases?

Patty Arnold

Niemann & Heyer LLP  
1122 Colorado Street, Suite 313  
Austin, TX 78701

[REDACTED]

[REDACTED]



[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 3:53 PM  
**To:** rulescomments@txcourts.gov  
**Cc:** Kennon Wooten; Karen Vasquez  
**Subject:** Proposed Rule prohibiting the central docket (OPPOSED)

**EXTERNAL**

Dear Rules Committee,

I am writing to express my opposition and surprise to the proposed rule prohibiting the central docket. In large counties, the central docket greatly improves efficiency, reducing wait times and allowing parties to set their cases for trials or hearings within a reasonable time frame and get reached. This is especially important for family law attorneys like me, and the parties we represent. Parties seeking a temporary orders hearing on a custody matter, or a final hearing on a divorce, need to be able to set their trials and hearings on shorter notice than is customary for other civil cases. The consequences of delay in a family law matter can be much more profound than in a business dispute.

I have represented clients in counties with a central docket and in counties in which each case is assigned to a specific judge for the duration of the case. Without exception, getting a hearing of sufficient duration within a reasonable time frame is much harder in counties with a traditional docket system in which each case is assigned to a specific judge, to the point that parties and their children suffer emotionally and/or financially.

As a practicing attorney for over 30 years, I have not seen a great benefit of having one judge assigned to a case for its entire duration. I am skeptical of claims to the contrary. Judges take vacations, are out sick, retire, or are defeated in a re-election bid. Further, it seems unlikely that many judges could remember a hearing with the same parties/attorneys that occurred months prior. There is no guarantee of continuity, even in counties in which cases are assigned, but delay is virtually certain.

Unlike family law attorneys who typically represent men and women, petitioners and respondents, some civil attorneys represent the same "side" every time. A delay due to a crowded docket or a judge out sick or on vacation might not affect their clients, or may even benefit their clients in negotiations. I don't know who is calling for a prohibition on the central docket, or if it is part of a coordinated effort, but the perspective of those who are calling for such reform should be considered.

I firmly believe that the central docket system in Travis County, where I practice law, is beneficial to the fair administration of justice in family law cases, and ask that the judges in large counties be allowed to decide what is best for their courts, rather than having a "one-size-fits-all" system imposed by a central authority that may or may not be appropriate for every county's district courts.

Thank you,

Greg Hitt  
Attorney and Mediator  
7000 N. Mopac Expressway, Suite 200  
Austin, Texas 78731



[REDACTED]

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**From:** [REDACTED]  
**Sent:** Thursday, February 20, 2025 11:43 AM  
**To:** Kennon Wooten  
**Subject:** Public Comment Re: Central Docket

**EXTERNAL**

In the world of divorce- parties need to close the divorce gently and swiftly. Central docket allows us to get hearings quickly and efficiently (within a couple of weeks). In other counties near Austin- we sometimes wait 3-4 months for a hearing. Additionally, final hearings in other counties are sometimes heard one day at time over the course of several months. Behavioral science indicates that children are far better off if their parents do not languish in the purgatory of the family court system.

Thanks!

***Lisa Londergan***  
*Attorney | Mediator*

Thompson Salinas Londergan LLP  
8911 North Capital of Texas Highway  
Building 4, Ste. 4260  
Austin, Texas 78759

[REDACTED]

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[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 3:23 PM  
**To:** Kennon Wooten  
**Subject:** Public Comment re: Central Docket

**EXTERNAL**

To whom it may concern:

I am writing to express my support for central-docketing systems. I have been practicing as a litigation attorney in the areas of construction, government, and general commercial law for the last 18 years. During that time, I have practiced in courts across the state of Texas including in major metropolitan areas as well as rural areas with traveling district court judges. Because I reside in Travis County, I have spent a significant amount of time practicing before the Travis County district courts. I have appeared before Travis County courts for hearings, jury trials, and bench trials. I have found the central docketing system to be an exceptional tool for the expedient and efficient resolution of lawsuits. In my experience, central docketing provides litigants quicker access to the courts for emergency matters, regular hearings, and trials as compared to a traditional assignment system. This access has been a critical tool in my practice when faced with parties attempting to use delay as a litigation tactic. I have not experienced any differences in the quality of judges or judges' work product between central and assignment dockets, even in very complicated cases. I have also found the central systems to allow the greatest flexibility by providing an option for assignment of cases. Most of the cases I have handled would likely qualify for assignment due to complexity. Despite this, I have only asked for a case to be assigned twice in my career because I almost always view the benefits of the central docket as greater than having an assigned judge. Thank you for consideration of my comments. If you have any questions or would like more information on my experiences, please do not hesitate to contact me.

**Amy Emerson**  
CO-MANAGING PARTNER

**allensworth** 

[REDACTED]  
303 Colorado Street Suite 2800 Austin, Texas 78701  
[REDACTED]



[REDACTED]

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**From:** [REDACTED]  
**Sent:** Monday, February 24, 2025 4:30 PM  
**To:** Kennon Wooten  
**Subject:** public comment re: prohibiting the central docket

**EXTERNAL**

Hi Kennon,

I am **strongly opposed** to prohibiting the central docket here in Travis County. Half of my cases are family law cases which, oftentimes, require quick access to a judge for short hearings regarding temporary orders. My personal experience is that I can typically find court availability for a shorting hearing within a couple of weeks. If I need a full day, I can usually find an opening within 3-4 weeks. Furthermore, the availability of the Duty Judge, Agreed Docket, and Submission Docket help streamline matters that are either extremely urgent (*e.g.*, a TRO before the Duty Judge) or agreed matters where it does not make sense to waste a court's time and resources.

However, the same cannot be said for Williamson or Hays County. Last October, in Williamson County, I needed to set a final trial date wherein the parties both agreed to a full day setting. However, the court was not available for two months and, even then, would only allow the setting to be for three hours. Thus, I was going to be severely limited as to the amount of evidence and number of witnesses I would be able to present at trial. When our date came around in December 2024, both parties appeared in court with counsel only to be told that we would not be reached that day and needed to reschedule. We were rescheduled for six weeks later in January. This significantly increased the costs for my client. When that date came around, I put on my limited number of witnesses and evidence, but the other side did not finish. So, the Court continued us for another three hours in two weeks. Again, this caused another increase in costs for my client. We then returned in February only to have the other side still not finish with her case, so we were again continued—this time for six weeks out in mid-March. In short, the lack of a centralized docket in Williamson County delayed final trial for my client by over six months and greatly increased his legal fees due to me needing to prepare and re-prepare for trial not less than four times.

Before another judge in Williamson County, I waited for an agreed order to be signed by the judge for over EIGHT months!

Before yet another judge in Williamson County, I have a pending case where the parties agreed to and signed an agreed docket control order which included a trial date in July 2025. This agreed order was submitted to the Court for signature in September 2024. As of today, six months later, the Court still has not signed the order and the parties are without any end date in sight.

In Hays County, I have a pending case the parties had a hearing set on competing claims. Opposing counsel drop his claims, but mine were left intact. I intended to move forward with the hearing, but the Court cancelled it because opposing counsel no longer agreed to the date. As of now, I am still unable to have a hearing set without opposing counsel's express agreement.

These are just a few examples of why I am opposed to prohibiting the central docket.

Thanks (and good luck!),

Todd

Houston Todd Musick  
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**From:** [REDACTED]  
**Sent:** Thursday, February 20, 2025 4:56 PM  
**To:** Kennon Wooten; Rulescomments  
**Subject:** Public Comments: Referral of Rules Issues

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

**EXTERNAL**

Dear Ms. Wooten and Supreme Court Rules Attorney:

I wanted to submit a public comment related to the February 7, 2025 correspondence from Chief Justice Blacklock to the Supreme Court Advisory Committee.

### Prohibiting the Central Docket

I am against prohibiting the central docket type system. While I am unfamiliar with Bexar County, I practice in Travis County regularly, as well as various counties across the State, including Harris County, Collin County, Dallas County, Williamson County, Brazos County, and Hidalgo County. I think it would be a mistake to interfere with each county's right to decide how best to handle its docket. The Travis County central docket is efficient and easy to learn. In my experience, the people who complain about the central docket are not local lawyers. However, if they are going to practice in Travis County, they should learn the Travis County system. This is no different than when I have to learn other county's systems because each court and county operates differently. In some other counties without a central docket, I have had to wait 2 months to a year to get a hearing on a contested matter. In other counties, it has taken over a month just to get an agreed order signed. Some judges have slower dockets than others, but the Travis County system keeps cases moving. I can almost always get a hearing within 2-3 weeks, which is impossible in several of the other counties.

I don't believe that I have to explain my case more to a Travis County judge because of the central docket than other judges. It is not uncommon for me to have 1 hearing on a case in nine months (like a summary judgment) before the case settles. To the extent I have to go back to a non-central docket judge for another motion (like to compel), I generally have to remind the judge what the case is about and who the players are because it is typical for months to go by before I need court intervention again.

The idea that bad lawyers sneak by because they appear in front of multiple different judges on the central docket is a myth. I've been practicing for 20 years and never experienced that problem.

I don't believe the central docket is for every county and I like the variety of experiences between counties. If the central docket were banned, then I think a lot more rules would be necessary to require uniformity between the courts like when hearings must be set by and when rulings must be issued. While there are statutory deadlines for cases like parental rights terminations, there

are no similar deadlines for non-family civil matters. This results in the every day business litigation case (not large enough for the business courts) getting pushed aside for what the judges believe are more important matters because they have statutory deadlines.

Overall, it would be a mistake to generally ban the central docket because it would be an attempt to fix problems that don't exist. Accordingly, new rules related to such are not necessary.

Sincerely,  
Blayre

V. Blayre Peña, Founding Partner

Office: 406 N. Lee St., #103, Round Rock, TX 78664

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[REDACTED]

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**From:** Kennon Wooten  
**Sent:** Friday, February 28, 2025 3:40 PM  
**To:** Kennon Wooten  
**Subject:** RE: Bexar county docket system

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**From:** [REDACTED]  
**Sent:** Saturday, February 22, 2025 4:27 PM  
**To:** Kennon Wooten <[kwooten@scottdoug.com](mailto:kwooten@scottdoug.com)>  
**Subject:** Bexar county docket system

**EXTERNAL**

Hi Kennon.

I thought I would send you my thoughts about the Bexar County rotating docket system and let you know that I am opposed to changing the system.

As you know, I've been practicing in Bexar County for more than 35 years. I have also litigated in other counties, which do not have a rotating docket system. Our system is far superior to those with single-court assignments because we can get any hearing set with three days' notice. We don't have to wait for a particular judge to be available and have their calendar cleared. We don't have to wait for opposing counsel to give us dates that they're available, such that it ends up taking weeks to get a simple hearing set. We just set the hearing. Of course, we do confer with each other on dates for the hearing and often reset hearings if counsel is unavailable. However, because everybody knows you can simply set a hearing and then they have to either announce not ready or explain why they wouldn't respond to your request for a hearing date, this prevents a lot of gamesmanship.

In other counties, because lawyers know how difficult it is to set a hearing, they drag things out and take advantage of the delay. They may not respond to your request for hearing dates, they'll provide dates far in the future, and by the time you get dates that everybody can agree to, the court is not available. In addition, our system avoids the ability to judge shop. I'm sure you're familiar with situations in which lawyers file multiple cases and then nonsuit multiple cases until they get the judge they want. With our system, you never know what judge you're going to be assigned to until the morning of the hearing with the parties announced at Presiding Docket call. The same is true with jury trials. You get notified of your court the Friday or Wednesday before the week your case is set for trial or you show up in the Monitoring Docket and get assigned on the Monday of the week your case is set. You have the right to object to a visiting judge, which sometimes happens and sometimes doesn't.

The complaint that lawyers try to get matters reheard by other judges is just not true. If you have a hearing before one district court, and they rule against you, and then you try to set the same motion for hearing to try to get a different court, I guarantee you that the lawyer on the other side is going to advise the court at Presiding Docket that the same matter was heard by a specific judge and you will be assigned back to that same judge. I have done this to my opposing counsel many times and it always works.

The rotating docket system also keeps our judges accountable to the lawyers and the system. Everybody knows who is working hard and who is not. If you're not available to take a case on the Presiding Docket and that starts to happen over and over again, people know that you're not the person who's working very hard. This sort of reputation has resulted in some of our less than studious judges being defeated in elections. Which is the way it should be. The

proposal for each court to control their own docket does not have this feature. There's no way to know how much work is getting done and how much work is not getting done.

In addition, as I know you know, there are some judges who are beholden to certain lawyers either because of large donations, party affiliations, or family ties. Those lawyers who have an "in" with that court have a great advantage, which will only be exacerbated if a case is assigned to one judge for the entire litigation process. In addition, if you have the bad luck to draw a really bad judge (and by this, I mean someone who may not be an experienced litigator, someone who has a very short temper and won't listen, someone who may be biased for one side or the other, etc.), you are not stuck with that judge for the entire case. I think the district judge who has raised this issue, is way off the mark with her criticisms. I am more than happy to speak with you about this issue.

Should there be any serious consideration about changing the system, I highly recommend that those who are working on this decision actually come to Bexar County and watch how it works. I think you will find that the majority of people who have been litigating in our county for many years appreciate the system and want to keep it the way it is. I also believe that the majority of our district judges feel the same way. I am a member of ABOTA and I know that at least 99% of our membership does not want to change the system. Merely listening to the naysayers is not going to give a full picture of how efficient our system is.

Thanks for your consideration and I hope all is well in your world.

Laura  
Laura A. Cavaretta  
Cavaretta, Katona & Leighner, PLLC  
700 N. St. Mary's Street  
Suite 1500  
San Antonio, Tx 78205



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**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 3:26 PM  
**To:** Kennon Wooten  
**Subject:** Replacement of the Central Docket - Comment in Opposition

**EXTERNAL**

Good afternoon, Kennon:

Thank you for your work on the SCAC and for being willing to field comments concerning the proposal to replace the central docketing system.

COMMENT:

I am writing in favor of the continued use of the central docketing system.

I have been licensed to practice law in the State of Texas since 2017. I obtained my J.D. from Baylor Law School in November 2016. I have practiced primarily in the following counties: Travis, Williamson, Bell, Hays, Comal, Bexar, and Harris. My practice has involved family and civil litigation. I am familiar with the central docketing system in Travis County and Bexar County.

The central docketing system increases judicial efficiency, decreases gamesmanship, and reduces litigation costs to clients:

- Judicial efficiency:
  - o I find that it is much easier to obtain hearing settings in counties with a central docket as opposed to the counties where each case is assigned to a particular judge. In the latter counties, it is frequently the case that there are no available hearing settings for months at a time.
  - o It is not only easier to get a hearing setting closer in time in counties with the central docket, but it is also easier to obtain a hearing setting for the appropriate amount of time. In counties without a central docket, I have been faced with situations where I've had to severely limit the presentation of my client's case. Example: I've had to present a client's request to flip custody on temporary orders in less than 2 hours when we had multiple expert witnesses (treating physicians, including one who had made a report to CPS) whose testimony was essential to having any hope of meeting the standard to show significant impairment of the children's physical health or emotional development. The alternative was having the temporary orders hearing reset about a month out, which was not an option for a parent who firmly believed their child's health/wellbeing was at risk.
  - o I have also found that the counties utilizing the central docketing system are better at managing regular dockets in conjunction with emergency matters. In counties without the central docket, judges are less available to consider TROs, or it takes them away from regular docket each time they are approached with a TRO.
- Gamesmanship/barriers to resolution by agreement: Based on anecdotal experience, when the other side knows you cannot get a hearing setting for months, it can incentivize litigants to be recalcitrant. This makes it harder to resolve issues by agreement and removes the settlement pressure generated by hearing/trial settings.

- Litigation costs: In counties without a central docket, there have been several occasions where I have appeared for a hearing and waited all day at the courthouse, only to be told we would not be reached and then to have the hearing reset for a date that is weeks if not months out. This unnecessarily increases costs to the client, particularly when subpoenas must be re-issued for witnesses or when experts are involved.

Where appropriate, there are procedures available in both Travis County and Bexar County by which a case can be assigned to a particular judge, and I have made use of that option in complex cases and cases with numerous parties.

I disagree with those who contend that the central docket results in judges being unprepared to preside over hearings. Our Travis County Judges do a spectacular job of preparing in advance of hearings, and the announcement procedures in our Local Rules ensure that the Judge to whom a case is assigned has an opportunity to review relevant pleadings in advance of a proceeding.

For the foregoing reasons, I respectfully oppose the replacement of the central docketing system with a statewide requirement that each case be assigned to a particular judge. The system is not broken and does not need fixing.

Best regards,

Ashley

\*\*\*\*\*

Ashley N. Morgan  
[Cain & Skarnulis PLLC](#)  
303 Colorado St., Suite 2850  
Austin, Texas 78701



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**From:** [REDACTED]  
**Sent:** Thursday, February 20, 2025 12:10 PM  
**To:** Kennon Wooten; rulescomments@txcourts.gov  
**Subject:** Rule issue pertaining to Central Docket

**EXTERNAL**

Dear Ms. Wooten and Supreme Court rules attorney:

I practice Family Law and Child Welfare Law in several counties and have practiced all over the state of Texas at some point in my career. I currently have a practice that is primarily practicing in Travis and Williamson Counties. Regarding Central Docketing, I can say that it is certainly helpful as a means of ensuring that the parties are able to schedule the length of trial or hearing that is needed and get heard, but I can also say that it is the most disruptive way of scheduling for an attorney. I support eliminating the Central Docketing System even if it means that some cases are not able to get the number of hours requested for trial.

In particular, for CPS cases in Travis County, each case is set for trial on four separate weeks due to the central docket. It has to be set on two bench trial dockets and two jury trial dockets to ensure that it can be reached prior to the dismissal date. This creates absolute chaos with attorney calendaring and sometimes has resulted in having multiple cases actually being announced at the same time for more days than are available in the week. It is also nearly impossible to tell professional witnesses that the case is set on Monday but I'll let you know when you'll be needed to testify. It is actually rather unprofessional, but an unreasonable expectation of someone who needs to schedule time to testify. I've had clients who think I'm joking when I say we will find out on Friday what court we are going to on Monday or even what day the case will be heard. While "short docket" days are a little easier to plan, it is still a huge challenge not knowing what time or court to report to, or if we are being reached at all until the Friday prior to the setting. It creates a very chaotic system and there has got to be a better way.

While I do agree that many counties without central docketing are more likely to limit witnesses and evidence in the interest of time, creating challenges to justice, I cannot be in support of central docketing for reasons stated above.

**Carrie C. Ward**

Attorney at Law  
Board Certified, Child Welfare Law-- Texas Board of Legal Specialization  
Mailing address:  
900 E Pecan St, Suite 300-248  
Pflugerville, TX 78660

Office Address By Appointment Only:  
1000 Heritage Center Circle  
Round Rock, TX

[REDACTED]

[REDACTED]

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, February 18, 2025 8:37 PM  
**To:** bboyce@adjtlaw.com; Kennon Wooten  
**Cc:** Scott Douglass & McConnico  
**Subject:** Ryan Squires Comments on Set Advisory Committee re: Prohibiting Central Docket

**EXTERNAL**

Mr. Boyce and Ms. Wooten,

I write to register my opposition to any order prohibiting the Central Docket. I am currently in a high-conflict family law jury trial that very much depended on the Central Docket to be reached for the announced 10-day final jury trial and to have been handled effectively pre-trial. It would have been very difficult for the parties, counsel and the court to have had it managed on a single assigned judge platform. Such a system would have so frustrated everyone, especially the parties, that I fear Texas court system would have suffered a huge public relations indictment from high profile litigant who have the means to publicize their well-founded criticism.

Our Central Docket system works very effectively in managing many different kinds of cases, especially jury trials. These efficiencies would be destroyed by a single-judge system. I hope you advise the Court of the strong opposition those of us in the trenches have to any suggestion to prohibit Central Dockets.

Rikky Rivers

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 10:50 AM  
**To:** Kennon Wooten  
**Cc:** David Plaut  
**Subject:** Texas Supreme Court asks for a study to replace the central-docketing system

**EXTERNAL**

I want to echo David Plaut's sentiments about replacing our docket system with one like they have in Houston. I have practiced extensively in both places — and the Houston system is inefficient to the point of frustrating the interest of justice. It is so difficult to get a hearing in Houston. For example, when you have a fast-approaching trial date and have an emergency need for relief, such as a party that will not comply with discovery, the court will tell you the first available date is after your trial date. In addition, cases in Houston seem to never get reached until the third setting, if not later. So parties have to prepare for trial, only to be told the week before trial or perhaps the week of trial, that they will not be called after all and need to reset the case. I vastly prefer the system in Travis County.

Please let me know if there's anything I can do to help you in evaluating or Assessing the proposals. Thank you for your work on this project.

Hamp

Hamp Skelton  
Skelton & Woody PLLC  
248 Addie Roy Road, Suite B-302  
Austin, TX 78746

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, February 21, 2025 9:14 AM  
**To:** Kennon Wooten  
**Subject:** Travis County Central Docket

**EXTERNAL**

I'm responding to an ABOTA request to chime in on the Travis County Central Docket.

I much prefer having cases assigned to a single judge who manages all discovery, motions and trial to the current central docket.

Reasons:

Certainty of scheduling and having a judge who is knowledgeable about the case and issues on motions

Court familiarity with case issues for the pretrial motions such as motions in limine

**Rockne W. Onstad**

The Onstad Law Firm  
4800 Eck Lane  
Austin, Texas 78734

[REDACTED]  
[www.onstadlaw.com](http://www.onstadlaw.com)

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Board Certified, Texas Board of Legal Specialization, Personal Injury Trial Law



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Mike Bernstein

Attorney at Law, Receiver

February 13, 2025

Chief Justice Tracy E. Christopher  
Chair, Supreme Court Advisory Committee  
14<sup>th</sup> Court of Appeals  
301 Fannin, Room 245  
Houston Tx 77002

Dear Chief Justice Christopher:

I am writing in opposition to the Central Docket system.

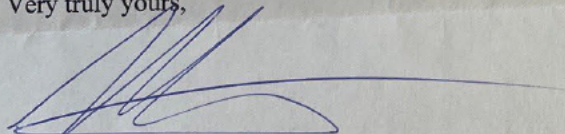
I serve as receiver under the turnover statute for courts statewide. My office is in the Dallas area.

I do not accept cases from Bexar County or Travis County, due to their Central Docket system. The central docket system means that I may be before a judge who did not appoint me in the first place. When it comes to a contest, it is best for the receiver to be before the judge that appointed them. I think the judges would like to be reviewing the work of their own receivers.

Once, I had an application for authority to distribute recovered funds and to pay receiver's fees before a judge on a rotating docket. He flat out told me that if our positions were reversed, he wouldn't want his fee application heard by a judge that did not appoint him. We passed the hearing.

I think that judges prefer to use receivers that they know and trust. The judge ruling on a receiver's fee should be the judge that appointed the receiver. The rotating docket frustrates that.

Very truly yours,



Mike Bernstein, Receiver

**From:** [REDACTED]  
**Sent:** Wednesday, February 26, 2025 5:23 PM  
**To:** Kennon Wooten  
**Subject:** Eliminating the Central Docket in Travis and Bexar Counties

EXTERNAL

Kennon—

I know that I am late in getting any comments to you, but I attended a meeting of the local chapter of the American College yesterday evening and the discussion there has energized me to offer my opinion, for what it is worth.

I have been practicing law here for over fifty years. My practice is almost entirely a trial and appellate practice and has been since I went into private practice. I essentially grew up as a trial lawyer under the Central Docket system in Travis County. That system serves the litigants and lawyers of Travis County very well. Unlike populous counties that do have cases assigned to a specific judge, the Travis County system is very efficient in moving the docket. We can go to a jury trial in a case filed in Travis County in less than a year. Nearly every week, the entire docket will be reached and heard. In my experience in places like Harris County and others one cannot realistically expect to go to trial for 3-4 years. I attribute that difference to our Central Docket. In populous counties that assign cases to an individual judge, one judge may not reach a number of cases on his or her docket because that judge is hearing a trial or hearing that is taking significant time while literally down the hall there are courts whose dockets fell through for some reason, and that judge is left with nothing to do. On the Central Docket that idle judge would be assigned the next case up, and cases that would not otherwise have been heard can be assigned to that idle judge and determined.

I recognize that one complaint about the Central Docket is that the judges don't develop any historical knowledge of the case. In my opinion, that "benefit" is grossly overblown. A judge is not going to remember much about a case when the last time he or she had any contact with the case was several months prior. It doesn't take much time to get up to speed for a judge on the Central Docket—all the pleadings are available electronically. Additionally, the judges have computer access to all of the judge's notes in the files—Judge A can see why Judge B ruled as he or she did at some prior hearing. It is also part of the trial lawyer's job to be able to distill for the court what the case is about and the significance of the pending issue. And even if there is case where such historical knowledge would be of significant benefit, our rules allow the presiding judge of the district to assign any case to a specific judge for all matters.

So who wants to outlaw the central docket and go to each case getting assigned to (and heard by) only one judge? Certainly not the lawyers here who actually try cases—we know better. Will eliminating the Central Docket benefit the citizens of Travis County? Of course not—the result of eliminating the Central Docket will only lead to more inefficient utilization of judges' time—on the whole a party is going to have to wait longer for his or her case to be disposed of in Travis County. I cannot discern who would benefit from the change—certainly not the people who are participants in the judicial system here.

I suspect that the motivation to change the system is simply political, and that is not a legitimate reason to do so. The civil justice court system is there to serve the litigants—not someone's political agenda. The system we have in this county serves the people of Travis County well and absent some compelling reason to change should be left as is.

Scott R. Kidd

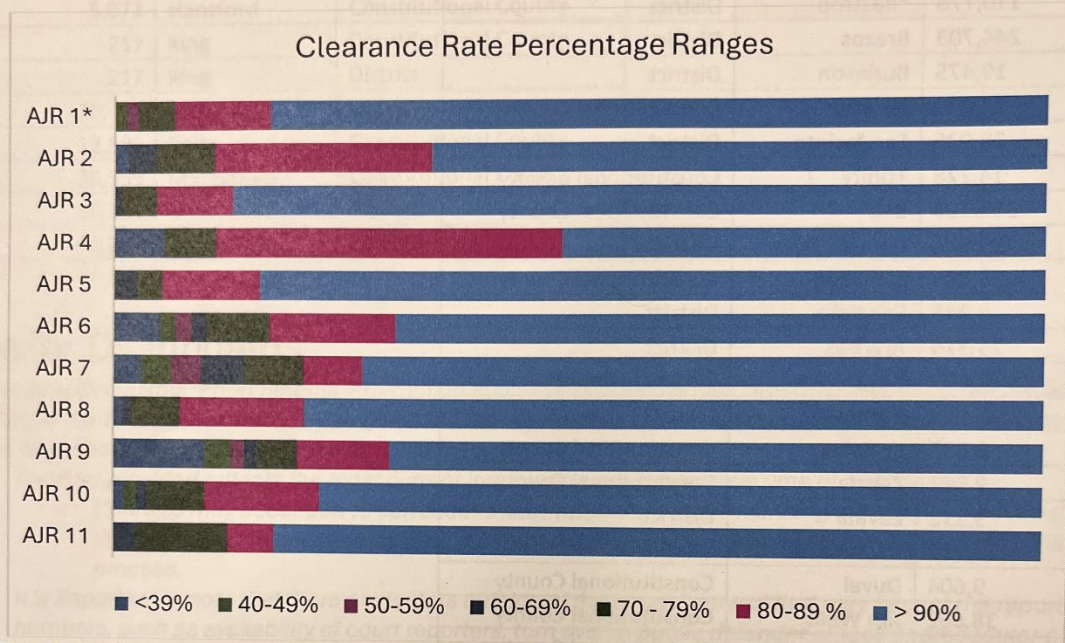
# EXHIBIT 4



## Statewide Summary

### Clearance Rates Ranges

Out of 815 courts across all AJRs, 76 % (619) had a clearance rate of 90% of higher. That is followed by 13% with clearance rate between 80 and 89%, indicating that 89% of courts had a clearance rate of 80% or higher. The clearance rate for the courts was calculated by including all case types each court handles.



\*AJR 1 Total is 78; 3 courts excluded because clerk is not able to report dispositions by court.

	<39%	40-49%	50-59%	60-69%	70 - 79%	80-89 %	> 90%
<b>AJR 1*</b>	0%	1%	1%	0%	4%	11%	83%
<b>AJR 2</b>	2%	0%	0%	3%	6%	24%	65%
<b>AJR 3</b>	0%	0%	0%	1%	4%	8%	87%
<b>AJR 4</b>	6%	0%	0%	0%	6%	38%	51%
<b>AJR 5</b>	0%	0%	0%	3%	3%	11%	84%
<b>AJR 6</b>	5%	2%	2%	2%	7%	14%	69%
<b>AJR 7</b>	3%	3%	3%	5%	6%	6%	73%
<b>AJR 8</b>	1%	0%	0%	1%	5%	14%	79%
<b>AJR 9</b>	10%	3%	1%	1%	4%	10%	70%
<b>AJR 10</b>	1%	1%	0%	1%	6%	13%	77%
<b>AJR 11</b>	0%	0%	0%	3%	10%	5%	82%



# EXHIBIT 5



Office of the District Judges  
Travis County Civil and Family Courts Facility  
Post Office Box 1748  
Austin, Texas 78767

February 26, 2025

Chief Justice Tracy E. Christopher  
Chair, Supreme Court Advisory Committee  
14<sup>th</sup> Court of Appeals  
301 Fannin, Room 245  
Houston, Texas 77002

Marcy Hogan Greer  
Vice-Chair, Supreme Court Advisory Committee  
98 San Jacinto Blvd Ste 1100  
Austin, Texas 78701

Re: Docketing System, Civil and Family Courts of Travis County, Texas

Dear Chief Justice Christopher and Ms. Greer,

We have received Chief Justice Blacklock's February 7, 2025, letter to Chief Justice Christopher and appreciate the opportunity to provide information to you and your committee about the docketing system we utilize in Travis County for civil and family cases.

Access to justice and efficiency have always been our primary goals. Our hybrid docketing system facilitates accomplishing these goals. Individual judges are assigned to handle high-conflict cases, complex matters, and administrative appeals; other judges hear specialized dockets in family violence, juvenile, and child welfare cases. Meanwhile, the Court Administrator evenly distributes hearings and trials to the remaining judges, ensuring that the workload is shared and all matters are heard regardless of one judge's crowded docket, illness, or other impediment. This system values fairness, access, and accountability.

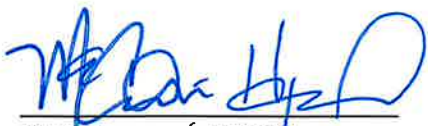
Our judges and court staff are proud stewards of a docketing system that has continued for over 60 years through a strong partnership between the Bench and Bar. In addition, we have made advances in recent years to ensure our courts are some of the most proficient, technologically advanced, and efficient in the state.

We would like to extend an invitation to the entire Supreme Court Advisory Committee to observe our Court Administration team and judges in action. Travis County civil and family courts have always worked with members of the Texas Supreme Court, SCAC, Texas Judicial Council, and Office of Court Administration to ensure we function at the highest levels. We welcome the opportunity to continue that conversation and collaboration while the SCAC looks at concurrent jurisdiction and centralized docketing systems statewide. We have attached some information to this letter that we hope will be helpful to you as you begin your work.

The SCAC is welcome to meet in the Travis County Civil and Family Courts Facility, and we look forward to working with you and demonstrating how well our system works. Please contact the Director of Court Management, Jacob Stokes ([jacob.stokes@traviscountytexas.gov](mailto:jacob.stokes@traviscountytexas.gov)), for additional scheduling opportunities and meetings.

Yours truly,

**The Civil and Family Judges of Travis County, Texas**



MARIA CANTÚ HEXSEL  
Judge, 53<sup>rd</sup> District Court



SANDRA AVILA RAMIREZ  
Judge, 98<sup>th</sup> District Court



AURORA MARTINEZ JONES  
Judge, 126<sup>th</sup> District Court



JESSICA MANGRUM  
Judge, 200<sup>th</sup> District Court



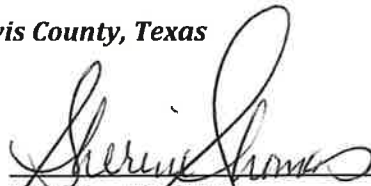
AMY CLARK MEACHUM  
Judge, 201<sup>st</sup> District Court



DANIELLA DESETA LYTTLE  
Judge, 261<sup>st</sup> District Court



JAN SOIFER  
Judge, 345<sup>th</sup> District Court



SHERINE THOMAS  
Judge, 353<sup>rd</sup> District Court



CATHERINE A. MAUZY  
Judge, 419<sup>th</sup> District Court



LAURIE EISERLOH  
Judge, 455<sup>th</sup> District Court



MAYA GUERRA GAMBLE  
Judge, 459<sup>th</sup> District Court



TODD WONG  
Judge, County Court at Law #1



ERIC SHEPPERD  
Judge, County Court at Law #2

cc: **Velva Price, Travis County District Clerk**  
**Mary-Ellen King, President of the Austin Bar Association**

**Enclosures**

# Tab B



## Memorandum

To: Texas Supreme Court Advisory Committee  
From: Rule 1-14c Subcommittee  
Date: 3/3/2025  
Re: Update on Review of Potential Amendments to the Texas Rules Related to Artificial Intelligence

---

### 1. Introduction

On July 24, 2024, the Supreme Court referred to the Supreme Court Advisory Committee a request to consider whether rulemaking should be considered to address the development of Artificial Intelligence. This was the Court's referral:

Artificial Intelligence. The State Bar of Texas's Taskforce for Responsible AI in the Law has issued the attached interim report recommending potential changes to the Texas Rule of Civil Procedure 13 and Texas Rule of Evidence 901. The Committee should review, advise whether such amendments are necessary or desirable to account for artificial intelligence, and draft any recommended amendments.

As is set out below, the Rules 1-14c Subcommittee and the Rules of Evidence Subcommittee both have actively reviewed and considered whether the Supreme Court should adopt rules specifically designed to address unique challenges arising from the advent of AI, including the use and disclosure of AI in connection with the submission of motions and briefing to the courts; the authentication and introduction of records into evidence that have been either created or include AI generated content; and how courts should address the potential that AI tools could be used to create audio or video content or otherwise alter recordings, photographs or videos that are submitted as evidence in trials.

The Chair of the SCAC has requested that the Rules 1-14c Subcommittee return to this topic to provide a summary of the discussions before the SCAC on the topic of AI and to advise the SCAC if it recommends specific rulemaking.

Summary of Recommendation: The members of the Rules 1-14c Subcommittee met to discuss whether it should recommend rules to address AI; the Subcommittee decided against proposing rules amendments. We suggest that the SCAC should advise the Court to refrain from adopting AI rules at this time, as both the technology and the legal literature on the topic are rapidly evolving. We further believe that due to the dynamic nature of this issue, there is a significant risk that any proposed rules could become obsolete or at least out of date by the time they are officially implemented.

## 2. Background of the SCAC’s evaluation of potential rulemaking to address AI

On August 8, 2024, the Subcommittee submitted its Review of Potential Rule Amendments to Address Artificial Intelligence (attached at Exhibit 1). The Subcommittee’s report was discussed before the Supreme Court Advisory Committee on August 16, 2024. The Committee concurred with the Subcommittee’s recommendation not to amend Texas Rule of Civil Procedure 13 to address potential misuse and overreliance on AI in preparing motions and other submissions to courts. The Committee discussed potential amendments to the Rules of Evidence to respond to the unique evidentiary issues courts could face due to the use of AI and the potential that documents and other evidence including videos or audio recordings could be the result of AI generated “deep fakes.” (see [Scac24-08-16.pdf](#)).

Following the August SCAC meeting, the Chair assigned further review to the Texas Rules of Evidence Subcommittee of potential Evidence rules amendments pertaining to AI. On October 28, 2024, the Rules of Evidence Subcommittee presented its report and recommendations. (attached at Exhibit 2).

The Subcommittee recommended that the SCAC consider amending the TRE to provide trial courts with guidance on resolving evidentiary issues pertaining to reliability and/or authenticity of potentially AI generated or modified evidence. The Subcommittee further noted the potential merit in considering amending Rules 901 and 902 and comments to provide courts and litigants with a clear procedure to address authentication of AI generated or modified ‘business records.’

The Subcommittee however suggested that the SCAC defer progressing these recommendations pending the decisions of the Federal Rules of Evidence Advisory Committee at its November 8, 2024, meeting. The Committee concurred in this recommendation. The Agenda Book for the Advisory Committee’s November Meeting is at [https://www.uscourts.gov/sites/default/files/2024-11\\_evidence\\_rules\\_committee\\_meeting\\_agenda\\_book\\_final\\_10-24.pdf](https://www.uscourts.gov/sites/default/files/2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf) and the report on AI is at pages 220-271.

## 3. U.S. District Judge Paul Grimm (ret.) Deep Thoughts Presentation on AI

At the Supreme Court Advisory Committee’s December 6, 2024 “Deep Thoughts” meeting, Former U.S. Federal Judge and head of the Bolch Law Institute and Duke University Law School Paul W. Grimm spoke to the SCAC on AI related issues. The following is an AI (ChatGPT) generated summary of Judge Grimm’s presentation:

### A. Introduction to AI and Generative AI

- Judge Grimm defined AI as software that replicates intellectual processes such as reasoning, learning, and problem-solving.
- He differentiated traditional AI from generative AI, which produces text, images, and audio in response to user prompts.
- Generative AI does not “know” facts but predicts word patterns, making its outputs potentially unreliable.

## B. Challenges in Authenticating AI-Generated Evidence

- Traditional authentication methods (such as voice recognition and document verification) may not be sufficient for AI-generated content.
- Deepfakes (AI-generated fake images, videos, or audio) pose serious risks in legal proceedings since they can be highly convincing.
- AI can be used to fabricate transcripts, audio messages, and court records, making it difficult to verify authenticity.

## C. Key Legal Framework and Rules of Evidence

- Judge Grimm discussed the rules governing evidence authentication:
- Rule 901: Requires that evidence be authenticated to prove it is what it purports to be.
- Rule 104(b): Allows a jury to decide whether disputed evidence is relevant and authentic.
- Rule 403: Judges may exclude evidence if its prejudicial impact outweighs its probative value.
- He highlighted the deepfake dilemma, where jurors may wrongly dismiss real evidence as fake or believe manipulated evidence as real.

## D. Risks of AI-Generated Evidence

- Wrongful convictions or unjust rulings due to deepfakes becoming indistinguishable from real evidence.
- AI-generated evidence could erode public trust in the legal system if not properly scrutinized.
- The “Liar’s Dividend”: Defendants may falsely claim genuine evidence is a deepfake to avoid accountability.

## E. Proposed Solutions for AI Evidence Authentication

- Mandatory disclosure when AI-generated content is submitted as evidence.
- Judicial training on AI to better evaluate AI-generated evidence.
- Technical verification tools, such as watermarking, metadata analysis, and blockchain records, to confirm authenticity.
- Courts should consult AI experts when dealing with disputed AI-generated evidence.
- A pilot project to test new AI authentication methods before implementing formal rule changes.

## F. Call for Judicial and Legislative Action

- Judge Grimm urged rule makers to act now to prevent AI from undermining judicial processes.
- He proposed procedural rules requiring disclosure of AI-generated evidence and giving courts tools to assess its reliability.
- He warned that delaying reforms could lead to legal crises, as AI technology evolves rapidly.

## G. Conclusion

- The legal system must adapt to AI advancements while ensuring fairness and due process.
- Collaboration between judges, lawyers, and lawmakers is essential to establish clear guidelines for handling AI-generated evidence.
- Judge Grimm stressed that failure to address AI-related challenges now will have serious consequences in the near future.

## Final Thoughts

- Judge Grimm's presentation underscored the urgent need for reforms in handling AI-generated evidence. His recommendations focused on balancing technological innovation with legal safeguards, emphasizing that proactive measures must be taken to maintain the integrity of the justice system.

## 4. Recent publications on the topic of AI:

- The Winter Publication of the Texas State Bar Litigation Section: *The Advocate* was devoted to the topic of AI and includes these 8 excellent expositions on the topic of AI and the intersection of courts (attached at Exhibit 3):
  - From Coding to Code of Conduct: Understanding the Ethical Dimensions of Lawyers' Use of Generative AI; by Hon. John G. Browning
  - The Deepfake Dilemma; by Hon. Paul W. Grimm (Ret.)
  - Judicial Regulation on the Use of AI; by Hon. Xavier Rodriguez.
  - Does the LLMperor Have New Clothes? Some Thoughts on the Use of LLMs in eDiscovery; by Maura R. Grossman, Gordon V. Cormack & Jason R. Baron
  - Conquering Doubts About AI in Discovery; by Taj. J. Clayton, Martha K. Harrison & Eugene Temchenko.
  - Poisoning the WeLL(M): Pirated Data, Large Language Models, and Copyright; by Justin A. Nelson, Rohit D. Nath & J. Craig Smyser
  - Is AI the New Decision Maker in the Workplace?; by Carter Crow & Jesika Silva Blanco
  - A Litigator's Introduction to Attacking and Defending Algorithms; by Frank Fagan
- [\*AI in the Courts: How Worried Should We Be?\*](#) Grimm, Paul; Grossman, Maura; Coglianese, Cary; *Judicature*, Vol. 107 No. 3 (2024).
- The Texas Center for Legal Ethics issues Opinion 705; [What Ethical Issues Are Raised under the Texas Disciplinary Rules of Professional Conduct by a Lawyer's Use of Generative Artificial Intelligence in the Practice of Law](#); February, 2025. The Opinion concluded as follows:
  - While there may be many ways that generative AI can assist in the practice of law and benefit lawyers and clients alike, Texas lawyers must always be aware of the ethical issues that may arise in the use of generative AI. Among many other issues, lawyers should acquire basic technological competence before using any

generative AI tool, should always ensure that the tool does not imperil confidential client information, should always verify the accuracy of any responses received from a generative AI tool, and should not charge clients for the time “saved” by using a generative AI program.

- [Navigating AI in the Judiciary: New Guidelines for Judges and Their Chambers](#); Vol. 26 The Sedona Conference Journal, February 2025
5. Status of Federal Rules of Evidence Advisory Committee’s Deliberations on potential rulemaking on AI.

At the January 7, 2025, meeting of the Committee on Rules of Practice and Procedure (the Standing Committee), Judge Jesse Furman, Chair of the Rules of Evidence Advisory Committee reported on the Committee’s discussions pertaining to AI rulemaking (attached at Exhibit 4 is the December 1, 2024, written report from the Advisory Committee on Evidence Rules to the Standing Committee).

Judge Furman reported that the consensus of the Advisory Committee was that AI is a big issue but there is also a recognition that technology changes rapidly. The Committee is concerned that it will not be able to timely adopt rules that will keep track of technological changes.

The Committee considered evidence rule issues related to Artificial Intelligence on two topics (a) machine learning and (b) deep fakes.

The Advisory Committee proposed a new rule on machine-generated evidence that it intends to finalize in its Spring meeting and recommend that the Standing Committee at its June 2025 meeting approve for publication and comment in August of 2025. The proposed new Fed. Rule of Evidence 707 would read as follows:

**Rule 707. Machine-generated Evidence**

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

Judge Furman next addressed the committee's assessment of the deep fake issue, acknowledging its significance. However, he conveyed that the committee believes an amendment may not be necessary. The committee feels that the existing rules already offer a framework for evaluating forgery issues, and this matter was previously tackled during the early days of social media and related disputes over forged content.

Notwithstanding the consensus of the Advisory Committee, it did develop a draft rule that it intends to address at the Spring meeting. Judge Bates, Chair of the Standing Committee noted that it was not anticipated that the proposed 901(c) rule would be presented to the Standing Committee for publication and comment at its June meeting.

The Committee’s draft Rule 901(c) reads as follows:

**Rule 901(c). Potentially Fabricated Evidence Created By Artificial Intelligence.**



If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been fabricated, in whole or in part, by artificial intelligence, the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

The Federal Rules of Evidence Advisory Committee meets on April 17, 2025, and is expected to formally propose rules amendments to the Standing Committee for publication and public comment for a six-month period commencing in August of 2025. We will continue to report back to the SCAC on these developments.

#### 6. The Subcommittee's Recommendation

The Subcommittee reviewed and evaluated its prior work on the AI topic and additionally considered the thorough work of the Rules of Evidence Subcommittee on the topic. We found as follows:

- AI technology continues to evolve at a rapid pace and the future of the technology and its use in society and in our legal system remains unpredictable. Consequently, proposed rules that might address current AI challenges likely will not be resilient and will not necessarily anticipate and meet the future needs of courts and counsel due to changes in the technology.
- The topic of AI is being considered in the legislative arena, including in the Texas Legislature during the current 89<sup>th</sup> Texas Legislative Session. It is conceivable that legislative enactments on AI could either prompt rulemaking or impact rules amendments that might be considered.
- Although many courts continue to experience problematic situations involving AI, judges have not struggled to apply the current rules to address these incidents. (For example, on February 24, 2025, the U.S. District Court for the District of Wyoming issued an Order on Sanctions and other Disciplinary Action involving the use of AI generated “hallucinations” that resulted in the citation of legal authority that did not exist. [Wadsworth v. Walmart, Inc., Order on Sanctions.pdf](#))
- The Subcommittee is not aware of circumstances where Texas trial courts have struggled with the issue of the admission of evidence that is disputed as a deep fake or otherwise altered by AI. Although Judge Grimm predicts that such situations are only a matter of time, we have concluded that it is not wise to adopt a consequential rule to address a situation that has not yet arisen.
- Guided by the Chair of the Rules of Evidence Subcommittee, we concluded that the Texas Rules of Evidence provide mechanisms to empower trial judges to adjudicate disputes regarding the authenticity, reliability or accuracy of proffered evidence, including allegations that the evidence was manipulated or faked through AI. A party objecting to the evidence as unreliable or inauthentic can argue under Rule 403 that the introduction of the evidence would be prejudicial and that the prejudice would outweigh any probative value, particularly if there is an indication that the evidence is AI-generated. The trial court could hear from the parties out of the presence of the jury on the motion, including potentially considering ancillary evidence on the alleged alteration or falsification of the evidence. The judge can then rule on the 403 motion and

decide whether the jury should receive the controverted evidence and whether any guidance is appropriate to enable the jury to weigh that evidence. If courts find the Rule 403 process unwieldy or otherwise not well-suited to evaluate the impact of AI on proffered evidence, rulemaking should be evaluated, considering the experiences of courts, particularly those in Texas.

- Consistent with our findings in August of 2024, attempting to amend rules such as Texas Rule of Civil Procedure 13 to reinforce the risks of using AI in legal research or other court submissions is more likely to result in unintended consequences and likely will not significantly reduce the risk that unrepresented parties misuse AI tools in their representations and submissions to the court.

We recommend that the SCAC advise the Court against pursuing specific rulemaking on AI at this time. However, if the SCAC or the Court disagrees, or believe it would be beneficial to consider potential rule amendments, we will promptly provide suggested approaches.

We continue to encourage Texas lawyers to seek opportunities to learn about AI, including reading the excellent scholarship published in the past year, particularly the Advocate's coverage. Texas judges should also take advantage of judicial training and available resources to be prepared for the unique challenges that will arise as AI becomes more prevalent in the practice of law, potentially becoming as common as the use of computers and other revolutionary technologies.

We remain ready to continue our work on this important topic at the pleasure of the Court and the Chair.

# EXHIBIT 1

Memo

To: Texas Supreme Court Advisory Committee

From: Subcommittee on Rules 1-14c

Date: August 8, 2024

Subject: Review of Potential Rule Amendments to Address Artificial Intelligence

---

On July 17, 2024, the Texas Supreme Court referred the following topic to the Texas Supreme Court Advisory Committee:

**Artificial Intelligence.** The State Bar of Texas’s Taskforce for Responsible AI in the Law has issued the attached interim report recommending potential changes to the Texas Rule of Civil Procedure 13 and Texas Rule of Evidence 901. The Committee should review, advise whether such amendments are necessary or desirable to account for artificial intelligence, and draft any recommended amendments.

This referral was assigned to the Rules 1-14c Subcommittee Chaired by Judge Harvey Brown. The following is the Report of the Subcommittee.

## I. Introduction and Summary of Recommendations

In this Memo,<sup>1</sup> the Subcommittee describes some of the unique risks and concerns for our courts and legal system sparked by the rapid development of AI. The Subcommittee also reviews how other states and federal courts have responded through standing orders, rulemaking and ethics opinions. The Subcommittee discusses the Interim Report of the Texas State Bar Taskforce for Responsible AI in the Law (Taskforce) and its 2023-24 Year-End Report and recommendations that pertain to potential rulemaking. Appendix A is a brief overview of AI and the transformative impacts of Generative AI and Large Language Models and resources on AI and federal and state court rules addressing AI.

### A. Recommendation on Amending TRCP 13

The Subcommittee reviewed the Taskforce’s recommendations (both in its Interim Report and 2023-24 Year-End Report) suggesting that the Advisory Committee should consider amending Rule 13 to highlight the duty of both attorneys and self-represented litigants regarding the use of AI in connection with pleadings, motions and other papers. Notwithstanding the Taskforce’s suggestions, the Subcommittee concludes that amending Rule 13 is unnecessary because self-represented litigants are unlikely to focus on revised language in Rule 13 and attorneys practicing in Texas understand their duty to be competent in the use of technology (and the Subcommittee anticipates that the Texas Committee

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<sup>1</sup> Note that this memo was prepared with the assistance of Generative AI (CoPilot).

on Professional Ethics will follow the Taskforce's recommendation to issue a more specific Ethics Opinion on the ethical considerations related to attorneys' use of AI).

To the extent the Committee concludes an amendment to Rule 13 is advised, the Subcommittee recommends the following language:

**RULE 13. EFFECT OF SIGNING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS**

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. The use of generative Artificial Intelligence in connection with any signed pleading, motion, or other paper must comply with this Rule. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or act and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

**Notes and Comments**

Comment to 1990 change: To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day "grace" period provided in the former version of the rule.

Comment to 2024 change: Attorneys and parties (including self-represented parties) should understand that pleadings, motions or other papers that include content from generative Artificial Intelligence tools are subject to the certification obligation of this rule.

The Subcommittee suggests that if there is a consensus to amend Rule 13, the reference to AI should be included in a new Comment to the Rule (in the format above), instead of amending the text of the Rule.



## B. Recommendation on Amending the Rules of Evidence

The Subcommittee recommends that the Advisory Committee review and consider amending Rules of Evidence 901 and 902 on authentication of evidence created or altered by generative AI tools.<sup>2</sup> Potential changes to Rule 901(b)(9) would include additional authentication steps if a party seeks to introduce AI created records into evidence. The Subcommittee also recommends evaluation of inserting a new Rule 901(c) to set out a procedure for a party to challenge the authenticity of computer-generated or other electronic evidence. This change is due to the risk of falsification or modification of photographs, videos and recordings using AI tools without any indication that the item is not genuine.

The Subcommittee also recommends that the Advisory Committee consider amending Rule 902(10) which details the language required for a Business Records Affidavit used for Self-Authenticating evidence under TRE 902.

## C. Recommendation on Amending TRCP 226a

Although not referenced in the Supreme Court's Referral, the Subcommittee also suggests that the Advisory Committee consider and refer to the Rules 216-299a Subcommittee whether to amend the TRCP 226a Instructions to Jury Panel and Jury to direct that potential jurors and empaneled jurors should not access AI tools to investigate information or other resources regarding the case before them. It also recommends updating the language to reflect changes in technology.

## II. AI use in the Legal Profession

Chief Justice John Roberts in his 2023 Year-End Report on the Federal Judiciary commented on the potential that technology and particularly AI will have on the practice of law. "As 2023 draws to a close with breathless predictions about the future of Artificial Intelligence, some may wonder whether judges are about to become obsolete. I am sure we are not—but equally confident that technological changes will continue to transform our work."<sup>3</sup> The legal community has long relied on computer applications that incorporate some forms of artificial intelligence, including writing tools such as Grammarly® and legal research tools Westlaw® and Lexis®.

Attorneys were very quick to realize the potential of Generative AI in the legal profession and Generative AI will transform the practice of law. Examples include using AI to review and assess contract terms and potentially suggesting additional clauses, analyzing large volumes of data, streamlining the discovery process, automating due diligence reviews, quickly summarizing depositions and recording transcripts and suggesting well-crafted arguments. "Attorneys could spend more time on client relations than contract drafting. Courts could identify better ways to help individuals through the legal system and resolve disputes. Self-represented litigants could navigate some legal problems without

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<sup>2</sup> The Subcommittee anticipates that the input of the Texas State Bar Evidence Committee will be requested prior to any final recommendation by the Committee.

<sup>3</sup> <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>

having to pay for an attorney. However, along with the extraordinary potential of generative AI, we should not lose sight of the extraordinary risks it poses.”<sup>4</sup>

The risks of AI in the legal profession were manifested quite quickly when a litigation attorney used ChatGPT to research supportive case precedent when drafting a brief in support of the plaintiff’s opposition to a motion to dismiss in a case pending in the U.S. District Court for the Southern District of New York, *Mata v. Avianca*; (1:22-cv-01461). The attorney did not realize that ChatGPT’s suggested cases and holdings were completely fabricated to resemble actual decisions. Unfortunately, the attorney did not check whether the citations were real before filing his response. The fake cases were soon discovered and the lawyer filing the motion was sanctioned by the court. He also endured public humiliation.<sup>5</sup>

An interesting and thoughtful initiative on AI and the legal system was formed at Duke University Law School called Responsible AI in Legal Services, or [RAILS](#). The initiative describes its mission as follows: “[To] [b]ring together a cross-industry group of leaders (judiciary, corporations, law firms, tech providers, access to justice orgs, etc.) to support the responsible, ethical, and safe use of AI to advance the practice of law and delivery of legal services to all.”<sup>6</sup> The Steering Committee includes Paul Grimm, former U.S. District Judge and Director of Duke’s Bolch Judicial Institute. The National Center for State Courts (NCSC) also has initiated the exploration of judicial and legal ethics issues involved with AI and the Courts.<sup>7</sup>

## A. Impact of AI in Litigation

The risks and concerns triggered by AI, particularly those impacting the legal profession and the justice system, quickly became apparent and will take time to work through courts and rulemaking bodies. A December article in the Duke Law School’s Law & Technology Review described some of the issues and challenges to law and the legal system because of Generative AI:

Generative AI (“GenAI”) systems such as ChatGPT recently have developed to the point where they are capable of producing computer-generated text and images that are difficult to differentiate from human-generated text and images. Similarly, evidentiary materials such as documents, videos and audio recordings that are AI-generated are becoming increasingly difficult to differentiate from those that are not AI-generated. These technological advancements present significant challenges to parties, their counsel, and the courts in determining whether evidence is authentic or fake. Moreover, the explosive proliferation and use of GenAI applications raises concerns about whether litigation costs will dramatically increase as parties are forced to hire forensic experts to address AI generated evidence, the

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<sup>4</sup> Griffin, Laskowski and Thumma, [How to Harness AI for Justice | Judicature \(duke.edu\)](#) 108 *Judicature* 1, 2024

<sup>5</sup> [Lawyer cited 6 fake cases made up by ChatGPT; judge calls it “unprecedented” | Ars Technica](#). (‘Adding insult to injury’, the plaintiff’s case was dismissed by the trial court.)

<sup>6</sup> [About RAILS | Responsible AI in Legal Services](#)

<sup>7</sup> [AI and the Courts: Judicial and Legal Ethics Issues \(ncsc.org\)](#)

ability of juries to discern authentic from fake evidence, and whether GenAI will overwhelm the courts with AI-generated lawsuits, whether vexatious or otherwise. GenAI systems have the potential to challenge existing substantive intellectual property (“IP”) law by producing content that is machine, not human, generated, but that also relies on human-generated content in potentially infringing ways. Finally, GenAI threatens to alter the way in which lawyers litigate and judges decide cases.<sup>8</sup>

In the preparation of this report, CoPilot was asked the following: What are potential risks to our court system because of AI? This was CoPilot’s response:

The integration of AI into our court system brings several potential risks:

1. **Over-reliance on AI:** There’s a risk of over-reliance on AI without assessing its quality and reliability. AI systems are not infallible and their outputs should be scrutinized for accuracy.
2. **Inaccurate or biased information:** AI systems can provide inaccurate or biased information. Biased data sets can lead to skewed outcomes or prejudice against improperly represented groups.
3. **Potential for fraudulent practices:** The use of AI opens up new avenues for fraudulent practices.
4. **Influence of commercial actors:** There’s a risk of commercial actors influencing public interest.
5. **Lack of empathy or human support:** AI systems lack the ability to provide empathy or human support, which is often crucial in legal proceedings.
6. **Reinforcing existing biases:** AI systems can reinforce existing biases if they’re trained on biased data.
7. **Unequal access to AI tools:** Not everyone has equal access to AI tools, which could lead to inequality in the legal system.
8. **Security risks:** AI systems in the judiciary can become a weak point for criminals, terrorist groups, and governments with malicious intent to take advantage of.
9. **Decrease in the number of civil servants:** The digitalization of legal services could cause a decrease in the number of civil servants.
10. **Threats to personal privacy:** The accumulation of massive amounts of personal information in the hands of a few, unregulated big-tech companies with unabashedly selfish commercial interests.

These risks highlight the need for careful consideration and regulation as we integrate AI into our legal systems. It’s important to ensure that the use of AI in the court system is transparent, fair, and doesn’t compromise the rights of individuals.<sup>9</sup>

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<sup>8</sup> Grossman, Grimm, Brown and Zu, [The ChatGPT Judge: Justice in a Generative AI World](#), 23 Duke Law & Technology Review, 1 (October 2023)

<sup>9</sup> CoPilot query August 1, 2024 (Ironically, the Bluebook has not yet issued guidance on how to cite to AI generated content, underscoring one of the many challenges with the use of AI in legal proceedings.)

## B. AI Issues that Will Need to Be Addressed by Courts

Generative AI and its impact on courts and litigants include the following considerations:

- Accuracy, reliability and authenticity of AI Generated information, including whether the output can be repeated
- The potential that uses of AI could compromise proprietary information as well as personal health and personally identifying information
- Does the attorney client privilege/work product doctrine apply to AI prompts from counsel and the Tool’s responses?
- Are prompts (questions posed in AI) and output subject to legal holds?
- What is the ‘chain of custody’ with respect to AI output?
- Who owns output generated by AI tools and is an AI inquiry or answer a declarative statement (that could be held against interest)?
- Jurors independently asking Generative AI tools for information related to the case they are adjudicating.
- Confidentiality of Information inputted into LLMs
- Is an AI generated response hearsay and if so, can it be considered a business record?
- How is AI output authenticated?
- Can AI output be considered as ‘expert’ testimony?

## III. AI Rulemaking by State and Federal Courts

Court systems around the U.S. have quickly responded to the AI revolution by implementing local rules, standing orders, and ethics rules to address perceived risks triggered by the technology.<sup>10</sup> As noted below, some of the early orders requiring disclosure of the use of AI have proven to be ineffective.

### A. Standing Orders Requiring Disclosure of the Use of AI

Following the press stories on the *Mata v. Avianca* pleading debacle described above, many courts (state and federal) adopted local standing rules requiring disclosure of the use of AI in pleadings. An example of a standing order is the version adopted by Federal Judge Michael Baylson of the U.S. District Court for the Eastern District of Pennsylvania. His standing order requires:

If any attorney for a party, or a pro se party, has used Artificial Intelligence (“AI”) in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court and assigned to Judge Michael M. Baylson, they MUST, in a clear and plain factual statement,

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<sup>10</sup> Two very useful tools to track AI rulemaking in state and federal courts includes [Generative Artificial Intelligence \(AI\) Federal and State Court Rules Tracker \(lexis.com\)](#) and RAILS dynamic list of over 58 [State and Federal Court Orders and Ethical Rules related to AI](#).

disclose that AI has been used in any way in the preparation of the filing and CERTIFY that each and every citation to the law, or the record in the paper, has been verified as accurate.

U.S.D.J. Araceli Martinez-Olguin of the N.D. of California requires a similar duty of disclosure for lawyers and pro se parties practicing in her court: “Any submission containing AI-generated content must include a certification that you have personally verified the content's accuracy. You are responsible for maintaining records of all prompts or inquiries submitted to any generative AI tools in the event those records become relevant at any point.”<sup>11</sup>

U.S.D.J. S. Kato Crews, (D. Colorado) requires a statement on whether AI was used for every paper filing:

[E]very motion filed pursuant to Fed. R. Civ. P. 12, Fed. R. Civ. P. 56, and any opposed motion (to include the corresponding response and reply), shall contain a Certification regarding the use, or non-use, of generative artificial intelligence (AI) (such as ChatGPT, Harvey.AI, Google Bard, etc.) in preparing the filing. The preparer of the filing must certify either that (a) no portion of the filing was drafted by AI, or that (b) any language drafted by AI (even if later edited by a human being) was personally reviewed by the filer or another human being for accuracy using print reporters or traditional legal databases and attesting that the legal citations are to actual existing cases or cited authority. The Court will strike any filing from a party who fails to include this certification in the above-mentioned motions. The AI Certification does not count against any page limitations.<sup>12</sup>

In an interesting development on the trend of local rules mandating disclosure of the use of Generative AI, on November 22, 2023, the Fifth Circuit Court of Appeals proposed the amendment of its Rule 32.3 and Form 6 which would require the following certification:

Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.<sup>13</sup>

On June 12, 2024, the Fifth Circuit announced that it would not implement the proposed rule, announcing:

The court, having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, has decided not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time. Parties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B). Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. “I used AI” will not be an excuse for an otherwise sanctionable offense.<sup>14</sup>

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<sup>11</sup> <https://www.cand.uscourts.gov/wp-content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf>

<sup>12</sup> [SKC Standing Order Civil Cases.pdf \(uscourts.gov\)](#) at 5.

<sup>13</sup> See [5th Circuit Notice of Proposed Amendment to 5th Circ. R. 32.2, Nov. 22, 2023](#)

<sup>14</sup> [5th Circuit Notice of Decision on Proposed Rule, June 12, 2024](#)



Notwithstanding the early trend of Courts to adopt rules on mandatory disclosure of the use of AI tools in court pleadings, the recent trend suggests that these rules are not practical and not particularly helpful to courts.

## B. Local Rules Prohibiting the Use of AI

The Eastern District of Missouri has expressly prohibited Self-Represented Litigants (SRL) from using any form of generative AI in preparing any pleading: “No portion of any pleading, written motion, or other paper may be drafted by any form of generative artificial intelligence. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, self-represented parties and attorneys acknowledge they will be held responsible for its contents. See Fed. R. Civ. P. 11(b).<sup>15</sup>” U.S.D.J. Donald W. Molloy of the D. Mont. also has entered case specific orders prohibiting the use of generative AI in connection with the case.<sup>16</sup>

## C. Standing Orders on AI that Do Not Require Disclosure of AI

Commentators have suggested that mandatory AI disclosure rules are fraught with problems and are counterproductive. An article in Judicature Magazine noted: “[w]hile the impulse underlying the imposition of these standing orders is understandable – even commendable – real disadvantages can result.” The authors instead propose that the better alternative is consistent, court-wide rules that are enacted following publication and public comment.<sup>17</sup>

The United States District Court for the Northern District of Illinois adopted a local rule for all matters in the District that explains its methodology and implements the Judicature article’s recommendation:

Some of the Court's standing orders address the Court's idiosyncrasies, such as its procedures for filing summary judgment motions. But other standing orders—which are unfortunately necessary—are often terse reminders that *all filers* need to follow statutes, the Federal Rules of Civil Procedure, and the Local Rules for the U.S. District Court for the Northern District of Illinois. The Court believes that a reasonable standing order on the use of artificial intelligence (AI) would fall into the latter category. So here's this Court's standing order on AI: Anyone—counsel and unrepresented parties alike—using AI in connection with the filing of a pleading, motion, or paper in this Court or the serving/delivering of a request, response, or objection to discovery must comply with Rule 11(b) and Rule 26(g) of the Federal Rules of Civil Procedure, and any other relevant rule, including any applicable ethical rule.<sup>18</sup>

U.S. District Court Judge Rita Lin (also of the N.D. California) follows a somewhat similar approach to the N.D. Illinois; It does not require certification but counsel have an ethical duty in connection with any filing:

Counsel is responsible for providing the Court with complete and accurate representations of the record, procedural history, and cited legal authorities. Use of ChatGPT or other such generative artificial intelligence tools is not prohibited, but counsel must personally confirm for

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<sup>15</sup> [Self-Represented Litigants \(SRL\) | Eastern District of Missouri | United States District Court \(uscourts.gov\)](#)

<sup>16</sup> See e.g. [Belenzon v. Paws Up Ranch, LLC, Case No. 9:23-CV-69, Dkt. No. 8](#)

<sup>17</sup> Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, [Is Disclosure and Certification of the Use of Generative AI Really Necessary?](#), 107 Judicature 68 (2023)

<sup>18</sup> <https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=1409> (emphasis added)

themselves the accuracy of any research conducted by these means, and counsel alone bears ethical responsibility for all statements made in filings.<sup>19</sup>

Other Federal Court Judges, including District Judge James Soto (U.S. Dist. Ct., Arizona) reminded the parties and their counsel in a specific case regarding the risks of the use of AI:

If any portion of a pleading or other document filed on this Court's docket has been drafted (in whole or in part) using generative artificial intelligence, including, but not limited to ChatGPT, Harvey.AI, or Google Bard, all attorneys and pro se litigants filing such pleadings or other documents shall verify that any language that was generated in any form by AI was checked for accuracy by using print reporters, traditional legal databases, or other reliable means by a human being.<sup>20</sup>

#### D. Adoption of Ethical Rules related to the Use of AI

Bar organizations also have raised numerous ethical issues arising out of the use of AI. On July 29, 2024, the ABA issued [Formal Opinion 512](#)<sup>21</sup> that describes the ethical duties under Model Rule 1.1, including the expectation that attorneys are knowledgeable of AI technology and how it can be used and abused:

Under Model Rule 1.1 (Competent Representation), you have an ethical obligation to understand the benefits and risks of any generative AI you use. Using generative AI might also implicate other duties under the Rules of Professional Conduct, like communicating with the client or charging reasonable fees.

As generative AI tools continue to develop, you may need to use them to provide competent legal services to your clients. However, you must evaluate the risks of client confidential information being disclosed or accessed by others when using generative AI tools. If your client specifically asks about your generative AI practices, you should disclose how you are using the technology in your representation.

The amount of review or verification you must do to meet your ethical obligation depends on the generative AI tool and the task being performed. Consider doing the following:

- Reading about generative AI targeted at the legal profession
- Attending relevant continuing legal education programs –and–
- Consulting others who are proficient in generative AI technology

The Washington DC Bar Association also issued an Ethics Opinion on AI<sup>22</sup> that includes the following guidance:

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<sup>19</sup> [2024-05-17-Civil-Standing-Order.pdf \(uscourts.gov\)](#)

<sup>20</sup> [Cowan v. Bd. Of Immigration Appeals, Case No. 4:23-cv-00327-JAS, Dkt. No. 15.](#)

<sup>21</sup> [Formal Opinion 512 \(americanbar.org\)](#), July 29, 2024.

<sup>22</sup> [DC Bar - Ethics Opinion 388](#)

- You should have a reasonable and current understanding of generative AI works and what it does, including (a) its potential dangers such as risk of "hallucinations", misuse, or exposure of client confidential information; (b) its limitations, including whether it uses a narrow dataset that could generate incomplete, out-of-date, or inaccurate results; and (c) its cost
- You must review and validate AI generated content before incorporating it in your work product for clients or relying on it in support of a legal proceeding
- You must ensure the confidentiality of the information provided to the generative AI tool
- You should take appropriate steps to ensure that any use of generative AI is consistent with the Rules of Professional Conduct
- In litigation or arbitration, you must confirm that any generative AI outputs do not contain misrepresentations of facts or law, or provide fake citations
- If you intend to bill your client for your use of generative AI for which there is an out-of-pocket cost, you should communicate that expected expense to your client
- You can only bill for the time you actually spent on a matter, not the time you would have spent absent using generative AI
- Consider whether specific interactions with generative AI in connection with a client matter should be retained as part of the client file

The California State Bar Committee on Professional Responsibility and Conduct (COPRAC) made a similar recommendation to adopt an ethical standard for the use of AI: "When using generative AI tools, lawyers must ensure, among other things, client confidentiality, competent use of AI tools, supervision of lawyers and non-lawyers when using generative AI, and candor with the court and clients."<sup>23</sup>

The New York State Bar Association Taskforce on AI recommended NY adopt ethical rules on AI, including the recommendation that attorneys should alert their clients when using AI tools: "When using AI tools in your case, you should advise clients of this usage and ensure legal staff, including paralegals, are properly trained and handling AI tools properly. Also consider responsibly using AI tools to aid in effectiveness in representing clients. However, you should periodically monitor the AI tool provider to learn about any changes that might compromise client confidentiality."<sup>24</sup>

The Michigan Bar issued an ethics opinion focused on judges rather than litigants.

Judges have an ethical obligation to understand technology, including AI, "and take reasonable steps to ensure AI tools on which their judgment will be based are used properly." Further, judges "have an ethical duty to maintain technological competence and understand AI's ethical implications to ensure efficiency and quality of justice."<sup>25</sup>

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<sup>23</sup> <https://s3.documentcloud.org/documents/24166448/recommendations-from-committee-on-professional-responsibility-and-conduct-on-regulation-of-use-of-generative-ai-by-licensees-1.pdf>

<sup>24</sup> [NYSBA Task Force on AI Recommendations \(nysba.org\)](https://www.nysba.org/press-releases/nysba-task-force-on-ai-recommendations)

<sup>25</sup> State Bar of Michigan's Standing Committee on Judicial Ethics: [Ethics Opinion JI-155](#)

## IV. Texas Taskforce on AI and the Courts

On August 25, 2023, then Texas State Bar President Cindy Tisdale created The Texas Bar Taskforce for Responsible AI in the Law (TRAIL or Taskforce). The Taskforce issued an [Interim Report](#)<sup>26</sup> on January 26, 2024 and followed up in June 2024 with its [2023-24 Year-End Report](#)<sup>27</sup> with more detailed recommendations. (The Taskforce also met on February 26, 2024, in a Summit and issued a Report [Summit Report](#).)<sup>28</sup>

The Taskforce in its Year-End Report described its work as follows: “This report represents an initial step in understanding the integration of AI within the legal profession. This report identifies the areas in which AI is already changing the practice of law and outlines recommended steps as this technology evolves. These recommendations are broad, reflecting the way that AI has touched nearly every area of legal practice.”<sup>29</sup>

The 2023-24 Year-End Report set out 15 Substantive Recommendations, including the following two related to potential amendments to rules:

**5. Review of Texas Rule of Civil Procedure 13.** The Supreme Court of Texas Rules Advisory Committee and the State Bar of Texas Court Rules Committee should explore Texas Rules of Civil Procedure 13, “Effect of Signing Pleadings, Motions and Other Papers; Sanctions,” and evaluate whether additional language or guidance is necessary for Texas lawyers and self-represented litigants regarding the need to verify the accuracy of all filings and an obligation to avoid AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding the same.

**6. Rules of Evidence.** The Rules Advisory Committee and Court Rules Committee should also address whether changes to the Texas Rules of Evidence are needed to address deep fakes and AI-manipulated evidence.<sup>30</sup>

These recommendations were also discussed in the Taskforce’s Interim Report at page 5 (recommended review of changes to Rule 13) and page 7 (discussion of evidentiary issues involving deepfakes).<sup>31</sup>

The Summit Report’s section on AI in the Courtroom is particularly instructive to the Advisory Committee and is set out below in full (emphasis added):

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<sup>26</sup>[Interim Report to the Board -- Taskforce for Responsible AI in the Law \(texasbar.com\)](#)

<sup>27</sup>[TRAIL 2023-24 Year-End Report](#)

<sup>28</sup>[Taskforce for Responsible AI in the Law, Summit Report February 26, 2024](#)

<sup>29</sup> TRAIL 2023-24 Year-End Report at 4

<sup>30</sup> *Id.* at 7.

<sup>31</sup> Interim Report at 5 and 7.

## AI in the Courtroom

Discussion by the AI Summit attendees about the role of AI and generative AI tools in the courtroom focused on three areas: the use of AI by pro se litigants, the use of AI by attorneys, and the use of AI by court staff.

Pro se litigants will likely use any available AI tools, especially if they are free and accessible. Courts may want to warn pro se litigants about the risks of AI and legal research, potentially through clerks, standing orders, or pro se and self-help centers. Concerns exist about pro se litigants becoming overconfident in their case due to AI-generated content.<sup>32</sup>

For attorneys using AI, Rule 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the CPRC require reasonable diligence from the filer. The Supreme Court's Rules Committee could clarify the rules without being specific to AI and generative AI. In addition to the risks inherent in using AI, there are potential benefits for attorneys. For instance, a free AI tool that checks citations for hallucinations could benefit good actors.

Nearly a quarter of judges use AI, and while responsible use in drafting opinions is permissible, requiring disclosure of AI use is not recommended. Standing orders educating about AI are encouraged, but those requiring disclosure are not.<sup>33</sup>

Deep fakes and the authenticity of evidence are concerns, and Texas Rule of Evidence 901 should be reexamined in this context.

Recommendations include reviewing educational materials for judges, considering pretrial hearings for evidentiary challenges, and providing training on metadata. Education efforts could

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<sup>32</sup> The Interim Report elaborated on this point: “While there has already been substantial publicity about inaccurate ChatGPT outputs and why attorneys must always verify any draft generated by any AI platform, the bench must also consider the impact of the technology on pro se litigants who use the technology to draft and file motions and briefs. No doubt pro se litigants have turned to forms and unreliable internet material for their past filings, but ChatGPT and other such platforms may give pro se litigants unmerited confidence in the strength of their filings and cases, create an increased drain on system resources related to false information and nonexistent citations, and result in an increased volume of litigation filings that courts may be unprepared to handle.” Interim Report at 7.

<sup>33</sup> The Interim Report explained this conclusion in more detail: “Because many legal research tools will (or already do) incorporate generative AI into their product, these standing orders may result in litigants disclosing their use of Westlaw, Lexis, Grammarly, etc. This is likely an unhelpful feature, and courts already have the ability to appropriately sanction an attorney for filing a motion or brief that contains false statements. It may also discourage the development and adoption of tools that, used properly, could enhance legal services.” Interim Report at 6.



involve the ATJ, State Bar, Pro Bono Law Group, and other organizations, with resources provided on the State Bar website.<sup>34</sup>

Following up its discussion in the Summit Report suggesting the issuance of a Texas ethics opinion on the responsible use of AI to bolster the 2018 Ethics Opinion 680 on lawyers' obligation to understand technology, the Taskforce formally submitted a request to the Texas Professional Ethics Committee, seeking "guidance on applying Texas Disciplinary Rules of Professional Conduct to the use of AI, including the lawyer's:

- duty to provide competent representation (tech competence),
- duty of confidentiality,
- duty to safeguard client communications and property,
- duty of supervision (both to other lawyers and to nonlawyer or virtual assistants),
- duty of candor to the tribunal, and
- duty to charge a reasonable fee."<sup>35</sup>

(Notably, the Summit Report included a recommendation that the ethics committee should "define due diligence for electronic services, as the level of risk varies among AI applications.")<sup>36</sup>

## V. Proposed Amendment of TRCP 13

### A. Discussions on Whether to amend FRCP 11

In evaluating whether to amend TRCP 13, it is initially instructive to explore the equivalent provision(s) in the Federal Rules of Civil Procedure and whether commentators believe Rule 11 is sufficient to empower judges deal with abuses arising out of the use of Generative AI.<sup>37</sup> Judge Grimm, Professors Grossman and Brown suggest that Federal Rules of Civil Procedure 11 (pleadings) and 26(g) (Discovery), together with attorneys' ethical obligations, sufficiently empower Federal Judges to address misuse of AI:

Accordingly, lawyers or parties who violate Rules 11 and 26(g) in connection with their use of GenAI in civil litigation are already subject to sanctions that can be strong medicine — depending on the extent of the violation — regardless of whether the presiding judge has issued their own standing order concerning the use of GenAI. Moreover, if widespread public humiliation over being sanctioned by a court for committing this kind of error is insufficient disincentive, the Rules of Professional Conduct also impose independent ethical obligations to

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<sup>34</sup> [Summit Report](#) at 3-4.

<sup>35</sup> TRAIL 2023-24 Year-End Report at 5.

<sup>36</sup> Summit Report at 3. Notably, the Taskforce made the following observation: "The AI Summit attendees also noted that ethical and effective representation of a client might require not using AI in some situations and using it judiciously in other situations. The possibility exists that as AI, particularly generative AI, becomes more pervasive, failing to utilize this technology might be unethical in that the attorney is not adequately using the tools available."

<sup>37</sup> See e.g. [Is Disclosure and Certification of the Use of Generative AI Really Necessary? | Judicature \(duke.edu\)](#)

refrain from the types of misconduct that have led courts to adopt standing orders prohibiting or regulating the use of GenAI applications.<sup>38</sup>

## B. TRCP 13 – No Amendment Needed

Texas Rule 13 includes a requirement that attorneys or parties sign pleadings, motions and other papers and by doing so are certifying that “they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.” (Federal Rule of Civil Procedure 11 which has a similar certification consequence only applies to filed pleadings and motions.)

Sanctions for violations of Rule 13 as well as violations of discovery and disclosure rules are available under Texas Rule of Civil Procedure 215.2b. Additionally, Texas Rule of Civil Procedure 191.3(b) (effect of signature on disclosures) and 191.3(c) (effect of signature on discovery request notice response or objection) also provide for sanctions for violations.

The Taskforce’s suggestion that this Committee “evaluate whether additional language or guidance is necessary for Texas lawyers and self-represented litigants regarding the need to verify the accuracy of all filings and an obligation to avoid AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding the same.” This suggestion was prompted by the fact that while Texas attorneys likely have an ethical duty regarding the use of AI, self-represented parties do not have any ethical duties. Thus, the duties of pro se litigants could be articulated in Rule 13. “The current version of Rule 13, however, requires that the pro se litigant arguably know, in advance of the filing of a motion, that the pleading is groundless and false. The Texas Supreme Court Rules Advisory Committee may wish to consider whether Rule 13 should be modified.”<sup>39</sup> The Taskforce did not propose specific language amending Texas Rule of Civil Procedure 13.

The Subcommittee recommends that the Advisory Committee decline to amend Rule 13 to add a reference to AI. As reflected in the discussion above regarding courts’ rush to add local rules requiring the disclosure of the use of AI which quickly proved to be impractical, amending Rule 13 will not ensure that self-represented litigants understand their duties to the court – importantly because self-represented litigants often do not review the Rules of Civil Procedure.

The Subcommittee proposes that the Advisory Committee recommend that a form be prepared for Self-Represented litigants in Texas that will be provided to the parties when filing their action or answer. This form should include general guidance and in addition information on the potential hazards related to AI technology. This will alert litigants of their duties and other important considerations in bringing civil litigation.

If the Advisory Committee disagrees and determines that Rule 13 should be amended, the following is a proposed approach to address AI:

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<sup>38</sup> *Id.*

<sup>39</sup> Interim Report at 7.

## Proposed Amendment to Texas Rule of Civil Procedure 13

### RULE 13. EFFECT OF SIGNING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. The use of generative Artificial Intelligence in connection with any signed pleading, motion, or other paper must comply with this Rule. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or act and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

#### Notes and Comments

Comment to 1990 change: To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day "grace" period provided in the former version of the rule.

Comment to 2024 change: To highlight to attorneys and parties (including self-represented parties) that pleadings, motions or other papers that include content from generative Artificial Intelligence tools are subject to the certification obligation of this rule.

Alternatively, the proposed language could instead be added into the Notes and Comments section to advise attorneys and self-represented litigants that they are responsible for information obtained from Generative AI tools.

### C. Is AI Subject to Disclosure under Texas Discovery Rules?

Although not the subject of the Supreme Court's referral, the Subcommittee notes that an open and interesting question is raised as to whether the existence of AI tools that were used to generate evidence in the dispute must be disclosed in response to Requests for Disclosure under TRCP 194.2. A similar question is prompted regarding whether AI tools themselves must be made available for inspection if these tools were used in connection with the expert's anticipated testimony or report.

Currently, TRCP 194.2(f)(4) reads as follows: “all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony.” TRCP 194.2(f)(4) (emphasis added). Although this issue is likely to be the subject of future case law, it is not within the ambit of the Supreme Court’s referral to this Committee and the Subcommittee does not believe that the Texas Rules should be amended at this time to resolve the issue.

## VI. Amending the Rules of Evidence

The current Texas Rules of Evidence, particularly rules related to authentication of evidence, do not account for unique aspects of information produced or influenced by AI tools. These considerations include determining the accuracy and reliability of AI generated content, authentication and chain of custody questions of AI as well the significant risks related to deepfakes and manipulation of data using AI. The Texas Rules of Evidence fail to consider these unprecedented factors and therefore the Subcommittee recommends that potential amendments to Rules 901 and 902 should be provided to the Texas State Bar Evidence Committee for comment before final consideration by the Advisory Committee.

### A. Rule 901 Authentication and AI

The Federal Rules of Evidence Advisory Committee recently initiated discussions on whether the Federal Rules of Evidence should be amended to reflect the unique impact of AI.<sup>40</sup> Because key Texas Rules of Evidence mirror the Federal Rules of Evidence (or have similar provisions), a review of these discussions is instructive.

A helpful overview of how Artificial Intelligence as evidence is complex and challenging is described in a 2021 article by Judge Paul Grimm and Professors Maura Grossman and Gordon Cormack, *Artificial Intelligence as Evidence*.<sup>41</sup>

Under FRE 901(a), “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” A proponent of this evidence can satisfy the low burden of authenticating by providing evidence to show that the item is what the proponent claims it is. The Federal Rules of Evidence Advisory Committee discussions include consideration of how this low burden might not be sufficient to address admission of AI.

Rule 901(b) sets out a non-exhaustive list of examples of how a proponent can demonstrate that the 901(a) showing is met. “The examples that most readily lend themselves to authenticating AI evidence are: Rule 901(b)(1) (testimony of a witness with knowledge that an item is what it is claimed to be); and Rule 901(b)(9) (evidence describing a process or system and showing that it produces an accurate result).”<sup>42</sup>

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<sup>40</sup> See, [Federal Rules of Evidence Advisory Committee October 10, 2023 Agenda Book\(Agenda Book\)](#) at 84

<sup>41</sup> Grimm, Grossman and Cormack, [Artificial Intelligence as Evidence](#), 19 Nw. J. Tech. & Intellectual Property 9 (December, 2021)

<sup>42</sup> *Id* at26.

A witness called to authenticate AI evidence under Rule 901(b)(1) must also comply with other applicable rules, including Rule 602 that requires the authenticating witness to have personal knowledge of how the AI technology functions.<sup>43</sup> Due to the often-opaque nature of AI tools deployed in a business setting, it could be quite difficult for a witness to demonstrate personal knowledge.

. . . AI applications seldom are the product of a single person possessing personal knowledge of all the facts that are needed to demonstrate that the technology and its output are what its proponent claims them to be. Data scientists may be required to describe the data used to train the AI system. Developers may be required to explain the features and weights that were chosen for the machine-learning algorithm. Technicians knowledgeable about how to operate the AI system may be needed to explain what they did when they used the tool, and the results that they obtained. These technicians, however, may be entirely at sea when asked to explain how the data was collected or cleansed, how the algorithm that underlies the AI system was programmed, or how the system was tested to show that it produces valid and reliable results.<sup>44</sup>

AI evidence could also be authenticated under Rule 901(b)(1) through the testimony of an expert qualified under Rules 702 and 703.

Authentication under Rule 901(b)(9) faces the same challenges as Rule 901(b)(1) regarding a witness who can testify either through personal knowledge or expert credentials to satisfy the requirement of Rule subsection (9).<sup>45</sup>

The Grimm, Grossman and Cormack article accurately describes the unique challenges with admitting AI evidence:

An important feature of authentication needs careful consideration in connection with admitting AI evidence. Normally, a party has fulfilled its obligation to authenticate non-testimonial evidence by producing facts that are sufficient for a reasonable factfinder to conclude that the evidence more likely than not is what the proponent claims it is. In other words, by a mere preponderance. This is a relatively low threshold--51%, or slightly better than a coin toss. However, as we have shown in this paper, not all AI evidence is created equal. Some AI systems have been tested and shown to be valid and reliable. Others have not, when, for

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<sup>43</sup> *Id* at 26-27.

<sup>44</sup> *Id* at 27.

<sup>45</sup> "There are two additional rules of evidence that may be used to authenticate AI evidence that are closely related to Rules 901(b)(1) and 901(b)(9). They are Fed. R. Evid. 902(13), which allows authentication of "[a] record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person"; and Fed. R. Evid. 902(14), which allows authentication of "[d]ata copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person." Rules 902(13) and (14) would allow the proponent of AI evidence to authenticate it by substituting the certificate of a qualified witness for their live testimony. But it must be stressed that the qualifications of the certifying witness and the details of the certification that the evidence produces an accurate and reliable result must be the same as would be required by the in-court testimony of a similarly qualified witness. Rules 902(13) and (14) are not invitations for boilerplate or conclusory assertions of validity and reliability and should not be allowed to circumvent the need to demonstrate, not simply proclaim, the accuracy and reliability of the system or process." *Id.* at Footnote 362. Texas does not have an analogous version of FRE 901(13) and (14), but Texas does have a similar method to self-authenticate business records (which conceptually include Gen AI output) through a Business Records Affidavit.



example, efforts to determine their validity and reliability have been blocked by claims of proprietary information or trade secret. Furthermore, some of the tasks for which AI technology has been put to use can have serious adverse consequences if it does not perform as promised--such as arresting and criminally charging a person based on flawed facial recognition technology or sentencing a defendant to a long term of imprisonment based on an AI system that has been trained using biased or incomplete data that inaccurately or differentially predicts the likelihood that the defendant will reoffend.<sup>46</sup>

## B. Deep-Fakes

In addition to the Federal Evidence Advisory Committee's focus on the relatively low burden of authentication of evidence is their concern that AI tools can be used to alter photographs, videos and other forms of evidence – often referred to as “Deep-Fakes”.<sup>47</sup> The Reporter for the Evidence Advisory Committee, Professor Dan Capra, laid-out the challenges of Deep-Fakes and the potential gap in the Federal Rules of Evidence to enable trial court judges to determine whether certain offered evidence is authentic, particularly because “AI make deepfakes much more difficult to detect.”<sup>48</sup>

Professor Capra further described the limitations of authentication of photos that might be altered under Rule 901(a):

Under Rule 901(a), the standards of authenticity are low. The proponent must only “produce evidence sufficient to support a finding that the item is what the proponent claims it is. . . . The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be<sup>49</sup>

Professor Capra explained the process of authentication of evidence under the Rule:

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity—enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides certain situations in which the proffered item will be considered self-authenticating—no reference to any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.<sup>50</sup>

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<sup>46</sup> *Id* at 28.

<sup>47</sup> See Dixon, Judge Herbert B. Jr., *The “Deepfake Defense”: An Evidentiary Conundrum*, [ABA Journal](#), June 11, 2024. [The “Deepfake Defense”: An Evidentiary Conundrum \(americanbar.org\)](#)

<sup>48</sup> [2023-10 evidence rules agenda book final 10-5.pdf \(uscourts.gov\)](#) at 85

<sup>49</sup> *Id* at 87.

<sup>50</sup> *Id* at 87.

He noted the unique problem raised by the potential for deepfakes: “Applying the current authentication rules to deepfakes raises at least two concerns: 1. Because deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity; and 2. On the other hand, the prevalence of deep fakes will lead to blanket claims of forgery, requiring courts to have an authenticity hearing for virtually every proffered video.”

In its May 15, 2024 [Report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States \(the Standing Committee\)](#)<sup>51</sup>, the Advisory Committee on Evidence offered the following takeaways from its Panel Discussion on AI and Machine Learning:

1. Consideration should be given to a rule covering machine-learning output when it is not accompanied by an expert witness. One possibility is a new rule applying the Rule 702 reliability standards to such machine-learning data. The problems posed by machine learning data are not ones of authenticity but rather of reliability. One challenge, however, is to draft a rule on machine-learning evidence that will not cover basic, well-established machine-based data such as thermometers, radar guns, etc.
2. The problem of deepfakes is really one of forgery --- a problem that courts have dealt with under the existing rules for many years. This cautions against a special rule on deepfakes --- with the proviso that traditional means of authentication such as familiarity with a voice, and personal knowledge, might need to be tweaked because the authenticating witness may not be able to detect a deepfake.
3. An opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The question is whether a rule is necessary to establish the requirement of an initial showing of fakery. Courts currently require some kind of showing before inquiring into whether digital and social media evidence have been subject to hacking; it is not enough for an opponent to contend that the item is inauthentic because, you never know, it might have been hacked. And courts have imposed that initial requirement on the opponent without relying on a specific rule. The question for the Committee is whether a procedural rule to impose a burden of going forward on the opponent is necessary when it comes to deepfakes. Such a rule might be added to Rule 901 as a new Rule 901(c). Former Judge Paul Grimm and Dr. Maura Grossman proposed a Rule 901(c) that the Committee considered at the meeting. The Committee agreed that the proposal could not be adopted in its present form, because it required the opponent to show that it was more likely than not a fake, which seems too high for an initial burden. The Committee remains open to considering a rule that would impose on the opponent a burden of going forward when an item is challenged as a deepfake.
4. It may be that the admissibility of machine-learning evidence could be dependent on validation studies, without the necessity of courts and litigants inquiring into source codes, algorithms, etc. Thought must be given, however, to how such validation studies

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<sup>51</sup> [Standing Committee June 21, 2024 Agenda Book](#) at 96

can be conducted, and how they are to be reviewed by courts.

### C. Potential Amendments to T.R.E. 901 to Address AI

The Subcommittee suggests that the Texas State Bar Evidence Committee should discuss whether the current Texas Rules of Evidence on authentication appropriately account for AI generated information, particularly the risk that deep-fake evidence could be offered as evidence without any inquiry as to whether the information is what it appears to be. As described above, the structure of Rule 901 sets a relatively low hurdle for the proponent of evidence to meet authenticity requirements and does not clearly enable another party to challenge whether the evidence could have been altered by means of AI technology. Amending Rule 901(b)(9) as well as adding a new 901(c) arguably will impose a minor but important additional step to prove-up evidence that was generated by AI and further will enable litigants to bring challenges to the authenticity of any electronic evidence that could have been fabricated or altered.

The Subcommittee recommends that the Advisory Committee consider the Grimm and Grossman proposals to amend Rule 901(b)(9) and add Rule 901(c) enabling a challenge to authenticity of electronic evidence.<sup>52</sup>

#### Rule 901

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

...

(9) Evidence About a Process or System.

(A) Evidence describing a process or system and showing that it produces an accurate and reliable result and

(B) if the proponent concedes that the item was generated by artificial intelligence, additional evidence that:

\_\_\_\_\_ (i) describes the software or program that was used; and

\_\_\_\_\_ (ii) shows that it produced valid and reliable results in this instance.

...

901(c): Potentially Fabricated or altered electronic evidence.

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent

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<sup>52</sup> See Appendix B, Judge Paul Grimm and Professor Maura Grossman: Proposed Modification of Current Rule 901(b)(9) for AI evidence and Proposed New Rule 901(c) for “Deepfake” Evidence (attached) and referenced in the Evidence Advisory Committee takeaways described above.

demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

#### D. Rule 902(10) Business Records Affidavit and AI

Although not within the subject matter of the Court's Referral, the Subcommittee suggests that the State Bar Evidence Committee should consider whether Texas Rule of Evidence 902(10), Business Records Accompanied by Affidavit should be amended to reflect AI generated records because Business Records Affidavits could be used to authenticate AI generated records that generally would not meet the requirements for authenticity and reliability. As noted above in the discussion pertaining to Rule 901, AI generated records could be unreliable or falsified and otherwise might not be subject to authentication under Rule 901. However, use of a Business Records Affidavit to self-prove admissibility, by-passing evidence of authenticity could result in admission into evidence of AI generated content that is neither reliable nor authentic.

The Subcommittee recommends that the State Bar's Evidence Committee discuss amending Rule 902(10) to either exclude AI generated content from a Business Records Affidavit and instead follow the amended procedures for authentication of evidence under 901(b)(9).

### VII. TRCP 226a Should be Amended and Updated

Texas Rule of Civil Procedure 226a sets out the instructions to be given to potential jurors when assigned to a jury venire as well as additional instructions given to jurors when they are seated on a jury. The Instructions were last updated in 2005 and include references to defunct technology. The Subcommittee suggests that the Rules 216-299a Subcommittee consider updating the instructions to reflect current technology as well as reference Generative AI.

Paragraph 3 of the Venire instructions and Paragraph 4 of the instructions to empaneled jurors are the same and could be updated as follows:

Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including ~~by~~ but not limited to phone, text message, email, ~~message~~, chat ~~room~~, , blog, or social networking electronic platforms and websites including apps such as Facebook, X (Twitter), Instagram, WhatsApp, Tik-Tok, or Slack ~~or Myspace~~]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

Paragraph 1 of the instructions for seated jurors should also be revised as follows:

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email, message, chat ~~room~~, blog, or social networking websites such as Facebook, Instagram, WhatsApp, Tik-Tok, or Slack X (Twitter), Instagram, WhatsApp, Tik-Tok, or Slack ~~or Myspace~~][I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on

the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Additionally, Paragraph 6 of the instructions for seated jurors should be revised

6. Do not investigate this case on your own. For example, do not:

- a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;
- b. go to places mentioned in the case to inspect the places;
- c. inspect items mentioned in this case unless they are presented as evidence in court;
- d. look anything up in a law book, dictionary, or public record to try to learn more about the case;
- e. look anything up on the Internet or by using generative artificial intelligence tools to try to learn more about the case; or
- f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet or generative artificial intelligence tools, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.



# Appendix A

## Backgrounder on AI and Resources

AI is a broad term that includes different elements of computer technology that is used to simulate or create intelligent behavior or thought in a computer. Definitions vary, but the definition from the Organization for Economic Co-operation and Development (OECD) has gained traction: “An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.”<sup>53</sup> Recent rapid-fire developments in the AI landscape, particularly tools such as ChatGPT, have materially changed the potential uses and opportunities to abuse AI tools. AI is now becoming a tool used by businesses to improve efficiency and assist in decision-making. AI supported tools perform detailed analytics and even create computer programming. The ostensible purpose of AI technologies is to enhance our collective efficiency. Just as the Industrial Revolution heralded the replacement of human labor with automation, an AI-led transformation using powerful algorithms could save millions of hours of cognitive processing time.<sup>54</sup>

Many forms of AI have been in use for over 35 years, including the IBM Watson computer that played chess against masters. The AI landscape materially changed however on November 30, 2022, when ChatGPT was released to the public. Over 1 million users used the tool within the first 5 days and within the first three months, over 100,000,000 users across the globe were actively using the tool.

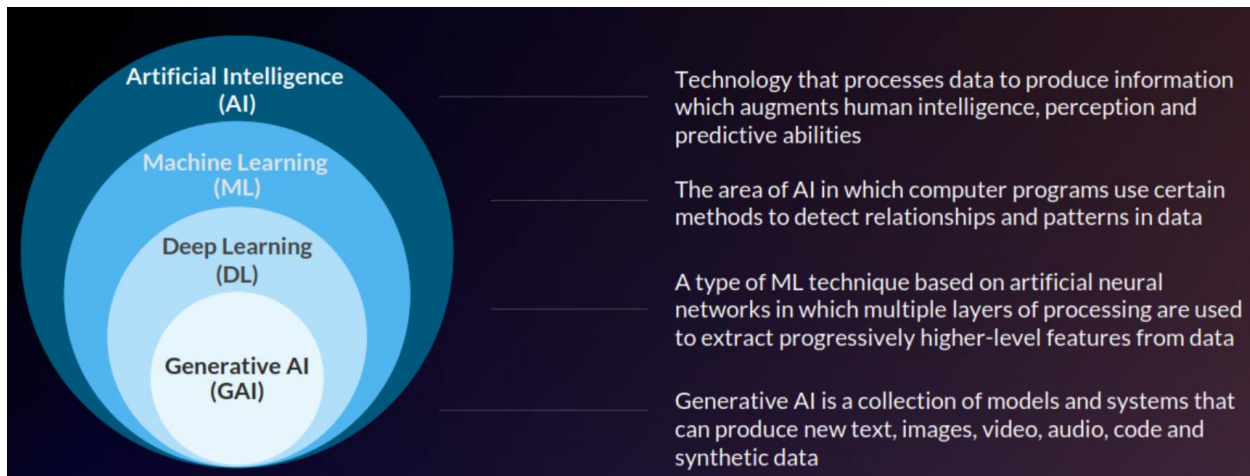
To understand the landscape of potential uses of AI, it is important to describe the different types of AI tools and their use cases. This chart<sup>55</sup> describes the progression of AI toolsets.

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<sup>53</sup> [What is AI? Can you make a clear distinction between AI and non-AI systems? - OECD.AI](#)

<sup>54</sup> [AI-and-Access-to-Justice-Final-White-Paper.pdf \(nacmnet.org\)](#) at 1.

<sup>55</sup> Courtesy of Christy Hawkins, [akerman](#)



Generative AI tools are often powered by Large Language Models (called LLMs) which are composed of huge volumes of data resources that are used by the engine to learn and respond to inputs. ChatGPT reportedly was trained on a dataset of over 300 billion words with a total data size of approximately 570 gigabytes of information. Another measure of the power of a LLM is the number of parameters created in the tool from learned information in the data set. ChatGPT is estimated to currently have hundreds of billions of parameters and growing.

Generative AI raises particularly unique concerns as it creates content, including text and images, without any human interaction. A Large Language Model is reliable only to the extent of the validity of the sourced data set; LLMs do not have the inherent ability to discern whether its source data is reliable or factually accurate. If the LLM does not have full access to all available information (for example if certain news sites are not included in the LLM), the output could be incomplete. Additionally, LLMs are also subject to the biases of the feedback provided by the developers who provide training data; some LLMs can be more prone to offer output consistent with the views (including subconscious biases) of its programmers. A more pernicious problem is that Generative AI is subject to ‘hallucinations’ which are inaccurate sentences or phrases contained in AI responses to queries.<sup>56</sup> “[G]enerative A.I. . . . relies on a complex algorithm that analyzes the way humans put words together on the internet. It does not decide what is true and what is not. . . . The tech industry often refers to the inaccuracies as ‘hallucinations.’”<sup>57</sup> There is no technology currently available that can eliminate this risk.<sup>58</sup>

<sup>56</sup> See Karen Weise & Cade Metz, When A.I. Chatbots Hallucinate, N.Y. Times (last updated May 9, 2023) <https://www.nytimes.com/2023/05/01/business/ai-chatbots-hallucination.html>

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

## Appendix B

### Proposed Modification of Current Rule 901(b)(9) for AI evidence and Proposed New Rule 901(c) for “Deepfake “Evidence

By Paul W. Grimm & Maura R. Grossman

[901](b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]:

(9) *Evidence about a Process or System.* For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a reliable** result; and

**(B) if the proponent concedes that the item was generated by artificial intelligence, additional evidence that:**

**(i) describes the software or program that was used; and**

**(ii) shows that it produced valid and reliable results in this instance.**

Proposed New Rule 901(c) to address “Deepfakes”

**901(c): Potentially Fabricated or altered electronic evidence.**

**If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.**

#### **Rationale:**

Given the complexities and challenges presented by artificial intelligence generated evidence, a new rule that sets a standard for what is sufficient to authenticate such evidence would be extremely helpful. Because AI generated evidence is, by definition, evidence produced by a system or process, the proposal is to add a subsection (B) to existing 901(b)(9) to set a standard for authenticating evidence that the proponent acknowledges is AI generated. The proposed revision substitutes the word “reliable” for “accurate” in existing rule 901(b)(9), because evidence can be “accurate” in some instances but inaccurate in others (such as a broken watch, which “accurately” tells the time twice a day but is not a reliable means of checking the time otherwise).

For acknowledged AI generated evidence, the proposed new rule would identify a sufficient means for authentication of AI generated evidence. It requires the proponent to (i) describe the software or program that was used to create the evidence, and (ii) show that it produced *valid* and *reliable* results in the particular case in which it is being offered. Valid evidence is evidence that produces accurate

results, reliable evidence is that which produces consistently accurate results when applied to similar facts and circumstances. Both are required to ensure authenticity of AI generated evidence.

A separate rule is required to address the relatively recent phenomenon of AI generated “deepfakes”, which, due to rapidly improving generative AI software applications, are capable of producing fabricated (or altering existing) photographs, audio recordings, and audio-visual recordings that are so realistic that it is becoming very difficult to differentiate between authentic evidence and fabricated/altered evidence. A separate rule is needed for such fake evidence, because when it is offered the parties disagree about the nature of the evidence. The opposing party challenges the authenticity of the evidence and claims that it is AI generated fakery, while the proponent insists that it is not AI generated, but instead that it is simply an electronic photograph (for example, one taken on a “smart phone”), or a voice recording (such as one left on voice mail) or audio-visual recording (such as one taken with a “smart phone” or digital camera). Because the parties fundamentally disagree about the very nature of the evidence, the proposed rule for authenticating acknowledged AI generated evidence will not work. A separate rule is required.

The proposed new rule creates a new rule 901(c). That is because the proponent of evidence challenged as AI generated fakery may be authenticated by many means other than Rule 901(b)(9), which focuses on evidence generated by a “system or process”. The proponent might choose to authenticate an audio recording under Rule 901(b)(5) (opinion as to voice) or Rule 901(b)(3) (comparison of evidence known to be authentic with other evidence the authenticity of which is questioned).

The proposed rule does not use the word “deepfake”, because it is not a technical term, but instead describes the evidence as being either computer-generated (which encompasses AI-generated evidence) or electronic evidence, which encompasses other forms of electronic evidence that may not be AI generated (such as digital photographs, or digital recordings).

The proposed rule puts the initial burden on the party challenging the authenticity of computer generated/electronic evidence as AI generated fakery to make a showing to the court that a jury reasonably could find (but is not required to find) that it is more likely than not either fabricated or altered in whole or part. This approach recognizes that the facts underlying whether the evidence is authentic or fake may be challenged, in which case the judge’s role under Rule 104(a) is limited to preliminarily evaluating the evidence supporting and challenging authenticity, and determining whether a reasonable jury could find more likely than not that the challenged evidence is fake. If the answer is “yes” then, pursuant to Rule 104(b), the judge ordinarily would be required to submit the evidence to the jury under the doctrine of relevance conditioned upon a finding of fact, Rule 104(b).

But deepfakes increasingly are getting so hard to detect, and often can be so graphic or have such impact that the jury may be unable to “ignore” the content of generative AI (GAI) shown to be fake once they have seen it. See generally Taurus Myhand, *Once The Jury Sees It, The Jury Can’t Unsee It: The Challenge Trial Judges Face When Authenticating Video Evidence in The Age of Deepfakes*, 29 Widener L. Rev. 171, 174-5, 2023 (“The dangerousness of deepfake videos lie in the incomparable impact these videos have on human perception. Videos are not merely illustrative of a witnesses’ testimony, but often serve as independent sources of substantive information for the trier of fact. Since people tend to believe what they see, ‘images and other forms of digital media are often accepted at face value.’ ‘Regardless of what a person says, the ability to visualize something is uniquely believable’. Video evidence is more cognitively and emotionally arousing to the trier of fact, giving the impression that they are observing activity or events more directly.” Internal citations omitted).

If the judge is required by Rule 104(b) to let the jury decide if audio, visual, audiovisual, or pictorial evidence is genuine or fake when there is evidence supporting each outcome, they are then in danger of being exposed to evidence that they cannot “unremember” even if they doubt that it is fake. This presents an issue of potential prejudice that ordinarily would be addressed under Rule 403. But Rule 403 assumes that the evidence is “relevant” in the first instance, and only then can the judge weigh its probative value against the danger of unfair prejudice. But when the very question of relevance turns on resolving disputed evidence, the current rules of evidence create an evidentiary “Catch 22”—the judge must let the jury see the disputed evidence on authenticity for their resolution of the authenticity challenge, but that exposes them to a new type of evidence that may irrevocably alter their perception of the case even if they find it to be inauthentic.

The proposed new rule 901(c) solves the “Catch 22” problem. It requires the party challenging the evidence as fake to demonstrate to the judge that a reasonable jury could find that the challenged evidence more likely than not is fake. The judge is not required to make the finding that it is, only that a reasonable jury could so find by a preponderance of evidence. This is similar to the approach that the Supreme Court approved regarding Rule 404(b) evidence in *Huddleston v. U.S.*, [cite], and the Third Circuit approved regarding Rule 415 evidence in *Johnson v. Elk Lake School District*. [cite].

Under the proposed new rule, if the judge makes this preliminary finding, it then they would be permitted to exclude it (without sending it to the jury) if the proponent of the evidence cannot show that its probative value exceeds its prejudicial impact. This is a fairer balancing test than Rule 403, which leans strongly towards admissibility. Further, the proposed new balancing test already is recognized as an appropriate in other circumstances. See, e.g. Rule 609(a)(1)(B).

The proposed new rule has other advantages as well. While it requires the party challenging the evidence as a deepfake to demonstrate facts (not conclusory or speculative arguments) from which the judge could find that a reasonable jury *could* more likely than not find it to be fake, this does not require them to persuade the judge that it actually is fake, which lessens the burden on the challenging party to make a sufficient initial challenge. Under an approach already recognized in *Huddleston* and *Johnson*, the proposed new rule only requires the judge to determine whether a jury reasonably could find it to be fake, at which time the proponent would be required to show that the probative value of the evidence was greater than its prejudicial impact. This determination would be made by the judge, as Rule 609(a)(1)(B) already permits.

The proposed rule also has the benefit of not imposing any initial obligation on the proponent of the evidence to authenticate it in any particular way. The proponent can choose from any authentication methods illustrated by Rules 901(b) and 902, or any other means of showing that it is what it purports to be. If, under the proposed rule, the party challenging the evidence as a deepfake then succeeds in showing the judge that a jury reasonably could find the challenged evidence to be fake, the proponent would have the opportunity to bolster the authenticating evidence, and the judge would then apply the new balancing test. This fairly allocates the initial burden on the challenging party, the responding burden of the proponent, and the role of the judge in screening for unfair prejudice without the need to send the disputed facts to the jury.



# Appendix C

## Artificial Intelligence Resources

### State Court Orders, Rules, and AI Rules Trackers

[Texas House Bill 2060 \(88R\)](#) that created the [Artificial Intelligence Advisory Council](#) which is co-chaired by Senator Tan Parker and Representative Gio Capriglione.

[Texas - TX R BEXAR CTY LOC RULES DIST CT Rule 3 - Nonjury Docket](#)

[Connecticut Judicial Branch -The Judicial Branch's Policies and Procedures Concerning Artificial Intelligence](#)

[Statement of Principles for the New Jersey Judiciary's Ongoing Use of Artificial Intelligence, Including Generative Artificial Intelligence](#)

[Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers](#)

[Utah, Interim Rules on the Use of Generative AI, October 25, 2023](#)

[Kansas Office of Information Technology Services, Generative Artificial Intelligence Policy](#)

[National Conference of State Legislatures - Artificial Intelligence 2023 Legislation](#)

Eastern District of Texas [GO 23-11 Amending Local Rules Effective December 1, 2023.pdf \(uscourts.gov\)](#)

### Legal Research

[Artificial Intelligence Court Rules | Westlaw Edge](#)

[ARTICLE: Rule 11 Is No Match for Generative AI, 27 Stan. Tech. L. Rev. P308](#)

[Resource: AI Orders | Responsible AI in Legal Services \(rails.legal\) Court Rules Tracker - Federal and State Courts](#)

# EXHIBIT 2

## MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)  
From: Rules of Evidence Subcommittee  
Re: Update on Potential Rules Amendments to Address Artificial Intelligence  
Date: October 28, 2024

---

Following the August 16, 2024, Supreme Court Advisory Committee meeting, our subcommittee has been reviewing whether the Texas Rules of Evidence should be amended to address issues related to artificial intelligence, particularly involving generative AI and the unique concerns caused by ‘deep-fakes’. (Please see the Subcommittee’s August memo for additional background.)

The Subcommittee has reviewed studies and law review articles discussing the advent of AI and the unique evidentiary issues that will impact the determination of authenticity, admissibility and whether the admission of this evidence could be unfairly prejudicial. Some of those articles are included in the material appended to this memo.



Deepfakes in Court  
How Judges Can Pro



Deepfake Dilemma



The Problem of  
Chopp edits TX Bar JcDeepfakes and AI-Ge

The Subcommittee paid particular attention ongoing discussions by the Federal Rules of Evidence Advisory Committee that has been reviewing whether the Federal Rules of Evidence should be amended to address the unique evidentiary consequences triggered by the development of AI technology. Of note are the [October 27, 2023](#), [April 19, 2024](#), and [November 8, 2024](#), Advisory Committee Agenda Books that include reports on the topic and minutes of the Advisory Committee’s deliberations. The Subcommittee commends to the Committee the excerpt from November 8 Agenda Book included as an exhibit to this Memo.

The Subcommittee also met virtually with Judge Paul Grimm (former U.S. District Judge and Director of the Bolch Judicial Institute at Duke University and Professor of Law) and Professor Maura Grossman, University of Waterloo - David R. Cheriton School of Computer Science; York University - Osgoode Hall Law School, to discuss their proposals to (1) amend the Federal Rules of Evidence to address the challenge of deep-fakes and (2) amending Rule 901 to provide a specific methodology for parties to prove-up AI generated records.

### The Subcommittee’s Recommendation

The Subcommittee has concluded that the Advisory Committee should consider amendments to the Texas Rules of Evidence to provide trial courts and parties with guidance on resolving evidentiary issues arising out of disputes whether proffered evidence is reliable and authentic or

Exhibit 2

potentially a deep fake generated by AI. Additionally, the Subcommittee also believes there is merit in the Committee considering amending Rule 901 and 902 and the Comments to the rules to provide courts and litigants with a clear procedure to address the authentication of AI generated records and how to resolve objections to admission of this evidence.

But the Subcommittee recommends that the Committee defer acting on potential amendments to the Texas Rules of Evidence to monitor the deliberations of the Federal Evidence Rules Advisory Committee which has been evaluating the same issues pertaining to AI. As reflected in the portion of the Evidence Advisory Committee's Agenda Book, the Advisory Committee will discuss potential options at its November 8, 2024, meeting in Washington, D.C.

The Subcommittee will continue to monitor the work of the Federal Rules of Evidence Advisory Committee and plans to work towards a proposed set of amendments for the Committee's consideration in early 2025.

# EXHIBIT 3



STATE BAR LITIGATION SECTION REPORT

# THE ADVOCATE



## ARTIFICIAL INTELLIGENCE



VOLUME 109

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2024

Exhibit 3



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## EDITOR'S COMMENTS



LONNY HOFFMAN

**A**RTIFICIAL INTELLIGENCE IS RESHAPING THE PRACTICE OF CIVIL LITIGATION, challenging traditional legal frameworks and prompting fresh ethical and procedural considerations. In this special issue, we delve into artificial intelligence and the law, with articles addressing its profound implications.

Our contributors explore critical topics, including the ethical responsibilities surrounding generative AI use, evidentiary challenges posed by AI-driven data, and the judiciary's evolving regulatory role. Practical tools like AI in document review and discovery are examined alongside emerging issues in copyright, intellectual property, and employment law. Finally, we turn to the unique complexities of litigating algorithmic systems, a field that demands novel legal strategies.

Through this symposium, we aim to equip legal practitioners, judges, and scholars with a deeper understanding of AI's transformative role in civil litigation, fostering dialogue about its responsible and effective integration into legal practice.

Jason Fulton chaired the editorial board subcommittee that worked up the issue, which included Hon. Sofia Adrogué, Roger Hughes, Greg Love, Matt Orwig, and Michelle Stratton, and associate editors Matthew Hoffman and Eugene Temchenko. Finally, we're again grateful to Dylan Drummond for the next installment of Procedure and Evidence Update. I look forward to hearing what you think of the symposium. My email is [lhoffman@uh.edu](mailto:lhoffman@uh.edu).

Regards,

A handwritten signature in black ink, appearing to read "Lonny Hoffman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lonny Hoffman  
Editor in Chief

P.S. – If you are wondering, the answer is yes: ChatGPT wrote the first two paragraphs above.

## CHAIR'S REPORT



REBECCA SIMMONS

**A**S CHAIR OF THE LITIGATION SECTION OF THE STATE BAR OF TEXAS, I am honored to lead during a period of significant transformation in both technology and governance. This moment presents both opportunities and challenges for our profession, and our Section remains committed to equipping you with the tools and insights to navigate them effectively.

### The Rise of Artificial Intelligence in Legal Practice

Artificial intelligence (AI) has swiftly transitioned from a concept to a permanent fixture in our profession. In 2025 and going forward, AI is projected to play a transformational role in the legal field, reshaping how we work and deliver value to our clients. While AI holds immense potential for streamlining processes like legal research, document drafting, and nonbillable tasks such as timekeeping and invoicing, it also introduces unique challenges. This quarter's edition of *The Advocate* focuses on the role of AI in the legal profession. The technology is still in its refinement phase, and many lawyers remain dissatisfied with its current capabilities and its reliability. Issues such as AI bias, "hallucinations" (incorrect or fabricated outputs), and the lack of ethical guidance are critical hurdles. Despite these challenges, AI's promise lies in its ability to enhance efficiency, particularly for small and mid-sized firms. By adopting specialized legal tech, firms can offer high-quality services, increasing access to justice while staying competitive in a rapidly evolving market.

### The Impact of a New Administration

The election of Donald Trump as President introduces a new era of policies and priorities that will undoubtedly influence the practice of law. His administration's emphasis on deregulation, limited government, and states' rights could bring sweeping changes to sectors like energy, finance, healthcare, and technology. For litigators, these policy shifts will likely generate increased demand for legal expertise in navigating new regulatory frameworks and addressing disputes arising from executive actions, particularly in areas such as environmental law, immigration, and healthcare. The anticipated rollback of regulations may also create a surge in litigation as businesses and advocacy groups challenge these changes.

### Staying Informed and Engaged

Amid these transformative developments, staying informed has never been more critical. The Litigation Section is committed to supporting you through this period of change with timely resources and programming. In addition to this quarter's *Advocate* spotlight on AI, our *News for the Bar* publication will continue to provide updates on emerging trends. We also offer free online lunch-and-learn CLE programs to our members, addressing timely topics such as the ethical use of AI, practice in the new Business Courts, as well as updates on Oil and Gas litigation, and jurisdictional issues. These sessions are designed to keep you at the forefront of the profession, offering practical tools and insights to adapt and thrive.

### Looking Ahead

The convergence of AI and a new political landscape presents a defining moment for the legal profession. As attorneys, we have the opportunity—and responsibility—to ensure that technology and policy changes serve justice and the rule of law. By staying engaged, informed, and adaptable, we can turn these challenges into opportunities to better serve our clients and society.

Sincerely,

Rebecca Simmons  
Chair, Litigation Section  
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ARTIFICIAL  
INTELLIGENCE



# FROM CODING TO CODE OF CONDUCT: UNDERSTANDING THE ETHICAL DIMENSIONS OF LAWYERS’ USE OF GENERATIVE AI

BY HON. JOHN G. BROWNING

**I**N HIS DECEMBER 2023 YEAR END REPORT on the Federal Judiciary, U.S. Supreme Court Chief Justice John G. Roberts sounded a warning about “the latest technological frontier: artificial intelligence (AI).”<sup>1</sup> Even as this technology has “great potential to dramatically increase access to key information for lawyers and non-lawyers alike,” he noted, it also “risks invading privacy interests and dehumanizing the law.”<sup>2</sup> The use of AI, Roberts observed, “requires caution and humility,” and he predicted that “judicial work—particularly at the trial level—will be significantly affected by AI.”<sup>3</sup>

The work of lawyers is also being impacted by artificial intelligence. In March 2023, LexisNexis published a survey of lawyers, law students, and legal consumers, in which 64% of lawyers responded that they had not used generative AI for work or any other purpose.<sup>4</sup> Only 10% of those surveyed felt that AI would have a “transformative” impact, while 29% felt it would have a “significant” impact, and 50% believed the technology would only have “some impact.”<sup>5</sup> As far as what legal tasks the respondents felt AI could be used for, 59% saw it as a tool for research, 53% believed it might assist in drafting documents, and 40% regarded it as a potential help in document analysis.<sup>6</sup>

What a difference a year and a half can make! In the time since that survey’s results, there have been highly publicized incidents of lawyers misusing generative AI all over the country,<sup>7</sup> and judges have demonstrated both a desire to regulate its use by lawyers,<sup>8</sup> and a desire to experiment with the use of AI themselves.<sup>9</sup> Lawyers’ attitudes toward generative AI have been changing as well. A Thomson Reuters Institute study, *Chat GPT and Generative AI Within Law Firms*, found that 82% of attorneys surveyed believed that generative AI can be applied to legal work, and only slightly more than half (51%) believed that it *should*.<sup>10</sup> A Wolters Kluwer study of

lawyers found that more than 80% of attorneys responding felt that generative AI “will create transformative efficiencies” for legal tasks.<sup>11</sup> Litigation was listed among the practice areas that were described as “most likely to be affected by generative AI.”<sup>12</sup>

What is it about the use of generative AI by lawyers that make so many of us wary and ethically troubled? Without a doubt, the string of highly publicized cases that began with *Mata v. Avianca, Inc.* in the late spring of 2023 that led to a small landslide of judicial reactions (in the form of standing orders and amended local rules) had a great deal to do with it. Lawyers fear public embarrassment for ineptitude almost as much as they fear disciplinary action or sanctions.

**A Wolters Kluwer study of lawyers found that more than 80% of attorneys responding felt that generative AI “will create transformative efficiencies” for legal tasks.**

*Mata v. Avianca, Inc.* was an airline personal injury case in which the plaintiff’s two New York lawyers filed an opposition to a motion to dismiss—but their opposition cited fictitious cases.<sup>13</sup> After it became obvious that

the cases had been fabricated by ChatGPT, the court held a sanction hearing in which the two plaintiff’s lawyers fell on their swords, admitting that using ChatGPT was their sole “research.”<sup>14</sup> The court held that the attorneys had “abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.”<sup>15</sup> Judge Kevin Castel sanctioned each lawyer \$5,000, ordered them to complete continuing legal education on technology competence and AI, ordered them to send a copy of the judge’s order to their client, and also ordered them to write letters of apology to each of the judges falsely identified by ChatGPT as having authored the fabricated cases.<sup>16</sup>

Unfortunately, *Mata v. Avianca, Inc.* was hardly the last of such

embarrassing incidents.<sup>17</sup> The wave of such “hallucination” cases teaches us that lawyers do not yet fully grasp the ethical ramifications of their use of generative AI. There are multiple areas of professional conduct that are impacted by a litigator’s use of AI: an attorney’s duty of competence in representation; the duty of confidentiality to clients; the duty to communicate; the duty of candor to the tribunal; the duty to supervise, and the duty to charge a reasonable fee. A number of jurisdictions have already provided ethics guidance to lawyers addressing these areas. This includes California,<sup>18</sup> Florida,<sup>19</sup> Kentucky,<sup>20</sup> Washington, D.C.,<sup>21</sup> Michigan,<sup>22</sup> Missouri,<sup>23</sup> New Jersey,<sup>24</sup> and Pennsylvania.<sup>25</sup> Another jurisdiction, North Carolina, has issued a Proposed Formal Ethics Opinion on the “Use of Artificial Intelligence in a Law Practice,” and is soliciting comments on it until October 15, 2024.<sup>26</sup> Texas’ new ethics opinion on attorney use of generative AI was issued for public comment at press time in late November. The ABA has recently weighed in as well.<sup>27</sup> A closer look at each of these ethical obligations and how they relate to a trial lawyer’s use of generative AI is warranted.

#### A. Competence

Under Rule 1.1 of the Model Rules of Professional Conduct, lawyers have an obligation to provide competent representation to their clients.<sup>28</sup> Comment 8 to this Rule makes it clear that this includes not only exercising the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” but also understanding “the benefits and risks associated” with technologies relevant to providing these services.<sup>29</sup> To date, forty of the fifty states have adopted some version of Comment 8 requiring technology knowledge and competence.<sup>30</sup> As ABA Formal Opinion 512 states, for lawyers using generative AI, this does not require them to become experts, but they must have “a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use.”<sup>31</sup> Furthermore, this is not, as the opinion points out, “a static undertaking.”<sup>32</sup> In light of the rapid pace of innovation, lawyers’ duties in this regard are ongoing. This includes being aware of the limitations of generative AI tools, including generating “false or inaccurate results” or “providing ostensibly plausible responses that have no basis in fact or reality.”<sup>33</sup> Because of this, a lawyer cannot rely on or submit the output of a generative AI tool without independently verifying or reviewing this output. Even if lawyers do not necessarily expect to use generative AI in a given matter, they should still be aware of the tools relevant to their work so that “they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.”<sup>34</sup>

*Mata v. Avianca, Inc.* was a classic case of the lawyers’ breach of this duty of technology competence. The lawyers did not familiarize themselves with ChatGPT, and mistakenly assumed it was akin to a free legal research service.<sup>35</sup> They further operated “under the false assumption and disbelief that this website could produce completely fabricated cases.”<sup>36</sup>

#### B. Confidentiality

Formal Opinion 512 highlights a lawyer’s duty of confidentiality of client information under Model Rule 1.6, along with the responsibility to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”<sup>37</sup> However, as the opinion notes, the self-learning generative AI tools into which attorneys input client information “may disclose information relating to the representation to persons outside the firm who are using the same GAI tool,” or to people within the firm who are either “prohibited from access to said information because of an ethical wall,” or who “could inadvertently use the information from one client to help another client.”<sup>38</sup> Because of this, the opinion states that “a client’s informed consent is required prior to inputting information relating to the representation” into a generative AI tool.<sup>39</sup> Moreover, as the opinion elaborates, this requires actual informed consent, and not “merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use” generative AI.<sup>40</sup>

#### C. Communication

Model Rule 1.4 addresses a lawyer’s duty to communicate with the client, and in particular, Model Rule 1.4(a)(2) requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>41</sup> For trial lawyers using generative AI, such communication would be required if the client expressly requires disclosure, in situations where “the lawyer proposes to input information relating to the representation into the GAI tool,” when the use of a generative AI tool “will influence a significant decision in the representation,” or “when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer’s fee.”<sup>42</sup> Accordingly, trial lawyers would be well-advised to address and explain their use of generative AI early (such as in the client engagement agreement) and throughout the attorney-client relationship.

#### D. Candor to the Tribunal

Model Rule 3.3 states that lawyers may not knowingly make any false statements of law or fact to a tribunal, or fail to correct a material false statement of law or fact previously made to a tribunal.<sup>43</sup> Given the potential for generative AI tools to

produce inaccurate information, this opinion reinforces the importance of lawyers' ensuring the accuracy of their generative AI outputs, especially before they are incorporated into a filed motion or brief—or correcting mistaken information or citations after the motions or briefs have been filed. Despite this, lack of candor to the tribunal has been arguably the most frequent ethical lapse by trial attorneys using (or more accurately, misusing) generative AI. For example, in *Mata v. Avianca, Inc.*, the court dismissed the offending attorney's protestations of innocence and found that the lawyer "knew before making a submission to the Court that the full text [of the opinions] could not be found *but kept silent*."<sup>44</sup> As the court elaborated, "An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system."<sup>45</sup>

#### E. Duty to Supervise

Under Model Rules 5.1 and 5.3, lawyers in managerial and supervisory roles have ethical obligations to the firm, other lawyers, and non-lawyers associated with the lawyer.<sup>46</sup> As Formal Opinion 512 demonstrates, those obligations include these individuals' use of generative AI. According to the opinion, lawyers in managerial and supervisory roles should "establish clear policies" on the firm's use of generative AI, and should also ensure that subordinate lawyers and non-lawyers are trained on such subjects as "the ethical and practical use of the GAI tools relevant to their work," as well as the "risks associated with relevant GAI use."<sup>47</sup>

The Colorado "hallucination" case of *People v. Crabill* is one of multiple examples that illustrate what can happen when one or more lawyers breach the duty of supervision.<sup>48</sup> In *Crabill*, a newly-licensed attorney was assigned by his firm "to prepare a motion to set aside judgment in the client's civil case," even though he "had never drafted such a motion before."<sup>49</sup> *Crabill* used ChatGPT, which cited fictitious caselaw, and *Crabill* never attempted to verify that the citations were accurate before filing the motion with the court.<sup>50</sup> Although he was confronted by the court about the fake cases, *Crabill*'s initial reaction was to falsely blame a legal intern. *Crabill*'s license was suspended for one year and one day.<sup>51</sup>

#### F. Fees

Model Rule 1.5(a) requires a lawyer's fees and expenses to be "reasonable."<sup>52</sup> Formal Opinion 512 states that this Rule applies to the use of generative AI and requires explaining charges related to the use of generative AI preferably either before the start of the representation or shortly thereafter.<sup>53</sup> In determining the reasonableness of fees, the opinion recommends that lawyers should account for its potential to be "a

faster and more efficient way to render legal services."<sup>54</sup> The opinion also instructs lawyers to "analyze the characteristics of generative AI tools and how they will be used before deciding if each tool is part of the firm's overhead, or an out-of-pocket to be billed to the client."<sup>55</sup> Importantly, because of the attorney's duty of competence, attorneys may not charge clients for the time incurred in educating themselves about generative AI tools that they will "regularly use for clients" in the course of practice.<sup>56</sup>

Will lawyers' use of generative AI ever reach the point of becoming an expectation, part of the attorney's reasonable standard of care? The profession is not there yet. However, as Formal Opinion 512 speculates, the:

establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.<sup>57</sup>

The 21<sup>st</sup> century trial lawyer must ensure not only that AI-generated content is accurate, but also that the lawyer's own use conforms to the ethical standards of our profession. Chief Justice Roberts was correct to be concerned about the risk of AI "dehumanizing the law." With its immense potential to enhance efficiency and accuracy, generative AI is indeed transformative, but its output is no substitute for a lawyer's professional judgment and adherence to ethical duties.

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<sup>1</sup> CHIEF JUSTICE JOHN G. ROBERTS, JR., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY, SUP. CT. U.S. (Dec. 31, 2023), <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Matt Reynolds, *Majority of Lawyers Have No Immediate Plans to Use Generative AI, LexisNexis Survey Finds*, ABA J. (Mar. 24, 2023), <https://www.abajournal.com/web/article/survey-finds-majority-of-lawyers-have-no-immediate-plans-to-use-generative-ai>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

<sup>8</sup> See, e.g., *Judge Brantley Starr – Judge Specific Requirements:*



*Mandatory Certification Regarding Generative Artificial Intelligence*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>.

<sup>9</sup> Snell v. United Specialty Ins. Co., No. 22-12581 (11th Cir. May 28, 2024) (Newsom, Jr. concurring).

<sup>10</sup> CHAT GPT AND GENERATIVE AI WITHIN LAW FIRMS, THOMSON REUTERS INST. (2023), <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2023/04/2023-Chat-GPT-Generative-AI-in-Law-Firms.pdf>.

<sup>11</sup> *Generative AI in the Law: Where Could All This Be Headed?*, WOLTERS KLUWER (2023), <https://www.wolterskluwer.com/en/expert-insights/generative-ai-in-the-law-where-could-this-all-be-headed> [full report on file with author].

<sup>12</sup> *Id.*

<sup>13</sup> Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Ex Parte Lee*, 673 S.W.3d 755 (Tex. App.—Waco 2023); *People v. Crabill*, 23 PDJ067 (Colo. Sup. Ct. Nov. 22, 2023), 2023 WL8111898; Order to Show Cause, U.S. v. Cohen, No. 1:18-cc-00602-JMF (S.D.N.Y. Dec. 12, 2023); *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024).

<sup>18</sup> PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW, ST. B. CAL. STANDING COMM. ON PROF'L RESP. & CONDUCT (2024), <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>.

<sup>19</sup> PROFESSIONAL ETHICS COMMITTEE OP. 24-1, FLA. ST. B. ASS'N (Jan. 19, 2024), <https://www.floridabar.org/etopinions/opinion-24-1/>.

<sup>20</sup> ETHICS OPINION KBA E-457, KENTUCKY B. ASS'N (Mar. 15, 2024), [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics\\_Opinions\\_\(Part\\_2\)/kba\\_e-437.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)/kba_e-437.pdf).

<sup>21</sup> *Ethics Opinion 388: Attorneys' Use of Generative Artificial Intelligence in Client Matters*, D.C.B. (Apr. 2024), <https://www.dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-388>.

<sup>22</sup> *Artificial Intelligence for Attorneys – Frequently Asked Questions*, MICH. ST. B. (May 2024), <https://www.michbar.org/opinions/ethics/AIFAQs>.

<sup>23</sup> *Informal Opinion No. 2024-11*, MO. OFFICE LEGAL ETHICS COUNSEL (Apr. 25, 2024), <https://mo-legal-ethics.org/informal-opinion/2024-11/>.

<sup>24</sup> *Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers*, N.J. SUP. CT. (Jan. 24, 2024), <https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey>.

<sup>25</sup> JOINT FORMAL OPINION 2024-200: ETHICAL ISSUES REGARDING THE USE OF ARTIFICIAL INTELLIGENCE, PENN. B. ASS'N COMM. LEGAL ETHICS & PROF'L RESPONSIBILITY AND PHIL. B. ASS'N PROF'L GUIDANCE COMM. (May 22, 2024), <https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf>.

<sup>26</sup> *Proposed 2024 Formal Ethic Opinion 1 – Use of Artificial Intelligence in a Law Practice*, N.C. B. (July 19, 2024), <https://www.ncbar.gov/>

[for-lawyers/ethics/proposed-opinions/](#).

<sup>27</sup> FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, ABA STANDING COMM. ETHICS & PROF'L RESPONSIBILITY (July 29, 2024), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/ethics-opinions/aba-formal-opinion-512.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf).

<sup>28</sup> MODEL RULES PROF'L CONDUCT R. 1.1 (2023).

<sup>29</sup> *Id.* Cmt. 8.

<sup>30</sup> Robert Ambrogio, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence*, LAW SITES, <https://www.lawnext.com/tech-competence>.

<sup>31</sup> FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

<sup>36</sup> *Id.*

<sup>37</sup> MODEL RULES PROF'L CONDUCT R. 1.6.

<sup>38</sup> FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 6–7.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> MODEL RULES PROF'L CONDUCT R. 1.4, 1.4(a)(2).

<sup>42</sup> FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 8–9.

<sup>43</sup> MODEL RULES PROF'L CONDUCT R. 3.3.

<sup>44</sup> Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023) (emphasis added).

<sup>45</sup> *Id.*

<sup>46</sup> MODEL RULES PROF'L CONDUCT R. 5.1; MODEL RULES PROF'L CONDUCT R. 5.3.

<sup>47</sup> FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 10–11.

<sup>48</sup> *People v. Crabill*, 23 PDJ067 (Colo. Sup. Ct. Nov. 22, 2023).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> MODEL RULES PROF'L CONDUCT R. 1.5(a).

<sup>53</sup> FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 12–14.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 5.

# THE DEEFAKE DILEMMA

BY HON. PAUL W. GRIMM (RET.)

**I**T IS DIFFICULT TO READ THE NEWS WITHOUT HEARING about the latest incident of cyberfraud caused by AI-powered deepfake technology. Or the use of deepfakes to cause dis-information in political campaigns, undermine public confidence in our governmental institutions, or disrupt businesses. According to one cyber-technology consultant, “[o]ver the past few years, the growth of deepfake material has been exponential, with the number of deepfakes online doubling every six months . . . . [I]n 2023, roughly 500,000 video and voice deepfakes were shared on social media around the world. By 2025, we can expect to see 8 million deepfakes shared online consistent with doubling deepfakes every six months.”<sup>1</sup>

What are the impacts of this explosion in widely disseminated fake content? They include political manipulation, misinformation and fake news, invasion of privacy, disruption of business, and fraud.<sup>2</sup> Given the explosive growth of deepfakes in wide circulation, it is inevitable that courts will have to grapple with the evidentiary challenges this technology presents as they are called upon to rule on admissibility of very realistic-looking fake video, audio, audiovisual, image, and text content that one litigant claims is authentic, but the opposing party claims is fake. The challenge will be great because the current Federal and Texas Rules of Evidence are not well equipped to handle the challenges associated with deepfakes.<sup>3</sup> This article will outline what the evidentiary dilemma is and offer suggestions as to how the current Federal and Texas Rules of Evidence may be used to address this challenge.

What are deepfakes? One cyber-technology consultant has defined them usefully:

Deepfakes are synthetic media often in the form of videos, audio, or images generated through artificial intelligence (AI) and deep learning algorithms. These algorithms use vast datasets to change or replace existing content, seamlessly overlaying one person’s likeness

[or voice] onto another. A similar, but perhaps not as widely recognized[,] form of deceptive media is shallow fakes, where instead of using AI, media is altered with simple editing tools. This process has reached a level of sophistication where it can be challenging to differentiate between genuine and fake content.<sup>4</sup>

To help focus our discussion, let’s start with a classic example of an evidentiary dispute that a judge may have to resolve involving evidence challenged as deepfake. In an employment discrimination case, plaintiff has sued her employer for a hostile work environment, alleging that her male supervisor has harassed her repeatedly over a nine-month period by demanding that she submit to his sexual advances. Plaintiff alleges these incidents occurred both in person and by sending her graphic voicemail messages demanding that she submit to his advances, and threatening her job should she refuse. Discovery has resulted in plaintiff’s production of three highly offensive, graphic, and threatening voicemail messages left on the plaintiff’s cell phone, and the voice sounds exactly like the supervisor’s. The supervisor adamantly denies that he has ever harassed plaintiff as she claims, and especially denies that it is his voice on the voicemail messages.

Defense counsel has filed a motion seeking to exclude the voicemail messages on the grounds that they are fake and claiming that if introduced as evidence, they will be excessively prejudicial. The plaintiff responds by attaching an affidavit that states that she has worked with her supervisor for several years, is extremely familiar with his voice, having conversed with him countless times in person, on videoconferences, on the phone, and has received many voicemail messages from him in the past on her office voicemail. Unlike other evidentiary challenges, such as whether evidence is hearsay, or an expert’s opinions are admissible, the deepfake challenge presents a somewhat unique problem—the parties diametrically disagree about the very nature of the evidence.

**Deepfakes are synthetic media often in the form of videos, audio, or images generated through artificial intelligence (AI) and deep learning algorithms.**

Plaintiff claims the voicemails are authentic messages her supervisor left on her cell phone, while the defendant claims they are entirely fake, created by a generative AI software application. Their disagreement is about the fundamental nature of what the evidence is.

What are the evidentiary rules that will govern the judge's ruling? First, of course, are Rules 401 (relevance), 402 (creating a presumption that relevant evidence is admissible unless required to be excluded by a constitutional, statutory, or rule provision), and 403 (which allows the judge to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). With regard to Rule 401, the showing needed to demonstrate relevance is slight—if the evidence has any tendency, even if only a little—to make a fact that is important to the resolution of the case more or less probable than it would be without the evidence, then it is relevant.<sup>5</sup>

Next, and importantly, are Rules 104(a) (which provides that the judge makes *preliminary* rulings about the admissibility of evidence, qualification of witnesses, and the existence of a privilege—the so-called “judge as gatekeeper” rule) and 104(b) (which provides that when the relevance of evidence depends on fulfillment of a condition of fact, the evidence is admissible subject to proof of the existence of that fact—the “conditional relevance” rule). Rules 104(a) and 104(b) are particularly important because they allocate the shared responsibility of the judge and jury in determining the ultimate admissibility of evidence where the facts that will govern whether the evidence is relevant are disputed. Our hypothetical presents this exact issue: Plaintiff claims the voicemails are authentic examples of her supervisor's voice. If true, then they are clearly relevant in proving her harassment claims. But the supervisor denies that it is his voice, and if the evidence produced to cast doubt about the authenticity of the messages is accepted by the jury as true, then the evidence is not relevant, and therefore inadmissible.

The critical point to be made is that when relevance cannot be determined without first resolving a dispute of fact (whether it is the supervisor's voice or not), then the judge cannot make the admissibility call alone—the factual dispute must be submitted to the jury for its determination of whether the voice is or is not the supervisor's. If they find it is, the voicemails are relevant and may be considered by the jury and given the weight they feel it deserves. But if they find the voice is not the supervisor's, then the voicemails are not relevant, and therefore are inadmissible and must be disregarded by the jury in reaching their verdict. But how can the

jury be expected to make the right call when generative AI technology has made it possible for almost anyone to make deepfakes that are so realistic that even experts have difficulty in determining whether they are real or fake?

This challenge is particularly difficult because studies have shown that once juries have been exposed to realistic appearing audio, visual, or audio-visual media, they may be unable to disregard its content even if it has been shown to be fake. As one commentator has observed regarding deepfake videos,

The dangerousness of deepfake videos lie in the incomparable impact these videos have on human perception. Videos are not merely illustrative of a witnesses' testimony, but often serve as independent sources of substantive information for the trier of fact. Since people tend to believe what they see, “images and other forms of digital media are often accepted at face value. Regardless of what a person says, the ability to visualize something is uniquely believable.” Video evidence is more cognitively and emotionally arousing to the trier of fact giving the impression that they are observing activity or events more directly.<sup>6</sup>

The same may be said for audio recordings. If “seeing is believing,” so too is hearing.

The final rules that must be considered in addressing the admissibility of evidence challenged as deepfake are Rules 901(a) (which sets forth the requirement that the proponent of non-testimonial evidence must first authenticate or identify it to show that it is what the proponent claims it is), Rule 901(b) (which sets out ten non-exclusive examples of how evidence can be authenticated), and 902 (which lists a series of ways in which evidence may be authenticated without the need of extrinsic evidence). It is important to keep in mind that the party undertaking to authenticate evidence under Rule 901(a) need only make that showing by a preponderance of the evidence, i.e., showing that it is more likely authentic than not.<sup>7</sup> And, thanks to Rule 901(b), the proponent has quite a number of ways in which to make this threshold showing, including Rules 901(b)(1) (testimony of a witness with personal knowledge), 901(b)(3) (comparison of a example known to be authentic with one in which authenticity is challenged), 901(b)(4) (distinctive characteristics of the evidence), 901(b)(5) (opinion as to voice), and 901(b)(9) (showing the evidence was created by a system or process that produces accurate results).

In the hypothetical above, the plaintiff has many ways she can demonstrate by a preponderance of evidence that the voicemail is that of her supervisor, including her opinion that it is his voice, based on her familiarity with it (Rule 901(b)(5)), or by introducing other recordings of the supervisor's voice that are acknowledged to be authentic and letting the jury hear those along with the voicemails that he disputes are his (Rule 901(b)(3)). Against this evidence of authenticity, the supervisor's denial (in the very voice heard on the voicemail) that it is him may pale in comparison. But there may be corroborating evidence the supervisor can produce supporting his contention that it is not his voice, such as witnesses who will confirm that at the time and date that the voicemail was left, he was present with them and did not make the call, or the testimony of a forensic expert that the voicemails are fake (provided the expert qualifies under Rule 702).

The initial dilemma the judge must resolve is first whether he or she believes that it is a close call as to the authenticity of the voicemails, then whether the contents are so graphic and powerful that the jury will not easily be able to disregard them once they have been heard (even if the jury thinks that it likely is fake). The judge must then determine whether to nevertheless allow the jury to hear the disputed evidence under Rule 104(b) or to rule under Rule 403 that the danger of unfair prejudice to the defendant is so great that the voicemails should not be heard by the jury but should be excluded? In resolving these dilemmas, the judge must confront a “catch 22” that the current rules of evidence create in situations such as this.

Whether the probative value of challenged evidence is substantially outweighed by the danger of unfair prejudice is a determination that the judge,<sup>8</sup> not the jury, must make. But there is the catch. The introductory phrase to Rule 403 states that “[t]he court may exclude *relevant* evidence” if it determines it is unfairly prejudicial. Evidence must be authentic for it to be relevant, and if the facts offered to authenticate it are challenged, it is the jury—not the judge alone—that must make that determination. In the case of deepfakes, does that mean that the judge must allow the disputed facts to be heard by the jury for its determination as to whether the challenged evidence is authentic or not—even if the judge believes that allowing the jury to hear the evidence may be unfairly prejudicial because the jurors are unlikely to be able to disregard it even if they find it is fake? That is the “catch 22” of the evidence rules when it comes to deepfakes.

There is no clear answer to this apparent dilemma, but there is relevant case law in analogous situations that suggests that

there may be a way to resolve this dilemma. For example, in *Huddleston v. United States*, 108 S Ct. 1496, 1502 (1988), the Supreme Court set forth the evidentiary standard judges must apply when deciding whether to admit “other crimes, wrongs, or acts” evidence pursuant to Rule 404(b). The question before the Court was whether the trial judge was required to make a preliminary finding that the government had proved the “other act” by a preponderance of the evidence before admitting this evidence. Chief Justice Rehnquist, writing for the Court, held that the Court did not have to make such a finding itself, but it merely had to assess whether under Rule 104(b) there was sufficient evidence for the jury to find by a preponderance that the government had proved the conditional fact necessary to make the other acts evidence relevant. (In *Huddleston*, that fact was whether television sets sold by the defendant were stolen.)

The Court concluded its analysis by addressing the possibility that the defendant might be unfairly prejudiced by the approach that it had endorsed. It held,

We share the petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from . . . other sources: first from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); *third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . .*<sup>9</sup>

There were two junctions at which the lower court in *Huddleston* could have made its Rule 403 analysis. It could have preliminarily decided that the government had offered sufficient proof for the jury to reasonably find that the disputed conditional act had been met, allowed the disputed evidence to go to the jury for its determination under Rule 104(b), then, after considering all the evidence before the jury, if the court determined that the other acts evidence was unfairly prejudicial, exclude it under Rule 403 and instruct the jury to disregard it. Alternatively, there is nothing in the rule itself or the Court's decision that would preclude the judge from conducting its 403 analysis ahead of submitting the disputed evidence to the jury, and—if convinced that the jury would be unable to disregard the evidence if instructed under Rule 403 to do so—make the Rule 403 ruling before allowing the jury to hear the disputed evidence, excluding

it if the court finds that letting the jury hear the evidence in the first place would create too great a likelihood of unfair prejudice to the defendant.

Factors that might influence when a court makes its Rule 403 determination would include the reasons why the court was concerned about the possibility of unfair prejudice, and whether that concern is mitigated by other facts—such as independent corroborating facts supporting the proof of the conditional fact. In the case of evidence challenged as deepfake, the court would consider the plaintiff’s evidence that the evidence is authentic (in our hypothetical, the plaintiff’s opinion that the voice is that of the defendant), the defendant’s evidence that it is fake, whether there are other corroborating facts of authenticity beyond the plaintiff’s opinion that the voice is that of the defendant, and the likelihood that, having heard the challenged evidence, the jury would be able to disregard it if instructed by the court to do so.

Should Rule 403 be read to permit the trial judge to employ either of these two approaches to determine, based on the particular facts of the case, whether to make their Rule 403 prejudice evaluation before deciding whether to allow the jury to hear the disputed facts regarding authenticity, or afterwards, when all the rest of the evidence of the case has been heard? Research has failed to reveal any dispositive answer to this question. But when confronting a new twist to the interpretation of an existing rule of evidence, the judge can take solace from Rule 102, which states, “These rules [of evidence] should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”<sup>10</sup>

Guided by Rule 102, it cannot seriously be argued that Rule 403 must be interpreted so rigidly as to prohibit the judge from applying Rule 403 to preclude the jury from hearing the disputed facts relating to the authenticity of a challenged deepfake, if the judge determines that there is a reasonable likelihood that the jury will be unable to disregard the challenged evidence once they have seen it, even if instructed by the judge to do so. Such a dogmatic approach would sacrifice a fair outcome of the case in favor of evidentiary purity. And it would retard the development of the rules of evidence in the face of new technology that literally was unimaginable just a few years ago and risks undermining the ability of juries to fairly and accurately fulfill their role as factfinders.

While the possibility of fraudulent evidence being offered at trial always has existed, deepfakes present a unique threat.

Deepfake technology is readily available to the public at little or no cost, and the internet offers no shortage of sites that provide instruction about how to make deepfakes.<sup>11</sup> Deepfake technology has evolved very rapidly (and continues to do so), and it has become increasingly difficult to tell fake video, audio, audiovisual, and image content from authentic digital media. It is no exaggeration to say that deepfake technology has democratized fraud. The threat to the truthfinding mission of the jury presented by deepfake technology is of a magnitude that has not previously been seen. In such circumstances, Rule 102 provides ample authority for judges to use Rule 403 with sufficient flexibility to make their unfair prejudice assessment before submitting the contested facts regarding audio, visual, and audiovisual evidence to the jury under Rule 104(b). If the court finds that the danger of unfair prejudice in admitting evidence challenged as deepfake to the jury for its 104(b) determination is mitigated by independent facts that corroborate the authenticity of the evidence, the court should go ahead and let the jury hear the contested facts and instruct them that if they find that it is more likely than not authentic, they may consider it and give it the weight they find it deserves. But if they conclude the challenged evidence more likely than not is not authentic, they should disregard it.

But if the court conversely finds that the impact of seeing the challenged deepfake is such that the jurors would be unable to disregard it if they find that it more likely than not is inauthentic, and the jury would be unable to disregard it if instructed by the court to do so, then the judge should be guided by Rule 102 and Rule 403 and exclude the evidence without sending it to the jury under Rule 104(b).

*Hon. Paul W. Grimm (ret.), David F. Levi Professor of the Practice of Law, Director, Bolch Judicial Institute at Duke Law School, U.S. District Judge (ret.). I gratefully acknowledge the contributions of my esteemed colleague Professor Maura Grossman, who reviewed this article and offered helpful suggestions for improving it. In addition, I would like to thank Matthew Chopp, a Duke Law School student for his editing and proofreading of this article. ★*

<sup>1</sup> Neill Jacobson, *Deepfakes and Their Impact on Society*, (Feb. 26, 2024) (internal citations omitted) <https://www.openfox.com/deepfakes-and-their-impact-on-society/>.

<sup>2</sup> *Id.*; see also Stanford University, *Dangers of Deepfake: What to Watch For* (Feb. 22, 2024) <https://uit.stanford.edu/news/dangers-deepfake-what-watch>.

<sup>3</sup> As relevant to this discussion, the Federal Rules of Evidence and Texas Rules of Evidence that are central to the admissibility of evidence challenged as deepfake are substantially identical. For



simplicity's sake, I will refer to the rule number, which will be the same under the Federal and Texas Rules of Evidence.

<sup>4</sup> Jacobson, *supra* note 2.

<sup>5</sup> Paul W. Grimm, Maura R. Grossman, & Gordon V. Cormack, *Artificial Evidence as Evidence*, 9 Nw. J. Tech. & Intell. Prop., 9, 87 (2021) (citing Michael M. Martin et al., 1 Federal Rules of Evidence Manual sec. 402.02[1] 401, 406-07 (12<sup>th</sup> ed. 2019) (“To be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the slightest bit more probable or less probable than it would be without the evidence.”) (italics in original)).

<sup>6</sup> Taurus Myhand, *Once The Jury Sees It, The Jury Can't Unsee it: The Challenge Trial Judges Face When Authenticating Video Evidence in the Age of Deepfakes*, 29 Widener L. Rev. 171, 174-75, 2023; see also Maura R. Grossman, Paul W. Grimm, Daniel G. Brown & Molly Xu, *The GPTJudge: Justice in a Generative AI World*, 23 Duke Law and Tech. Rev., 1, 25-27 nn.54, 55 and 59 (2023) (“Research has already demonstrated that humans are unable to reliably distinguish AI-generated faces from real faces in photographs and find the AI-generated faces to be more trustworthy. Audiovisual evidence is particularly scary. Studies have shown that ‘jurors who hear oral testimony along with video testimony are 650% more likely to retain the information,’ and that ‘video evidence powerfully affects human memory and perception of reality.’”) (internal citations omitted).

<sup>7</sup> *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542 (D. Md. 2007); see also Grimm, Grossman, & Cormack, *supra* note 6 at 94 (“Normally, a party has fulfilled its obligation to authenticate non-testimonial evidence by producing facts that are sufficient for a reasonable factfinder to conclude that the evidence more likely than not is what the proponent claims it is. In other words, by a mere preponderance. This is a relatively low threshold—51%.”).

<sup>8</sup> “The *court* may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.” Fed. R. Evid. 403 (emphasis added). The Texas rule is the same.

<sup>9</sup> *Huddleston*, 108 S. Ct. at 1502 (internal citations omitted) (emphasis added); see also *Johnson v. Elk Lake Sch. Dist.*, 283 F. 3d 138, 143-44 (3d Cir. 2002). In *Johnson*, the Third Circuit followed *Huddleston* when deciding whether, in a civil case seeking damages for sexual assault, evidence that the defendant previously had committed an “offense of sexual assault” pursuant to Federal Rule 415 should be admitted. The Court held that the trial court only needed to determine whether the jury reasonably could find by preponderance that the defendant had committed a prior sexual assault before admitting that evidence under Rule 104(b) for the jury's determination of whether the conditional fact had been proved by a preponderance. But it qualified its ruling, adding “[w]e also conclude, however, that even when the evidence of a past sexual offense is relevant, the trial court retains discretion to exclude it under Federal Rule of Evidence 403 if the evidence's ‘probative value is substantially outweighed by the danger of unfair prejudice . . . .’” *Id.* at 144.

<sup>10</sup> Texas Rule 102 is even more emphatic: “These rules [of evidence] shall be construed to secure fairness in administration, elimination

of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

<sup>11</sup> U.S. Gov't Accountability Off., GAO-20-379SP, *Science & Tech Spotlight: Deepfakes* (Feb. 20, 2020), <https://www.gao.gov/products/gao-20-379sp> (“Anyone with basic computing skills and a home computer can create a deepfake. Computer applications are openly available on the internet with tutorials on how to create deepfake videos.”).



# JUDICIAL REGULATION ON THE USE OF AI

BY HON. XAVIER RODRIGUEZ

**A**N ATTORNEY IN NEW YORK USED AN EARLY VERSION of ChatGPT, failed to verify the accuracy of ChatGPT's response, and then filed the response as a brief. It was then discovered that the response contained nonexistent cases. See *Mata v. Avianca, Inc.*<sup>1</sup> Sanctions were imposed on the lawyer by the court, and after that some courts across the country promulgated standing orders regulating the use of artificial intelligence tools in court filings.

Part I of this paper suggests that most of these standing orders are unhelpful and have largely been overtaken by the reality that artificial intelligence tools, especially generative artificial intelligence (GenAI) tools are becoming commonplace in the legal industry. That said, GenAI tools may produce errors and lawyers and pro se litigants have a responsibility to ensure that their filings are correct. Part II will address the propriety of judges using GenAI tools for research, judicial decision making, and the publication of any orders or opinions. Finally, Part III will discuss the use of AI tools in the discovery phases of civil litigation, and how courts should respond to disputes about the accuracy of any production.

## I. Standing Orders issued after *Mata v. Avianca* are generally unhelpful.

### A. What is GenAI (and how does it differ from earlier AI tools)?

Artificial intelligence (AI) tools have been used in the legal industry for some time now. An early form of AI in the legal space was technology assisted review (TAR) platforms. When documents were gathered for a discovery production, the TAR platform was “taught” by a human reviewer. The human reviewed a subset of the gathered documents and tagged each as either responsive or non-responsive. Once enough documents were appropriately tagged, the TAR platform then reviewed the remaining larger set of documents and predicted the coding/tagging for the remaining documents. Humans then evaluated the TAR platform results for accuracy.

GenAI is another type of AI. Large language models (LLMs) are one type of GenAI tool. LLMs are trained on massive amounts of text learn the probability distributions of words in that text. This statistical understanding of the language on which it was trained allows LLMs to predict the next word for a given piece of text, repeating this process to generate sentences, paragraphs, and more. AI images and video rely on a slightly different process.

### B. Why did some courts issue standing orders after the *Mata v. Avianca* mishap?

One of the first orders after *Mata v. Avianca* was issued by U. District Judge Brantley Starr. Judge Starr requires that all attorneys and pro se litigants “certify that a portion of any filing in [the] case [was] drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence—including quotations, citations, paraphrased assertions and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court.”<sup>2</sup> Judge Starr states that because the current state of GenAI tools could produce errors or hallucinations, the tool’s reliability has not been established. He adds that a GenAI tool could be “biased.”

Judge Starr does not elaborate on how the GenAI tool could be biased, but it is likely that he was referencing that LLMs learn from human-generated datasets and may absorb the biases present in the training dataset, potentially perpetuating stereotypes and discrimination. Further, selection bias may occur when the training data is not representative of the population or target audience. If certain groups or data are underrepresented or excluded from the training data, the AI model will lack the necessary knowledge to generate unbiased content. Judge Starr concludes that the perceived shortcomings in current GenAI tools potentially violated a lawyer’s duty to uphold the law.

Standing Orders have largely been overtaken by AI tools widely used in recognized applications.

Judge Starr states:

While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why.

A few other courts followed with orders of their own. Some judges have banned the use of any AI tool, GenAI or otherwise. Some require disclosure of use. Some require that lawyers preserve all prompts they enter into a GenAI tool. Some merely express that caution be exercised. For a listing of judicial orders on the use of AI, see <https://edrm.net/judicial-orders-2/>.

### C. Why are these orders unhelpful?

Attorneys and litigants should be cautious when using a GenAI product, for many reasons. Along with the possibility of hallucinations (fabrications or errors), there are legitimate concerns as to whether personally identifiable information may be inadvertently disclosed when prompting the tool, whether attorney-client or work-product privileged information may be waived, and whether adequate cybersecurity measures are maintained by the GenAI developer. To complicate the picture, questions still exist as to whether the GenAI developer or user could be liable for copyright infringement. During the development of a large language model, data is scraped from many sources, including material that enjoys copyright protection. Developers have asserted the “fair use” defense to this copying of training materials, but the viability of this defense has not been adjudicated fully. GenAI outputs could also infringe on copyrights, potentially subjecting both developers and users of their products to infringement claims. If the GenAI product hallucinates and inadvertently defames somebody, whether that is an actionable tort and who may be responsible remains undetermined. In addition, there have been times when the GenAI product has

produced dangerous, irresponsible, or degrading conduct. These “errors” are the result of the tool attempting to predict what the next set of words should be in response to a prompt. These GenAI tools are simply predictive algorithms, and like some human predictions they turn out to be inaccurate.

Despite the problems outlined above, GenAI tools designed for the legal industry rather than the general market have tried to reduce errors. Many of these products use retrieval augmented generation (RAG) to run the user’s prompt in a curated legal database (rather than relying solely on a large language model that has scraped non-legal, general data to engage in its predictions). By directing the LLM to work with specifically retrieved materials, accuracy is greatly improved. Accordingly, even though GenAI tools are still improving, criticisms of the early versions of general purpose consumer tools as justification for a complete ban are unfair.<sup>3</sup> One of these critical evaluations (Magesh), despite its conclusion that RAG-based legal AI systems have not eliminated hallucinations and should be used with caution, nevertheless concluded that “these products can offer considerable value to

legal researchers compared to traditional keyword search methods or general-purpose AI systems, particularly when used as the first step of legal research rather than the last word.”

More concerning to me is that these orders may (intentionally or unintentionally) stifle lawyer use of GenAI products.

Companies throughout the economy are adopting various AI tools to increase efficiency and lower costs. Attorneys must develop a fundamental understanding of the technology to appreciate any legal risks. As for GenAI products, lawyers will be expected by clients to likewise reduce the expense associated with many functions. Brief writing and analysis, as well as discovery review and production are large components of the costs associated in the civil justice system. Traditional reluctance to adopting new technology eventually falls (recall initial concerns over using email and the cloud), courts should avoid inadvertently slowing down the progress of technology in the law.

An additional issue associated with these orders is how to respond to the ever-increasing tools that have now incorporated some element of AI into their product (e.g., Westlaw Precision, LexisNexis, Bloomberg for research and drafting, Grammarly for editing, CLIO output used to justify an attorney fee request, Casetext CoCounsel, Clearbrief, etc.). Will courts monitor these products to determine whether

**Legal use of GenAI tools should be carefully monitored, but not be curtailed in a too restrictive fashion.**

they are a “traditional legal database”, or will these courts entertain a motion to approve a product upon some showing that the “platform has the requisite accuracy and reliability for legal briefing....”?

Additionally, legal aid organizations are developing a wide range of tools for self-represented litigants, including tools that use generative AI. It is one thing to discourage self-represented litigants from using ChatGPT, although it is understandable that some who cannot afford a lawyer and cannot secure *pro bono* representation might turn to ChatGPT and similar tools. But these orders go too far when they ban or chill the use of AI tools developed by legal aid organizations.

Instead of these orders, a practical approach is merely to remind attorneys of their existing obligations to ensure the accuracy of any documents they file, regardless of whether any technology was used. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.1 (a lawyer should only raise meritorious claims or defenses); 3.3 (a lawyer should not make a false statement of law or fact to a tribunal). Lawyers and pro se litigants (recall they are not subject to the attorney disciplinary rules) should merely be reminded of their obligations under the rules of civil procedure (FED. R. CIV. P. 11(b) and TEX. R. CIV. P. 13 – claims, defenses and legal contentions must be warranted by existing law and factual contentions must have evidentiary support). Additionally, to directly address the age-old problem of litigants citing bad law or failing to cite relevant law, judges should use tools offered by major legal information providers that instantly check the cases cited by the parties and identify relevant cases not cited by the parties.

## II. Use of GenAI tools by judicial officers

There have been at least two non-U.S. judicial officers who have announced that they used a GenAI tool to help draft their orders. The United Kingdom has recently announced guidance to its judicial officers in the appropriate use of GenAI (AI tools useful to summarize documents, drafting presentations and assisting with administrative tasks; but “AI tools are a poor way of conducting research to find new information you cannot verify independently. They may be useful as a way to be reminded of material you would recognise as correct.... [C]urrent public AI chatbots do not produce convincing analysis or reasoning.”).<sup>4</sup> A United States judge on the Eleventh Circuit recently published a concurring opinion that acknowledged using ChatGPT and Bard to understand what the “ordinary meaning” of “landscape” was. Defining that term was important in the commercial general liability policy at issue. Judge Newsom opined that because LLMs were trained on a large dataset they could “provide

useful statistical predictions about how, in the main, ordinary people ordinarily use words and phrases in ordinary life.”<sup>5</sup> The use of AI for that exercise may be useful, but it raises various considerations. Might the tool be biased, such as if it was trained on significant data that favors one side and little data that would support a finding for the other side? Also consider that consumer GenAI tools are designed to produce varied output for the same input entered multiple times, including by setting the “temperature” relatively high.<sup>6</sup> A tool tailored for this task would likely be designed differently. Also, whether an AI tool can be used to determine the original intent of certain other words or phrases when timeframes may be involved may be even more challenging, unless the dataset was curated with certain dates as guardrails. Another interesting question also is raised by using an AI tool. Is that “receiving factual information that is not part of the record”?<sup>7</sup>

As stated above, now that at least two major legal research platforms (Westlaw and LexisNexis) have announced the incorporation of GenAI into their products, some U.S. judicial officers and law clerks have begun using these tools in chambers.

The accuracy of AI systems that use GenAI is likely to increase, including by using other AI tools, RAG, databases, and knowledge graphs. That said, it is also likely that hallucinations or errors will occur. Accordingly, judicial officers should ensure that GenAI tools are used only as a tool, and that any responses to a prompt are not used as a final, unverified product. Further, the following codes of judicial conduct should be considered. A judge must act in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary. MODEL CODE JUD. CONDUCT, CANON 1.2, TEX. CODE JUD. CONDUCT, Canon 2A. A judge shall perform all duties of the judicial office fairly and impartially. MODEL CODE JUD. CONDUCT, CANON 2.2. A judge shall perform the duties of judicial office without bias or prejudice. MODEL CODE JUD. CONDUCT, CANON 2.3, TEX. CODE JUD. CONDUCT, Canon 3B(5). These canons likely prohibit a judicial officer from merely using a GenAI response as a final product, without first verifying the accuracy of the response.

## III. AI and Discovery in Civil Cases

When discovery is exchanged in civil cases, a producing party is under the obligation to ensure that its required initial disclosures under FED. R. CIV. P. 26(a) are “complete and correct as of the time” they were made.<sup>8</sup> When responding to requests for production and interrogatories, an attorney certifies that she has made a “reasonable inquiry” prior

to producing relevant, proportionate, and non-privileged information.

Some eDiscovery vendors are now marketing their products by asserting that document review can be considerably expedited and automated using AI tools that prioritize the review set by predicting relevance and suggesting “tags” when documents are similar to those already reviewed by a human reviewer. Vendors suggest that their AI-embedded technology surpasses traditional keyword searches because the AI technology can detect patterns and find related documents that a keyword may miss.

As these AI-enhanced eDiscovery platforms become used more widely it is highly likely that requesting parties will question what platform the producing party used, what “prompts” were given to the tool, and how the production was validated to ensure that enough responsive documents were produced. Courts have faced these questions previously when technology assisted review (TAR) platforms were first developed for discovery production. Regrettably, TAR platforms were not fully embraced because of the collateral litigation (an additional cost) that arose regarding the validation of TAR results, despite the time and cost savings associated with these platforms.<sup>9</sup> And when some parties have agreed to the use of TAR, parties and courts have sometimes become mired in the drafting and approval of ESI (electronically stored information) protocols (usually a court order adopting the parties’ agreement as to how ESI is collected, processed and produced).

Attorneys representing producing parties must show that a “reasonable inquiry” was made to ensure that relevant documents were produced. To achieve this, AI-enhanced eDiscovery vendors will need to offer some transparency into how their tools work, and producing parties will need to demonstrate what measures were taken to validate the results of the production. Courts, however, should consider avoiding a repeat of the TAR and ESI protocol disputes. Before filing any motion to compel or motion for sanctions, a requesting party must demonstrate that there has been a material deficiency in the production. And unlike responses to required initial disclosures, the discovery rules have never mandated a “complete” discovery production—only a reasonable, proportionate production. Courts should avoid the invitation to intervene in discovery disputes prematurely. Early ESI protocol orders are often negotiated well before there is an understanding of the corpus of documents and before there is an understanding of what can and cannot be produced in a reasonable and proportionate manner.

### Concluding Thoughts

The current state of AI in the legal space dictates that attorneys and judges should exercise caution in using any AI tool. That said, these tools have already made a great deal of progress in such a short time. And indications are that Moore’s law (number of transistors on a chip would double every two years) will result in greater data processing capacity for AI tools.<sup>10</sup> Even absent significant technological advancements, the capabilities of existing AI tools have not yet been fully realized in law. Attorneys and judges need to understand the current state of AI technology, “including the benefits and risks associated with [that] technology...”<sup>11</sup> Traditional reluctance and overly risk adverse positions, however, will neither well serve clients, the public, or the judicial system.

*Xavier Rodriguez is a United States District Judge in the Western District of Texas. Thanks to Prof. Daniel W. Linna, Jr. of Northwestern Pritzker School of Law and U.S. Magistrate Judge Allison Goddard for their review of this article and suggestions. ★*

<sup>1</sup> 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

<sup>2</sup> <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>

<sup>3</sup> See Artificial Intelligence Index Report 2024, Stanford University, Institute for Human-Centered Artificial Intelligence (charting the progress in machine-learning systems in reading comprehension, image classification, and mathematics); Contra Varun Magesh, et. al., Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools (calculating an error where the AI tool described the law incorrectly or made a factual error and where the response was correct, but cited a source which did not in fact support its claims; also opining that RAG-based legal AI systems face challenges because documents could be retrieved from jurisdictions with different precedents and there is a tendency for some AI tools to agree with the user’s incorrect assumptions placed into a prompt).

<sup>4</sup> <https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf>

<sup>5</sup> *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1221 (11th Cir. 2024) (Newsom, J., concurring).

<sup>6</sup> “Temperature” is a parameter in algorithms used to control the randomness of predictions. A lower “temperature” is thought to minimize hallucinations. See <https://www.affino.com/insights/insights/generative-ai-temperature-and-hallucinations>

<sup>7</sup> MODEL CODE JUD. CONDUCT, CANON 2.9(A)(3) (“A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record,

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and does not abrogate the responsibility personally to decide the matter.”).

<sup>8</sup> FED. R. CIV. P. 26(g)(1)(A); *see also* TEX. R. CIV. P. 215.3 (authorizing sanctions if the “court finds a party is abusing the discovery process in seeking, making or resisting discovery...”).

<sup>9</sup> *See* <https://www.everlaw.com/blog/ai-and-law/tar-predictive-coding-case-law/>

<sup>10</sup> <https://www.intel.com/content/www/us/en/newsroom/resources/moores-law.html#gs.a346d4>

<sup>11</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. 8.



# DOES THE LLMEROR HAVE NEW CLOTHES? SOME THOUGHTS ON THE USE OF LLMs IN eDISCOVERY

BY MAURA R. GROSSMAN, GORDON V. CORMACK & JASON R. BARON

## Introduction: A Parable

As Hans Christian Andersen’s parable goes, an emperor was—above all else—obsessed with showing off his new clothes. Approached by a pair of swindlers, who purported to be weavers of the most magnificent and uncommonly fine fabrics, he was convinced by them that their cloth had the magical quality of being invisible to anyone who was either unfit for office or unusually stupid. Thinking that such an outfit would be just the thing for him to tell wise men from fools, the emperor commissioned the weavers—for a handsome sum—to fashion him a new outfit.

Eager to hear news on the progress of his new costume, the emperor dispatched his most-trusted advisors to see how things were going. While neither was able to see anything on the weavers’ empty looms, both returned to report on the unparalleled beauty of the cloth, describing—as the swindlers had done for them—the gorgeous colors and intricate patterns of the woven fabrics. Finally, attended by a retinue of his most ardent followers, the emperor went to try on his new clothes. “Magnificent!” “What beautiful colors!” “What a fabulous design!” they decried, pointing to the empty hangers. “It has my highest approval” proclaimed the emperor, assuming he could not see what the others could, but unwilling to admit it.

The emperor decided to wear his new clothes to a grand procession he was about to lead before his fellow countrymen. Remarking on the wonderful fit, off he went to the procession on his splendid canopy. Everyone in the village exclaimed how amazing were the emperor’s new clothes; no one dared to admit they couldn’t see them for that would prove them either unfit for their position or a fool. No costume ever worn by the emperor was such a complete success, except for one small issue. “He hasn’t got anything on!” exclaimed a small child. But the procession continued, proudly as before, with the emperor’s noblemen holding high the train that did not exist.

## Large Language Models and eDiscovery

Artificial intelligence (“AI”) in the form of Large Language Models (“LLMs”) has recently emerged as the shiny new object for use in a variety of legal settings and operations. LLMs have been touted as a new form of legal “Swiss Army knife,” capable of removing much of the need for the human element involved in such varied legal tasks as summarizing or translating documents, performing research, constructing arguments, and reviewing and drafting contracts. While LLMs have shown early promise in performing relatively straightforward, ministerial tasks, it is also evident that overreliance on LLMs—and sloppy lawyering—have led to grave mishaps, where faulty LLM use resulted in the misrepresentation of case law, including hallucinations of fake case citations.<sup>1</sup>

**Artificial intelligence (“AI”) in the form of Large Language Models (“LLMs”) has recently emerged as the shiny new object for use in a variety of legal settings and operations.**

With respect to the use of LLMs in eDiscovery, on almost a daily basis, claims are being made by lawyers and commercial solution providers that LLMs either can or will soon replace not only traditional methods of identifying responsive electronically stored information (“ESI”) using keyword searches,

but also newer methods using technology-assisted review (“TAR”). As part of these assertions, suggestions have been made that LLMs eliminate the need to follow sophisticated protocols that have come to be associated with search methods and the complex statistical efforts aimed at validating the results of particular TAR efforts.

But are the tasks involved in eDiscovery sufficiently similar to those for which LLMs have been shown to hold promise; that is, is it reasonable to expect that LLMs can be substituted for current search methods, including what have come to be known as “TAR 1.0” and “TAR 2.0”? What kind of benchmarking and validation protocols are necessary when using LLMs? And how should trial lawyers go about evaluating the effectiveness of LLMs, as well as the defensibility of using them in eDiscovery to satisfy the legal obligations imposed on



counsel by Fed. R. Civ. P. 26(g) (and state-law equivalents), to respond to discovery requests (including RFPs) “to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry.”

### What are Large Language Models?

Some definitions are in order. LLMs are computer programs that train on an enormous corpus of online text to be able to recognize human language. They use what is known as “deep learning,” a type of machine learning capable of recognizing patterns in terabytes of unstructured data. Recent breakthroughs have employed particular LLMs known as “transformer models.” Transformer models learn the statistical properties of data supplied in a prompt-and-response format and use those learned statistical properties to predict likely responses to new human-supplied prompts. LLMs and transformer models represent a subset of text-based applications within the larger domain of “Generative AI,” which encompasses not only the production of text, but also images, audio, video, and other forms of mixed media. For example, one might prompt a transformer model to respond with a poem in a particular style, a picture of a kitten wearing a tutu, or the translation of a phrase into another language. Alternatively, one might prompt a transformer model to categorize a poem as a sonnet or a limerick, a picture as a kitten or a ballerina, or a phrase as English or Spanish.

The examples above illustrate the ability of LLMs to harness and reproduce general knowledge—information whose essence can be found in the training corpus. The format of an eDiscovery task seems, at first blush, to resemble that of the examples above: “Is this document responsive to this request for production (“RFP”)?” or “Is this document material to this case?” But the correct response relies on case-specific information, such as names, dates, filings, and a nuanced understanding of the legal issues. Are LLMs able to answer these questions as well as or better than existing practices involving human review, search terms, or TAR? How can this claim be evaluated, both in general and in any particular case? Does the LLMperor have new clothes, or are we all imagining them because we are loath to admit they may not be there?

### Machine Learning and Technology-Assisted Review

Over the past 15 years or so, the legal profession has become increasingly aware of the availability of various forms of AI used specifically to find responsive documents in complex litigation. The two most-established methods—commonly dubbed “TAR 1.0” and “TAR 2.0”—employ supervised machine learning to distinguish responsive documents from non-responsive documents. Like all supervised machine-

learning methods, both rely on human reviewers to code a certain number of exemplar training documents as responsive or not. The TAR 1.0 method, after being given a sufficient number of training examples, either categorizes the remaining uncoded documents as responsive or not, or scores and ranks them according to their likelihood of responsiveness. The TAR 2.0 method, on the other hand, continuously presents likely-responsive documents for review and coding, until substantially all responsive documents have been identified.

Supervised machine learning may be contrasted with unsupervised machine learning, which requires no labeled training examples. Common applications of unsupervised machine learning are clustering and latent feature analysis. Clustering groups documents into several groups (*i.e.*, clusters) of similar documents, while latent feature analysis uses statistical techniques to reduce the information in a document to a small number of essential features. Early methods of latent feature analysis were known as latent semantic analysis or indexing (“LSA” or “LSI”), probabilistic latent semantic analysis (“PLSA”), and latent Dirichlet analysis (“LDA”). More recently, deep learning has been employed to create word embeddings, phrase embeddings, and document embeddings that map words, phrases, or documents to their latent features. LLMs are largely unsupervised machine-learning methods, as they are derived from vast quantities of unlabeled data. But they can also be fine-tuned, by adding application-specific data, or prompts and responses, to the unlabeled training data. They can be further improved through Retrieval Augmented Generation (“RAG”) and Reinforcement Learning with Human Feedback (“RLHF”). The former involves confirming the LLM’s response with information stored in an external database, and perhaps providing links to the external sources, while the latter involves humans providing positive or negative feedback in response to an LLM’s output.

The use of TAR was first recognized by the courts for use in eDiscovery in a seminal decision, issued in 2012, where the Court held that “computer-assisted review now can be considered judicially[-]approved for use in appropriate cases.” *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012). As authorities, the Court relied on two studies, one by Roitblat et al.,<sup>2</sup> and the other by Grossman and Cormack,<sup>3</sup> indicating that certain TAR methods could be at least as effective as exhaustive manual review, at a fraction of the effort and cost. Importantly, the Court recognized that with any “technological solution” in eDiscovery, “counsel must design an appropriate process” with “appropriate quality control testing” to review and produce relevant ESI. In line with this prescription, the judiciary has signaled the

desirability that standard search protocols be followed by the parties, in at least two different ways. First, through the adoption of local rules and standing orders in connection with the meet-and-confer process under Fed. R. Civ. P. 26(f), where the specific parameters of proposed searches and their validation are expected to be discussed by the parties. And second, through the acceptance of sophisticated protocols, proposed by the parties or by special masters—often either stipulated, or adopted, at least in part, over the objections of one or both parties.

### **Are Large Language Models New Clothes for eDiscovery?**

LLM tools and protocols have not yet been demonstrated to be as effective as currently recognized methods for legal research,<sup>4</sup> nor for TAR. The first step towards such recognition should be empirical studies akin to those cited in *Da Silva Moore*, demonstrating the effectiveness of TAR for eDiscovery tasks on a meaningful number of varied and representative RFPs and datasets. The second step should be to demonstrate, through the use of a statistically sound and well-accepted validation protocol, that each particular eDiscovery effort using a recognized LLM tool and protocol is reasonably effective.<sup>5</sup>

We consider the second step first, as it is not specific to any one eDiscovery method, be it the use of keyword search, manual review, TAR, or LLMs. For example, in 2018, the *In re Broiler Chicken Antitrust Litigation* case set forth a validation protocol to be followed, regardless of the review method employed—TAR or manual review. No. 1:16-cv-08637, 2018 WL 1146371 (N.D. Ill. Jan. 3, 2018). An essential aspect of the *Broiler* TAR protocol was evaluation of the effectiveness of the review method using an independent review of a stratified statistical sample representing all documents in the collection, whether reviewed or excluded by software, and, if reviewed, whether coded responsive or not by a human. This independent review was to be conducted blind, meaning that the reviewers were to be given no indication of whether any document in the sample was previously reviewed, and, if so, whether it had been coded responsive or not. It is well known that reviewers are influenced by the dearth or abundance of responsive documents,<sup>6</sup> as well as by their knowledge of how a document was previously treated. These sources of bias are mitigated by the inclusion of a reasonable number of responsive and non-responsive documents in the validation sample, combined with blind review.

Returning to the first step towards recognition of the use of LLMs for eDiscovery, we must address the question: How does the use of LLMs in eDiscovery measure up against the

proven track record and acceptance of TAR methods? As of the date of this writing, the answer is, at best, unknown. Many of the articles promoting the use of LLMs for eDiscovery mention uses that are peripheral to the core eDiscovery task of identifying substantially all responsive or material documents. Summarization, translation, and case-law search may be useful, but they do not help to identify substantially all responsive or material documents. As noted above, LLMs might be used to answer questions like “Is this document responsive to this RFP?” This could possibly be accomplished in one of two ways: (1) one could compose a prompt of the form “Is this document [fill in the document] responsive to this RFP [fill in the RFP]; or (2) first, fine-tune the LLM on data of the form “[fill in the document] is [fill in responsive or not].” The question would then be posed and answered by the LLM, for each document in turn. Method (1) relies heavily on the skill of a “prompt engineer” in much the same way that keyword search relies on the skill of the searcher. Slightly different prompt formats can lead to wildly varying responses, and without fine-tuning, different state-of-the-art LLMs may show very different success rates from each other.<sup>7</sup> As far as we are aware, the impact of this phenomenon on eDiscovery search has neither been researched nor reported. Method (2) is in effect supervised machine learning. No study has yet shown either approach to be superior to state-of-the-art TAR methods.

Non-specific, conclusory pronouncements of stellar LLM performance abound. But empirical research—particularly that which has been subject to rigorous peer-review—has yet to demonstrate a well-defined eDiscovery protocol employing LLMs that improves on current TAR practice in eDiscovery. One study developed a set of prompts to classify a subset of documents from the National Institute of Standards and Technology’s (“NIST’s”) Text Retrieval Evaluation Conference (“TREC”) 2011 Legal Track.<sup>8</sup> The subset of documents is work product from TREC, consisting almost exclusively of documents that had already been deemed relevant to the evaluation task. For this reason, the results are not comparable to the findings from the TREC Legal Track, or to those of subsequent experiments on the same data. Another study developed prompts to classify an undescribed, non-public, uncharacteristically high-prevalence dataset according to non-public RFPs.<sup>9</sup> Those results show that, according to a second review, the LLM process yielded greater recall but lesser precision than a first-pass human review; however, no comparison to an established TAR process is provided. Yet another investigated the use of fine-tuning on a non-public dataset, concluding that fine-tuning provides some benefit in a TAR 1.0 process, with overall results comparable to that

of logistic regression—a well-established machine-learning method.<sup>10</sup> While extravagant pronouncements about recall and precision results achieved by LLMs have been made by some lawyers and commercial eDiscovery service providers, the more serious research efforts conducted to date have not shown that LLMs improve on the state-of-the-art for TAR 1.0, or for TAR 2.0.<sup>11</sup> Until valid testing demonstrates that LLMs are at least as effective as established practice for concrete eDiscovery tasks, they should be treated with caution.<sup>12</sup>

### Conclusion

The bottom line is that, at the time of this writing, there is no well-defined protocol for how to employ LLMs to find substantially all documents responsive to matter-specific requirements (e.g., RFPs) in a matter-specific collection of documents. The selection of tools, the engineering of prompts, and protocols for fine-tuning are largely unspecified, inscrutable, and no such selection has been demonstrated to improve on established TAR tools and practice. Further research is necessary to develop and document such protocols, and large-scale evaluation comparable to that of the TREC Legal Track (2006 – 2011) and TREC Total Recall Track (2015 – 2016) efforts are necessary to establish their effectiveness. As a first step, tools should be compared against the benchmarks established by these TREC evaluation workshops, using the same test methodology. If and when LLMs can be shown to improve on these benchmarks, they can and should be tested—and compared to established methods—on new datasets. The use of new datasets is necessary to avoid the problem that legacy benchmarks are likely to have been included in the online corpus used to train the LLMs in the first place. Once these studies give us all good reason to believe that a specific LLM tool and protocol will be effective, it can and should be employed subject to the same statistically sound validation as any other eDiscovery protocol. Otherwise, we are all at risk of being convinced by the LLMperor—and his fans—that he is wearing the finest threads imaginable, when they are, in fact, imaginary.

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<sup>1</sup> See, e.g., *Mata v. Avianca*, No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023); *Ex parte Lee*, No. 10-22-00281-CR, 2023 WL 4624777 (Tex. App. Jul. 19, 2023); *Thomas v. Pangburn*, 23-CV-0046, 2023 WL 9425765 (S.D. Ga. Oct. 6, 2023); *Morgan v. Community Against Violence*, No. 23-CV-0353, 2023 WL 6976510 (D. N.M. Oct. 23, 2023); *U.S. v. Cohen*, No. 18-CR-602 (JMF), 2023 WL 8635521 (S.D.N.Y. Dec. 12, 2023); *Kruse v. Karlen, et al.*, No. ED111172, 2024 WL 559497 (Mo. Ct. App. Feb. 23, 2024); *Park v. Kim*, No. 22-2057, 2024 WL 332478 (2d Cir. 2024).

<sup>2</sup> Herbert L. Roitblat et al., *Document Categorization in Legal Electronic Discovery: Computer Classification v. Manual Review*, 61 J. AM. Soc'Y FOR INFO. SCI. & TECH. 70 (2010).

<sup>3</sup> Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17:3 RICH. J.L. & TECH. art. 5 (2011).

<sup>4</sup> For an example of a study showing high rates of hallucination (17-33%) in commercial legal research tools employing LLMs, see Varun Magesh et al., *Hallucination-Free? Assessing the Reliability of Leading Legal Research Tools* (Stanford Univ. HAI May 30, 2024).

<sup>5</sup> For good examples of statistically well-grounded search validation protocols, see Bruce Hedin & Samuel Curtis, *Model Protocol for Electronically Stored Information (ESI) – Guidelines for Practitioner* (The Future Society and IEEE Oct. 2023); Maura R. Grossman & Gordon V. Cormack, *Vetting and Validation of AI-Enabled Tools for Electronic Discovery*, ch. 13 in Jesse Beatson et al. (eds.), *Litigating Artificial Intelligence* (Edmond Pub. May 2020).

<sup>6</sup> Adam Roegiest & Gordon V. Cormack, *Impact of Review Set Selection on Human Assessment for Text Classification*, SIGIR '16: Proc. of the 39th Int'l ACM SIGIR Conf. on Rsch. & Dev. in IR 861 (2016).

<sup>7</sup> See Aisha Khatun, *Uncovering the Reliability and Consistency of Language Models: A Systematic Study* (Univ. of Waterloo Thesis Repository Aug. 22, 2024).

<sup>8</sup> Sumit Pai et al., *Exploration of Open Large Language Models for eDiscovery*, NLLP '23: Proc. of the Natural Legal Language Processing Workshop 166 (2023).

<sup>9</sup> Roshanak Omrani et al., *Beyond the Bar: Generative AI as a Transformative Component in Legal Document Review* (Relativity ODA LLC 2024).

<sup>10</sup> Fusheng Wei et al., *Empirical Study of LLM Fine-Tuning for Text Classification in Legal Document Review*, IEEE Big Data '23: Proc. of the IEEE Int'l Conf. on Big Data 2786 (Dec. 2023).

<sup>11</sup> In fact, research results suggest otherwise for at least TAR 2.0. See Nima Sadri & Gordon V. Cormack, *Continuous Active Learning Using Pretrained Transformers*, arXiv:2208.06955 [cs.IR] (Aug. 15, 2022).

<sup>12</sup> See Gordon V. Cormack et al., *Unbiased Validation of Technology-Assisted Review for eDiscovery*, SIGIR '24: Proc. of the 47th Int'l ACM SIGIR Conf. on Rsch. & Dev. in IR 2677 (July 11, 2024).

# CONQUERING DOUBTS ABOUT AI IN DISCOVERY

BY TAJ. J. CLAYTON, MARTHA K. HARRISON & EUGENE TEMCHENKO

**C**UTTING-EDGE DISCOVERY TECHNOLOGY PROVIDES a solution to a real problem that modern technology has created over the past decade or more. Incessant emails exacerbated by the constant ping-pong of messages via Teams, Skype, Slack, and a growing chorus of collaboration tools dominate daily corporate life. As a result, document discovery has exploded in cost and complexity, and the ever-increasing volume and variety of electronically stored information (“ESI”) show no signs of slowing. In response to the rapid increase of discoverable documents and communications, eDiscovery companies have invested significant resources in improving the tools available to lawyers to expeditiously process data and sort between responsive and nonresponsive content. Much of this innovation focuses on discovery tools that rely on computer algorithms to reduce human attorney involvement in deciding which documents are relevant to the case and which are not. The rapidly growing list of such products in this field, which this article refers to as “AI discovery tools,” can cause consternation for outside counsel tasked with mastering new tools, in-house counsel asked to pay for such tools, and courts moved to adjudicate disputes over them.

This article addresses concerns with AI discovery tools by examining the three most common reasons parties avoid using them: lack of familiarity with how AI-powered tools work; lack of experience in using the tools successfully; and lack of knowledge of how courts view such tools.

**I. Become Acquainted with Technology Assisted Review.** Some practitioners lack confidence using AI discovery tools in eDiscovery because they are not familiar with the tools now available. This section summarizes the AI discovery tools now available to lawyers and explains how they function.

All of the current AI discovery tools fall under the umbrella term “technology-assisted review” (“TAR”). Technically

speaking, TAR is “[a] process for prioritizing or coding a collection of electronically stored information using a computerized system that harnesses human judgments of subject-matter experts on a smaller set of documents and then extrapolates those judgments to the remaining documents in the collection.”<sup>1</sup> Put simply, a human reviewer tags as “responsive” or “non-responsive” a sufficiently representative sample of ESI to allow the software to identify other likely responsive documents based on words, phrases, metadata, and other objective parameters.

TAR comes in different versions that offer varying capabilities. The original model, TAR 1.0, relied on counsel reviewing

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a statistically significant number of randomly selected documents (a “seed set”) that trained the algorithm for coding the remainder of the database. For TAR 1.0, the user trains the algorithm once. The seed set must both consist of randomly selected documents and be statistically significant because the purpose of the seed set is for

the human reviewer to see a representative sample of the full database. TAR 1.0 does not function properly if counsel reviews only a small batch of identical documents. After counsel reviews the seed set, TAR extrapolates the results to score the rest of the documents from 0 to 100. At this point, counsel, with the guidance of TAR experts and based on recommendations generated by the TAR algorithm, decides which portion of the documents to review for production based on their scores (e.g., reviewing only documents with a responsiveness score of 50 and above).

The second version of TAR, TAR 2.0 or Continuous Active Learning (“CAL”), does not rely on seed sets. Instead, it continuously feeds documents to the reviewing attorneys that the algorithm suggests are likely to be responsive until CAL can no longer find likely responsive documents. CAL takes note each time counsel marks a document responsive or non-responsive and updates the algorithm such that



CAL is constantly learning from the reviewing attorneys' coding decisions. That is, the training and classification of the documents happens concurrently and on a continuous basis throughout the review. CAL adjusts the ranking of the documents in real time, and review does not end until the number of responsive documents significantly decreases and further review to find the next responsive document would be disproportionate.

In recent years, TAR models have shifted into conceptual analytics and clustering, in which the algorithm attempts to categorize similar documents into clusters, allowing the reviewing attorney to review the database by responsive *topics* rather than individual documents. As the reviewing attorney codes documents either responsive or non-responsive, the algorithm adjusts the clusters, facilitating further review by identifying other related documents.

Even more recently, discovery vendors have begun to advertise generative AI-based TAR. Recent product demos show counsel being able to submit ordinary text queries or even briefly summarize the case, with the TAR model then identifying documents responsive to such query or summary, automatically generating the search parameters and locating responsive documents. eDiscovery vendors also advertise generative AI-based TAR as being capable of generating summaries of documents, thereby expediting review.

While the functions of the models may differ, each TAR concludes with validation, which is a process for proving that the set of documents coded by the algorithm as non-responsive is unlikely to contain a meaningful number of responsive documents. Specifically, the model will generate a validation or null set: a statistically significant and representative set of randomly selected documents from among those not yet reviewed by a human. For instance, a validation set may consist of 400 randomly selected documents scoring below the selected cutoff score for TAR 1.0, or 400 randomly selected documents after CAL continuously fed the reviewers an increasing number of non-responsive documents. The goal of the validation/null set is to have a second look at a representative sample of the documents TAR would exclude. Once counsel finishes reviewing the validation/null set, the model generates statistics showing:

- **Elusion:** This refers to the estimated percentage of potentially responsive documents remaining in the unreviewed set. For example, an elusion rate of 5% with 10,000 unreviewed documents means that there may be up to 500 responsive documents in

the set of 10,000, and counsel would need to review an additional 9,500 documents to identify, at most, 500 documents.

- **Recall:** This refers to the ratio of responsive documents TAR identified to the total number of responsive documents in the full set of documents. A recall rate of 75%, for example, means that the review successfully identified 75% of all responsive documents.
- **Richness:** This is the estimated percentage of responsive documents within the database. A rate of 30%, for example, means that 30% of the entire database is responsive.
- **Precision:** This is the ratio of documents the TAR model correctly identified as responsive to the total number of documents categorized as responsive. For instance, a precision rate of 80% means that the model inaccurately identified 20% of non-responsive documents as responsive and was overinclusive.

The results of the validation/null set will determine whether the review is “complete.”

Like any document review, this method will not result in the production of *all* responsive documents.<sup>2</sup> This does not mean, however, that TAR is inferior to human review. Studies have shown that human review, which many lawyers still view as the superior review method, has lower recall and precision rates than TAR. Indeed, some data indicates that human reviewers may miss as much as 75% of all relevant documents.<sup>3</sup> Unlike human review, TAR provides tangible statistics and quantifiable metrics, giving the producing party and the receiving party confidence that the producing party made a reasonable search for responsive content.

## II. Adopt Best Practices to Make TAR a Success.

Practitioners sometimes shy away from TAR for fear they do not know how to use TAR effectively. This section provides guidance on key ways to make TAR a success.

**Be strategic in deploying TAR.** TAR is a tool. When properly wielded by knowledgeable counsel, the tool may enable efficient, accurate, and cost-saving review. But not every tool is appropriate for every case. The decision to use TAR should be made after weighing, among other things, the efficiencies achievable through TAR, its costs, the needs of the case, TAR's defensibility in the forum and venue of the litigation (or, in

cases of investigations, the likelihood the investigative body will accept results based on the use of TAR), and the risk of expensive motion practice concerning the use of such tool.

To plan effectively, counsel should explore the client's understanding of the facts and of the likely categories of discoverable ESI. While some practitioners may want to start by collecting and reviewing documents to learn the facts and identify potential deficiencies, all discovery becomes more efficient after counsel grasps a basic understanding of the facts and can envision the types of documents likely to appear.

**Be transparent with opposing counsel.** Practitioners should advise opposing counsel of their intent to use TAR in advance and seek agreement. These discussions typically arise in connection with an initial case management conference or in negotiating an E-Discovery Protocol. Here, parties often leave flexibility for the use of TAR, including language in the protocol such as “To facilitate costefficient review, the parties may use search terms, custodians, de-duplication, TAR, predictive coding, and other discovery tools, subject to validation for elusion and recall.” The parties may negotiate more precise provisions, specifying specific elusion, precision, or richness targets a party must meet.

Generally, parties should not bog the negotiations down in such minutiae. The parties should generally agree to use TAR in a transparent and verifiable manner, leaving debate over the appropriate statistics for a later date. For instance, the producing party may wish to negotiate for a 20% elusion rate at the start of discovery, whereas the requesting party may not accept a rate greater than 5%, precluding agreement and potentially necessitating court intervention. By delaying this dispute to a later time, the parties will allow the actual statistics to better inform the parties' dispute, and the parties might discover that the producing party's review already achieved an acceptable elusion rate, thus mooting any dispute.

**Leverage clients' knowledge to train TAR at the outset of discovery.** Fundamentally, document collection for TAR-based review is no different than any ESI collection. Counsel and the client will collaborate to identify, among other things, a reasonable set of individuals who are likely to have responsive documents (“custodians”), non-custodial locations with responsive documents (e.g., shared drives, file cabinets), and documents the client is aware are responsive that are susceptible to immediate and targeted collection. Unlike traditional discovery, however, TAR, particularly CAL, empowers the client to facilitate more efficient review

by assisting in identifying clearly responsive documents that can begin training TAR on responsiveness in conjunction with a control set. In other words, if a client can identify a set of key emails, meeting notes, and agreements, the reviewer can immediately use these documents to train TAR to identify other similar responsive documents.

**Be precise in coding documents as responsive.** Reviewing attorneys should always take care to avoid over- and under-tagging documents as responsive. This is particularly important for TAR, however, because erroneously tagging documents as responsive would cause TAR to promote non-responsive documents, decreasing the efficiency of the process.

Relatedly, the reviewing attorney must evaluate each document for responsiveness on its face without reference to its attachments. The review may not code the full document “family” (a document with all its attachments, such as a cover email with any separate documents or embedded files) consistently during the review phase. For example, if a reviewer comes across an email that says only “FYI” and attaches a highly relevant presentation, the reviewer must mark the cover email “not responsive” and mark only the presentation as “responsive.” Otherwise, the reviewer will mislead TAR into thinking that simply saying “FYI” makes a document responsive. This does not mean that the reviewer must produce documents independent of their families. After counsel completes reviewing documents for responsiveness, the production set would consist of all document families with at least one responsive member.

**Combine TAR with other eDiscovery tools.** Counsel can use TAR together with other discovery tools, such as search parameters (limiting the database using terms, dates, custodians, file types, etc.), de-duplication, de-NISTing, threading, and near duplicate detection. For instance, counsel can implement TAR-based review before or after applying search parameters, allowing counsel to both negotiate a reasonable scope of ESI review and facilitate efficient and productive review within the dataset.

### III. Assess Critically TAR's Defensibility.

Lawyers and clients are often concerned about how courts will view their use of TAR should a motion to compel arise concerning the methodology. This concern is becoming increasingly unfounded: Many courts have weighed in on the use of TAR in discovery, providing parties with robust precedent for defending or challenging its use in their particular cases. The first published opinion recognizing TAR as an “acceptable way to search for relevant ESI in appropriate



cases” is now over 10 years old. *See Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012).

While not all courts have weighed in on TAR, the use of TAR should not impose any additional burdens on the producing party other than the burden borne by all parties: the obligation to undertake reasonable steps to identify and produce relevant documents. And while adversaries will often suspect that the methodology chosen by the producing party avoids discovery of the smoking gun, and the parties will vigorously dispute whether the methodology was “reasonable” or whether additional steps are disproportionate or unduly burdensome, the party using TAR will only need to convince the court that such use was reasonable. The defense strategy will depend in part on the scope of counsel’s use of TAR.

For example, parties will generally find their use of TAR less susceptible to criticism when they use it solely to train their review team. Before delegating review of the database to the full team, counsel most familiar with the facts of the dispute could review a seed set to prioritize the remaining database from most to least likely to be responsive. This allows the rest of the team to view the most-responsive documents first, educating the team on the case and facilitating more accurate review when the team confronts ambiguous documents.

However, this methodology would not reduce the total number of documents counsel would have to review, and thus would have a more modest effect on discovery cost. Further, the producing party should consult any standing orders or agreements governing the manner of its review. This methodology may require the receiving party’s consent depending on the wording of the parties’ eDiscovery or TAR protocol, if any. Certain regulators also limit the producing parties’ ability to modify the responsiveness of TAR-scored documents. For example, the DOJ and FTC currently require parties responding to a Second Request (a request for documents during an investigation of whether a merger has anticompetitive effects) to use TAR 1.0 and prohibit parties from changing the responsiveness of any document identified through TAR 1.0 through manual review.

On the other hand, parties are more likely to see disputes over their use of TAR when counsel intends to review only the documents the TAR model predicts are responsive. Resolving such disputes will generally require counsel to

carefully explain their methodology and demonstrate its reliability, including through statistical analysis. A low elusion rate would mean that few documents within the set marked non-responsive are likely to be responsive, making continued review unduly burdensome. The current industry-standard recall is 75%; in other words, it is standard practice to omit from production 25% of potentially responsive documents.

Counsel should not, however, rely solely on statistical validation and ignore other common-sense ways to validate the review, as demonstrated in *Deal Genius, LLC v. O2Cool, LLC*, 682 F. Supp. 3d 727 (N.D. Ill. 2023). In that case, the producing party achieved a remarkable 0.08% elusion rate, suggesting that, of 662,502 documents unreviewed,

there were, at most, 530 responsive documents. The receiving party was able to demonstrate a potential flaw in the process, however, by asking the producing party to run a highly targeted search, yielding 28 unreviewed documents, *all of which were responsive*. This oversight did not mean that the entire process was flawed, and the court did not

order the producing party to scrap the entire methodology. Instead, the court ordered the producing party merely to continue with additional validation, including reviewing additional targeted searches to ensure that it did not unduly miss responsive documents.

At bottom, defending TAR is less about complex processes or impressive numbers but more about willingness to submit the methodology to reasonable tests. Often, the validation/null set will alone be sufficient to demonstrate that a party fully discharged its discovery obligations. At other times, the methodology can be pressure tested through targeted search terms, additional validation sets, and other suggestions, all of which (when reasonable and proportional) should give both parties and the court confidence in the methodology used.

#### IV. Conclusion

The legal profession should not view technological innovation in eDiscovery with skepticism. AI-powered eDiscovery products offer lawyers new tools to combat the exponential growth in discovery volume and cost. Counsel can readily learn to apply such tools by reviewing online resources, receiving product presentations from eDiscovery vendors, and partnering with knowledgeable counsel. To make TAR successful, counsel should carefully plan the review process,

**A low elusion rate would mean that few documents within the set marked non-responsive are likely to be responsive, making continued review unduly burdensome.**

train the reviewers, monitor progress, and pressure test the TAR model. When properly deployed, counsel will have robust caselaw and detailed metrics supporting the use of TAR. Counsel should thus strive to master the tools and apply them strategically to serve their clients with utmost efficiency.

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<sup>1</sup> *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 SEDONA CONF. J. 263 (2020).

<sup>2</sup> One limitation is that TAR cannot be used on all forms of ESI, namely: very large or very small text files; audio or visual data; and other unusual file types.

<sup>3</sup> Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICHMOND J. L. & TECH. 11, 47 (2011).

# POISONING THE WELL(M): PIRATED DATA, LARGE LANGUAGE MODELS, AND COPYRIGHT

BY JUSTIN A. NELSON, ROHIT D. NATH & J. CRAIG SMYSER

## A. The Napster Problem

It's the year 2000 and you're 16 years old, exploring this new thing called the "internet." You open up Napster so you can download copies of 'N Sync's *No Strings Attached*, the best-selling album that year. Maybe you also get yourself a free copy of *Marshall Mathers LP*. You want to listen to it to enjoy it, and you're also looking for inspiration for your own garage boy band.

Did you commit copyright infringement? We know now the answer is yes. After years of litigation, the Ninth Circuit held that Napster was liable for enabling the infringing acts of its users. A necessary predicate of that decision was that Napster's users—people downloading free copies of music to listen to at home—were copyright infringers. See *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001), as amended (Apr. 3, 2001).

Fast forward to today. While the Napster model is no longer mainstream, illegal enclaves of pirated literature, music, and art still persist across the internet. Today's patrons of pirated material are not teenagers who want to avoid paying \$16 for a compact disc. Instead, they include multibillion-dollar companies developing artificial intelligence models, like OpenAI or Anthropic, which have an insatiable appetite for high-quality, copyrighted material. These companies say they need this material to "teach" their models how to write well, make quality music, or other art. Like the 16-year-olds of yesteryear, these AI companies procured copies of copyrighted material for free from pirated websites to avoiding paying the cost of a legal copy of it from their local book or record store.

Since the breakout success of ChatGPT in November 2022, copyright questions have loomed large. For academics, commentators, the tech community, and others, debates over AI's copyright compliance are normally expressed in terms of whether large language models ("LLMs") (and their training) represent "fair uses" of the training data. These debates have

typically focused on whether reproducing copyrighted material to "train" an LLM is fair use, or whether an LLM itself constitutes a thinly-veiled copy of the training data.

These questions also provoke metaphysical questions about whether computer programs can truly "learn," or what differentiates "human learning" from computer algorithms. As attorneys for putative classes authors in copyright infringement lawsuits against OpenAI and their major competitor Anthropic, the reader will be unsurprised to learn that we think none of these "uses" is "fair."

But put those topics aside. What commentators miss in analyzing these higher-order questions is a much more basic act—one that need not invoke any soul-searching or require any stance on the ontological status of LLMs. That act is the initial acquisition and copying of the data in question.

Unlike public research programs regarding training and model-interpretability, some AI companies have been opaque about (1) what data they use to train their models and (2) how they obtained that data. That silence is in part

a recognition that data-quality is the single biggest driver of model quality—and so keeping datasets secret is a key competitive edge. It also may reflect, however, a recognition of the tremendous copyright liability arising out of the way they acquired training data—namely, by taking it without permission from pirated sources.

## B. Initial Acquisition as the Crux of Copyright Liability

Consider the following scenario: a remix-artist purchases a song. The remix-artist then produces a remix of the song and distributes it for sale. The copyright holder of the original song sues the remix-artist and challenges (1) the remixing and (2) the distribution of the remix. This was basically the situation which the Supreme Court considered in *Campbell*. While individual cases present unique issues, the "fair use" analysis is a well-worn application of the four statutory fac-

**While the Napster model is no longer mainstream, illegal enclaves of pirated literature, music, and art still persist across the internet.**

tors: (1) nature of the use, i.e. was the remixing sufficiently transformative, (2) the nature of the copyrighted work, (3) amount of the work used, and (4) the effect on the potential market for or value of the copyrighted work.

Now consider that same fact pattern, but with the following wrinkle: instead of purchasing the original song, the remix-artist illegally pirated the song. The copyright holder of the original song again sues. This time it challenges the *initial act* of piracy by which the remix-artist acquired the copy in question, in addition to the remixing and distribution of the remix. While the fair use question for the acts of remixing and distribution remains the same as in the previous example, no substantial fair use defense exists for the initial act of piracy. Nor would a court finding that the remix and/or its distribution was “fair use” constitute a defense to the initial act of piracy. The commonsense answer is that the initial acquisitive act itself is not a “use” amenable to a fair use defense.

And it’s not just common sense. This is the unanimous conclusion of the federal courts. After the rise of file-sharing business models like Napster, the music industry sought to hold individual users accountable for copyright infringement. While the majority these such suits settled, music labels won two cases that went to trial, and those judgments were unanimously affirmed on appeal without any issue as to “fair use.” See, e.g., *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487, 500 (1st Cir. 2011); *Capitol Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899, 906 (8th Cir. 2012). So too for companies that download massive quantities of copyrighted material from the same type of illegal websites. Whatever the arguments for or against fair use of the training data, that initial acquisition of known pirated material does not and should not have legal protection under the guise of fair use.

### C. A Taxonomy of LLM Training Data and Acquisitive Acts

In general, training data for these models comes from a variety of sources, including:

1. Collections of works in the public domain for which any copyright protection has expired, like Bram Stoker’s *Dracula*.
2. Data on the “open web” which is “scraped” by the AI Company or non-profits like Common Crawl;
3. Collections of works sourced from pirated repositories. For example, Books3, described in further detail below.

Category 1 poses no issue from an “initial-acquisition” perspective, as works in the public domain may be reproduced and exploited freely.

The second category, however is problematic. Particularly given the large volume of pirated material available on the open web, simply trawling without care or concern as to pirated data “bycatch” may demonstrate that the initial act of copying this data constituted a copyright violation.

Regardless of any defense with respect to web scraping (and we think none exists especially where a company knows its scrape includes pirated material), the final category—where an AI company acquires large repositories of pirated data—has no fair use defense. Take, for example, the most popular “open source” compilation of AI training data available today: a dataset known as “The Pile,” a dataset used by the company Anthropic as alleged in the Complaint we filed on behalf of authors against the company. The Pile’s authors noted that its goal was to replicate the data set which OpenAI used to train GPT-3. One of the many datasets in the original version of The Pile is a dataset called Books3. Books3 is a compilation of nearly 200,000 books, all sourced from a notorious pirated book collection called Bibliotik.

Why books? Here’s what the firm that created The Pile, EleutherAI, said: “We included Bibliotik because books are invaluable for long-range context modeling research and storytelling. (See <https://arxiv.org/pdf/2101.00027> (accessed Oct. 18, 2024)). In the AI world, “you are what you eat” is particularly salient. High quality, lengthy, coherent text as training material means a large language model will be better able to process longer and more complicated text inputs and generate longer text output that is coherent. But to get this high-value training material, companies like Anthropic or OpenAI, the allegations go, didn’t approach authors or publishers or bookstores; they took them from corners of the web that few readers would ever even think to look.

With Books3, we have a dataset that (1) clearly consisted of pirated material, (2) which the AI companies, like Anthropic, are alleged to have downloaded. Whatever those companies did with that data after that point, the initial act of copying from a known pirated website was unlawful. In this way, the AI company is no different from the teenager using Napster, except that AI companies have downloaded illegal copies for a commercial purpose versus personal use—a factor that weighs only further *against* a finding of fair use. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 511 (2023)

A number of suits are percolating through the federal courts advancing the theory that the acquisition of pirated datasets constitutes infringement. *See, e.g., Authors Guild v. OpenAI Inc.*, No. 1:23-cv-8292-SHS (S.D.N.Y.); *Bartz v. Anthropic PBC*, No. 3:24-cv-5417-WHA (N.D. Cal.). To be sure, these suits also challenge the use of the data, however acquired, in training, but it is a mistake to think of these suits as rising or falling solely on the fairness of those uses. Focusing on the initial acquisition clarifies the liability and exposure of companies like OpenAI and Anthropic who are alleged to have knowingly downloaded pirated material.

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The current slate of lawsuits against AI companies raise a variety of questions, and some of these questions are more difficult and more hotly contested than others. But one of those questions is straightforward under the law: Is it copyright infringement to make unlicensed copies of works by obtaining them from pirated sources? The answer to that question is yes. This issue was resolved long ago in the Napster era. The answer today should be no different. If a pimply 16-year-old is liable for an illegal download, so is the AI company worth \$160 billion.

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# IS AI THE NEW DECISION MAKER IN THE WORKPLACE?

BY CARTER CROW & JESIKA SILVA BLANCO

**A**RTIFICIAL INTELLIGENCE (AI) IS TRANSFORMING every aspect of our lives, and the workplace is no exception. In 2023, a study by Goldman Sachs concluded that roughly two-thirds of current jobs are exposed to some degree of AI, and that generative AI could substitute up to one-fourth of current work. Jan Hatzius, Joseph Briggs, Devesh Kodnani, Giovanni Pierdomenico, *The Potentially Large Effects of Artificial Intelligence on Economic Growth*, (Mar. 26, 2023), <https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html>.

Many employers find AI to be more efficient, a better predictor of employee performance and fit, and a tool to advance diversity. Beyond that, employers argue that AI, unlike humans, is not susceptible to bias in decision making. As a result, employers have increasingly turned to AI to automate tasks and decisions that we have traditionally thought of as requiring a “human touch.” From resume scanners to managing employee time, performance, and even leave requests, AI is at every corner of the workplace.

However, the use of AI in the workplace is not without risk. Perhaps the most jarring aspect of the use of AI in the workplace is that what [would have] previously [been] a poor (but discrete) individual [decision] by a manager now embodies itself in the form of a poorly designed AI tool that [could] result in large-scale discrimination or a mass leak of confidential information. Lina M. Khan, Chair of the Federal Trade Commission (FTC), recently commented, “technological advances can deliver innovation—but claims of innovation must not be cover for lawbreaking. ***There is no AI exemption to the laws on the books . . .***” Employers must tread cautiously when using AI in the workplace.

**Many employers find AI to be more efficient, a better predictor of employee performance and fit, and a tool to advance diversity.**

## Current Legal Landscape

### Federal Law and Regulations (or the Lack Thereof)

There is no comprehensive federal legislation governing the use of AI in the workplace. However, there are several bills in Congress that address the use of AI. Among others, the Algorithmic Accountability Act of 2022 empowers the FTC to require entities to conduct impact assessments for bias, effectiveness, and other factors when using AI to make critical decisions. In October 2022, the White House released a Blueprint for an AI Bill of Rights and President Biden subsequently signed an executive order addressing bias and discrimination with respect to AI. In May 2024, the White House issued a guidance titled “Critical Steps to Protect Workers from Risks of Artificial Intelligence” that sets forth governing principles for the use of AI in the workplace.

But the lack of federal laws and regulations expressly governing the use of AI does not mean employers are free to do as they wish. Employers must still abide by existing employment laws. In particular, employers

should ensure their use of AI tools complies with Title VII of the Civil Rights Act of 1964 (Title VII), Section 1981 of the Civil Rights Act of 1866, the Equal Pay Act, the Age Discrimination in Employment Act (ADEA), the Immigration Reform and Control Act, Title I and Title V of the Americans with Disabilities Act (ADA), the Pregnant Workers Fairness Act, the Uniform Services Employment and Reemployment Rights Act, the Genetic Information Nondiscrimination Act, and the Occupational Safety and Health Act.

### Government Agencies Chime In

On April 25, 2023, the Equal Employment Opportunity Commission, the Department of Justice (DOJ) Civil Rights Division, the FTC, and the Consumer Financial Protection Bureau (CFPB) issued a Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems. <https://www.eeoc.gov/joint-statement-enforcement-civil-rights-fair-competition-consumer-protection-and-equal-0>.



The Joint Statement confirms the agencies' collective commitment to enforce laws regarding the use of AI.

The EEOC has been the most active agency player. In May 2022, the EEOC issued technical guidance discussing how employers' use of software utilizing algorithmic decision-making may violate the ADA. EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employers* (May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>. In May 2023, the EEOC issued further guidance addressing how employers can monitor and assess algorithmic decision-making tools consistent with Title VII. EEOC, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (May 18, 2023), <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>. The EEOC's guidance broadly covers resume scanning programs, employee monitoring software that tracks productivity, video interviewing software that evaluates candidates, and testing software that provide "job fit" scores. The EEOC sets forth best practices to mitigate the risks of AI. Importantly, the EEOC takes a strong stance that employers are liable even if the AI tools are designed or administered by another entity.

On April 4, 2024, ten federal agencies, including the EEOC and the DOL, issued a joint statement recognizing the potential for discrimination, bias, and other harm through the use of AI and reiterated each agencies' enforcement power. *Joint Statement on the Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems*, <https://www.justice.gov/crt/media/1346821/dl>. Shortly after, the DOL issued a Field Assistance Bulletin addressing risks with the use of AI under the FLSA when employers use AI to perform or assist with payroll, performance management, and other HR functions. A month later in May 2024, the DOL issued its own set of principles for employers and developers that create and use AI, which largely mirror the principles set forth by the EEOC. The Office of Federal Contract Compliance of the DOL has also issued guidance regarding the use of AI tools and systems to perform or assist with government contractors' workplace functions.

#### **States' Proactive Approach to AI in the Workplace**

Many states have proactively sought to regulate employers' use of AI.

**Illinois** enacted the Artificial Intelligence Video Interview Act (effective January 1, 2020). The law regulates Illinois employers' use of AI in the interview and hiring process. Before conducting an AI based video interview, employers must:

- notify applicants that AI may be used to analyze the video interview and assess the applicant's fit for the position;
- provide applicants with a written explanation of how the AI works; and
- obtain the applicant's consent for the use of AI for this purpose.

Employers cannot use AI to evaluate applicants without their consent or share the videos with anyone, except with those whose expertise is necessary to evaluate the applicant's fit for a particular position. Employers must also delete a video interview, including all copies and duplicates, within 30 days of receiving a request from an applicant. Effective January 1, 2022, employers who rely solely on an AI analysis of a video interview to decide whether to offer an in-person interview must annually collect and report to the Department of Commerce and Economic Opportunity the race and ethnicity of applicants who are not offered an in-person interview and are hired.

On August 9, 2024, Illinois Governor J.B. Pritzker signed into law H.B. 3773 (Limit Predictive Analytics Use). Effective January 1, 2026, the Illinois Human Rights Act is amended to provide that it is a civil rights violation for an employer to use AI that has the effect of subjecting employees to discrimination on the basis of protected classes or to use zip codes as a proxy for protected classes in the context of recruiting; hiring; promotion; renewing employment; training or apprenticeship selections; discharges or discipline; tenure; or the terms, privileges, or conditions of employment. It is also a violation for an employer to fail to provide notice to an employee about the use of AI.

**New York City** implemented its Automated Employment Decisions Tools (AEDT) Law in July 2023. The law prohibits employers and employment agencies from using AEDT to conduct or assist with hiring or promotion decisions unless:

- the tool has undergone an independent bias audit

- within a year prior to its use,
- a summary of the most recent bias audit is publicly available on the employer's or employment agency's website; and
- the employer notifies candidates living in New York City at least 10 business days before an interview that an AEDT will be used to assess or evaluate the individual, allow the candidate to request an alternative selection process or accommodation, and identify the job qualifications or characteristics the tool uses to assess the candidate or employee.

If not disclosed on its website, the employer or employment agency must make the type, source, and retention policy of data collected for the AEDT available within 30 days of a written request.

**Colorado** became the first state to enact comprehensive AI legislation on May 17, 2024. The law (effective February 1, 2026) applies to developers and deployers (i.e., users) and requires the use of reasonable care to avoid algorithmic discrimination. Employers must implement a risk management policy and program, complete an annual impact assessment, notify employees and applicants about the use of AI where AI will be used to make an employment decision, make a publicly available statement summarizing the high-risk systems used, and disclose to the Colorado attorney general any algorithmic discrimination within 90 days of discovery. The law defines "high risk AI systems" as an AI system that makes, or is a substantial factor in making a consequential decision (i.e., a decision that has a material legal or similarly significant effect on the provision or denial to Colorado residents of services, including employment). While there is currently no private right of action, the Colorado Office of the Attorney General can enforce the law and there is language indicating that violation may be considered a "deceptive trade practice" under Colorado law.

**California** announced a notice of proposed rulemaking to address potential employment discrimination arising from the use of automated decision systems to make or assist in making hiring or other employment decisions. The regulations would require employers to evaluate the impact of the automated decision tool, prepare an annual impact assessment, provide notice to employees of the use of the tool, establish an internal governance program, and publicly publish a policy disclosing the AI systems used and how the employer is managing the risks of discrimination.

**Maryland** enacted its Facial Recognition Technology law in 2020. While the law makes no specific mention of AI per se, many facial recognition software use AI processes. The law prohibits employers from using facial recognition during the hiring process without the candidate's consent.

### Litigation Risks

Employers should be wary of the litigation risks posed by using AI in the workplace.

In particular, employers must remain cautious not to run afoul of existing employment laws. In August of 2023, the EEOC secured its first workplace AI settlement. The EEOC sued three companies providing tutoring services under the "iTutorGroup" name alleging that they violated the ADEA because the AI program it used for hiring automatically rejected female applicants age 55 or older and male applicants age 60 or older. iTutorGroup paid \$365,000 to a group of 200 rejected applicants, adopted antidiscrimination policies, and conducted training.

There is also an increased risk of disparate impact claims. For example, in February 2023, a job applicant filed a class action against Workday, Inc., alleging disparate impact in hiring based on age, race, and disabilities from the Company's use of AI systems and screening tools. *Mobley v. Workday, Inc.*, 3:23-cv-00770 (N.D. Cal. Feb. 21, 2023). The plaintiff is an African-American male over 40 years of age who suffered from anxiety and depression. He applied to nearly 100 positions with various employers over the course of several years and was rejected from each one. Plaintiff alleges that the employers used Workday's AI systems and screening tools to disproportionately screen out members of protected classes. While there have been several motions to dismiss filed (with the most recent ruling in July 2024), the lawsuit remains ongoing.

Employers should also remain cognizant of the type of information that is inputted into AI tools. In *West Technology Grp., LLC v. Sundstrom*, the defendant had used an AI tool (Otter.ai) to record and transcribe confidential meetings. 3:24-CV-00178 (D. Conn. Feb. 8, 2024). Following the defendant's termination, the defendant retained possession of and access to the transcriptions. The employer was forced to sue to protect their trade secrets and ultimately obtained a preliminary injunction ordering the defendant to return the confidential information.

**Best Practices**

As AI continues to transform the workplace, employers should take several measures to mitigate potential risk. Some best practices for employers who use AI in the workplace include:

- **Transparency and consent**—Provide applicants and employees with advance notice about the use of AI tools and obtain their consent.
- **Accommodations**—Consider what accommodations may be needed and have accommodations plans in place.
- **Policies and Training**—Develop policies on the use of AI and train HR and IT teams on the proper use of AI.
- **Audit and Remedial Steps**—Conduct regular bias audits and take any remedial steps as needed.
- **Assess Vendors**—Review and assess vendor tools based on governing law and negotiate strong indemnity, warranty, and liability provisions with the vendors.

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# A LITIGATOR'S INTRODUCTION TO ATTACKING AND DEFENDING ALGORITHMS

BY FRANK FAGAN

**I**N A WORLD WHERE TECHNOLOGY AND JUSTICE INTERSECT, understanding the complexities of dealing with algorithms in the practice of litigation is essential for ensuring that a litigation outcome is not overshadowed by an overreliance on flawed algorithmic decision-making. In this respect, this Article serves as a short strategic guide for attacking and defending algorithms in private litigation—beginning by exploring how algorithms are used in criminal justice, where they routinely elicit constitutional questions, to how algorithms could potentially influence private litigation and raise complex questions of evidentiary accuracy.

## Introduction

Algorithms have quietly but significantly embedded themselves in the fabric of criminal justice, particularly in the areas of bail, sentencing, and parole. These digital tools, employed by state authorities, are intended to assess a defendant's risk of flight or reoffending. The expectation is that algorithms, backed by vast amounts of data, will deliver more accurate decisions than a judge, and at a lower cost. However, their use has attracted significant attention, sparking extensive debate over constitutional questions concerning due process and equal protection, the latter being especially relevant given documented cases of algorithmic bias. With respect to due process, defendants have contended that constitutional rights should limit judges from leaning too heavily on algorithmic outputs, and courts have generally agreed. As a consequence, the debate has largely settled on the position that while algorithms can offer valuable insights, they must not supplant a judge's discretion outright. This balance was notably struck in the case of *State v. Loomis*, 881 N.W. 2d 749 (Wis. 2016), where the Wisconsin Supreme Court upheld the use of the COMPAS algorithm but underscored the necessity for human oversight.

Algorithms have been used in other contexts by the state, including in predicting future employee performance. It

should be no surprise, then, that public employees have challenged the use of algorithms in termination (and other) decisions that have led to a deprivations of property interests. For example, in cases involving the dismissal of public school teachers due to poor performance, algorithms have been deployed to assess various metrics that contribute to such decisions. However, here too, the legal framework mandates that algorithmic outputs should be one of several factors considered by a judge. The case of *Hous. Fed'n of Teachers v. Hous. Indep. Sch. Dist.*, 251 F. Supp. 3d 1168 (S.D. Tex. 2017), serves as a further illustration that while algorithms can inform decisions, they should not dictate them outright.

These cases underscore a fundamental tension in the legal system: the juxtaposition of technological efficiency with the unique value of human judgment. It is notable that defendants

**Algorithms have quietly but significantly embedded themselves in the fabric of criminal justice, particularly in the areas of bail, sentencing, and parole.**

have not challenged the accuracy of the algorithms per se but rather how these tools were applied by the state. This speaks to a broader societal unease with the idea of unsupervised algorithms making decisions that touch on fundamental rights. The judiciary has echoed this concern, reinforcing the principle that a human judge must oversee and critically evaluate the conclusions drawn

by digital decision-making systems.

As mentioned, defendants have also raised issues related to equal protection, questioning whether the data feeding into algorithms adequately represents their individual circumstances. In the *Loomis* case, for example, the defendant contended that the COMPAS algorithm exhibited bias against him as a male from Wisconsin because it relied on national data, which included female profiles. Rather than challenging the algorithm's statistical accuracy, *Loomis* argued that its application to his specific demographic was fundamentally flawed, revealing a critical issue in how data representation can impact algorithmic fairness.

### Algorithmic Litigation

In the future, defendants can be expected to routinely challenge the accuracy of algorithms, particularly in private litigation where parties may accept the use of algorithms but dispute their outcomes. Consider a trademark infringement case where a corporate defendant seeks to demonstrate that its mark does not confuse consumers. Instead of relying on traditional methods such as consumer surveys, the company might turn to an algorithm to analyze a synthetic dataset. This dataset, created by the defendant or a third-party, could be composed of real individuals combined with thousands of hypothetical profiles, specifically designed to simulate consumer behavior. For instance, the dataset might include profiles of 19-year-olds from Western Pennsylvania who played lacrosse before attending college—an entirely hypothetical group that the algorithm uses to predict how such consumers might perceive the trademark.

However, this innovative approach is fraught with potential legal challenges. Plaintiffs might argue that the algorithm's conclusions are flawed due to issues of representativeness. They could question whether there are enough real 19-year-olds in Western Pennsylvania who fit the specific profile used by the algorithm, or whether the hypothetical population truly reflects real-world consumers in other ways. Even if the dataset is comprised entirely of real individuals, regional differences—such as those between consumers in Pennsylvania and Texas—could potentially skew the algorithm's predictions. People observed in Western Pennsylvania, for instance, might not accurately represent how people in Western Texas would respond to the trademark. This opens the door for plaintiffs to argue that the algorithm's findings are unreliable and should be adjusted or, alternatively, to introduce their own algorithmic analysis as a counterpoint.

This emerging battleground in private litigation indicates that the role of algorithms in legal strategy is evolving, though seasoned litigators will see parallels to challenging other forms of statistical evidence. Both the data and the models behind these algorithms are open to scrutiny and dispute.

### Data Dilemmas

For legal practitioners seeking to challenge algorithms, several critical issues must be addressed: the problems of small sample sizes, the complexities of reflexive human behavior, and the implications of rapid innovation. Each of these factors can significantly undermine the representativeness and reliability of algorithmic outputs.

**Small Sample Sizes:** One of the fundamental challenges in

algorithmic decision-making is the need for large datasets to achieve accurate predictions. Modern machine learning models often require thousands of labeled examples to function at a level comparable to human judgment. In the legal context, however, such comprehensive data is seldom available, which can result in inaccuracies in algorithmic predictions. Imagine a scenario where a litigator relies on an algorithm to predict whether settling a case is the best course of action. Ideally, the dataset underpinning the algorithm would include outcomes from thousands of similar cases, accounting for variables such as the defendant's workforce size, years in business, and financial performance. But in practice, such data is often sparse, resulting in predictions that may not fully capture the nuances of the case at hand.

To mitigate the limitations posed by small sample sizes, many algorithms employ advanced techniques such as matching, where data scientists attempt to create a more comprehensive dataset by finding comparable data points to fill in gaps. Imagine, for example, a judicial system in which judges always incarcerate defendants of above-average height, meaning we would never observe the post-release behavior of tall parolees. To predict the outcomes for tall individuals if they were released, data scientists match their characteristics—such as variables related to their criminal histories and social backgrounds—with those of shorter, released defendants. If the match is sufficiently accurate, we can infer the behaviors of those we have observed (the short parolees) to those we have not (the tall ones). With effective matching, accurate predictions can be made. Additionally, using these inferred outcomes, we can expand the data to include “observations” of events that have never actually occurred, thereby creating a larger dataset. However, this approach is not without its challenges. The success of the matching process hinges on the validity of the assumptions made during its development. For example, we might assume that a particular social history predicts good behavior irrespective of height. If this assumption is flawed, the resulting predictions and synthetic data can be misleading. This highlights a broader truth in data science: while large datasets and sophisticated algorithms may appear impressive, the accuracy of their predictions ultimately depends on the quality of the underlying data and the robustness of the hypotheses that drive the matching process.

**Reflexive Behavior:** Human actions are not merely reactive; they are often anticipatory, shaped by expectations of future developments. This forward-looking aspect of human behavior presents a significant challenge for algorithms, which are inherently backward-looking and rely on historical data

to make predictions. For example, if a regulatory agency argues that a new rule will have minimal negative impact based on past data, it must assume, explicitly or implicitly, that the new rule is comparable to previous obstacles faced by businesses in the past. After all, its prediction is based upon data that captures past patterns of behavior. The validity of the agency's argument again hinges on the principle of matching: the proposed regulatory environment must be sufficiently similar to an earlier one. Alternatively, if the agency does not rely on a data-driven approach and instead uses a theory of business behavior, it must model how the industry is likely to react to the new rule based on certain behavioral assumptions. As in the previous examples, the accuracy of the agency's prediction depends entirely on the validity of the underlying hypotheses.

**Innovation:** Algorithms are typically built on the premise that future conditions will closely mirror the past, but this assumption is increasingly challenged in a world characterized by rapid technological and social change. When the environment in which an algorithm operates evolves, the data it was trained on may become outdated, leading to inaccurate predictions. Consider a scenario where a company uses an algorithm developed in 2024 to predict employee performance in 2025. Now, if Microsoft releases new software that incorporates an advanced large language model into its Office suite, significantly boosting the productivity of the company's younger, technologically savvy employees, then the algorithm will likely underestimate their future performance. This is because it was built with data that observed these employees before they had access to the new technology. A systematic change in their environment has occurred, diminishing the accuracy of the earlier algorithm's predictions. The data used to create the algorithm is not representative of the younger employees' current capabilities.

In addition to issues associated with unrepresentative data, algorithms can also be critiqued for poor modeling. An algorithm might assign incorrect weight to certain variables or fail to account for significant factors altogether. In most scenarios, a litigator will likely rely on an expert to conduct thorough diagnostic testing of the algorithm's architecture and assess how confident one can be in its predictions on its own terms. However, good litigators should also use their own judgment to compare and contrast the specific features of their case with the algorithm's aggregated underlying data. If their case is a poor match, then the predictions of their adversaries can be challenged effectively.

### Conclusion

As algorithms become increasingly integrated into legal processes, their use will inevitably come under greater scrutiny. Litigants must be prepared to challenge these tools not just on the basis of how they are applied, but on the foundational data and assumptions that drive their outputs. Understanding the limitations of algorithms—whether due to small sample sizes, reflexive behavior, or failure to account for innovation—will be essential for effective legal strategy. Attorneys defending an algorithm should apply these insights in reverse, and potential defendants should proactively devise strategies to counter these arguments before implementing a new algorithm. By working closely with experts to dissect the data and the models, litigators can better navigate the complex interplay between technology and law, ensuring that a litigation outcome is not overshadowed by an overreliance on flawed algorithmic decision-making.

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# THE ADVOCATE

EVIDENCE &  
PROCEDURE  
UPDATES

**U**PDATES ON CASE LAW pertaining to procedure and evidence as compiled by Dylan O. Drummond of Langley & Banack, Inc.



## ARTIFICIAL INTELLIGENCE



# EVIDENCE UPDATE

BY DYLAN O. DRUMMOND

## Rule 503(b)(1)—Attorney-Client Privilege’ Attorney’s Representative

*Univ. of Tex. Sys. V. Franklin Ctr. for Gov’t & Pub. Integrity*, 675 S.W.3d 273 (Tex. 2023). The University of Texas System chancellor hired an outside investigator to evaluate allegations of external pressures on the university’s admissions process. The resulting report was posted on the university’s website. A public integrity center filed a Texas Public Information Act request for “[a]ll emails, interview transcripts and other documents provided to or obtained by” the investigator in preparation of its report. The System resisted disclosure and sought an Attorney General decision on the withheld documents, which subsequently determined that the System may withhold some—but not all—of the requested information on the ground that it was protected by the attorney–client privilege.

The System sued the Attorney General to challenge the portions of the ruling that ordered disclosure and the center intervened, seeking a declaration and a writ of mandamus compelling the System to disclose certain requested documents—including internal emails shared with the investigator that were exchanges between the System and the university’s lawyers and clients discussing or transmitting legal advice and containing draft redlined communications from the system’s general counsel to interviewees. The parties filed cross-motions for summary judgment, and after reviewing the disputed documents in camera, the trial court determined they were privileged and granted the System’s summary-judgment motion. The court of appeals reversed and rendered judgment requiring disclosure of all the documents, holding that the investigator was not a lawyer’s representative.

The supreme court reversed and remanded, holding that: (1) the investigator acted as a “lawyer’s representative” in conducting the investigation; (2) the disputed documents fell within the attorney–client privilege, as they were made between privileged persons and were for the purpose of facilitating the rendition of legal services to the university; (3) the university did not waive the privilege by disclosing some of the disputed documents to the investigator; and (4) to

the extent the investigator’s final report directly quoted from or otherwise disclosed “any significant part” of the disputed documents, publication of the report did waive the university’s attorney–client privilege as to those specific documents.

*Dylan O. Drummond is a former wildlife biologist who practices in San Antonio, Texas as an appellate shareholder with the law firm of Langley & Banack, Inc. He is a former chair of the State Bar of Texas Appellate Section and the Texas Bar College, as well as a former president of the Texas Supreme Court Historical Society. ★*

# PROCEDURE UPDATE

BY DYLAN O. DRUMMOND

## DEFECTIVE CITATION

*Nelson v. Eubanks*, No. 15-24-00037-CV, 2024 WL 4886621 (Tex. App.—Austin [15th Dist.] 2024) (mem. op.). In November 2023, Texas voters approved thirteen amendments to the Texas Constitution, which Travis Eubanks and others (collectively, “Eubanks”) challenged on the basis of the purported use of allegedly illegal electronic voting machines. Texas Secretary of State Jane Nelson filed a plea to the jurisdiction, which the trial court denied, and this interlocutory appeal followed.

In addition to a substantive issue not analyzed here, the Secretary raised a procedural issue regarding what she contended was a fatal procedural defect in the citation served on her office. The general deadline to answer civil actions in Texas is “the Monday next after the expiration of twenty days after the date of service thereof.” But the Texas Election Code shortens the deadline slightly for statewide election contests like this one to “the 20th day after the date of service”—not the first Monday after the 20th day following service. The Secretary argued that the citation at issue here, which erroneously stated the general deadline (Monday next after 20 days after service) rather than the statutory deadline (20 days after service), constituted a jurisdictional defect that rendered this contest moot.

The Fifteenth Court of Appeals held that stating the correct deadline in a citation for an answer to an election contest is mandatory—but not jurisdictional. Here, the court reasoned, the Secretary was actually served with the citation, actually knew of the citation defect (which was cited in her plea), and actually responded several days before the statutory deadline arrived. If such an error by a court clerk were jurisdictional, then election contests could be thwarted merely by unforced errors of a court employee.

## DEFECTIVE TRIAL NOTICE

*Wade v. Valdetaro*, 696 S.W.3d 673 (Tex. 2024) (per curiam). During a remote bench trial that lasted less than an hour, a trial court awarded \$21 million in damages against a company’s former executive. Unbeknownst to him, notice of

the trial had been sent to an incorrect address. During the trial and proceeding pro se, the former executive offered no evidence and cross-examined no witnesses after informing the court coordinator that he never received notice of the trial until the court clerk emailed him instructions earlier that day regarding how to log into the court proceedings. The court of appeals court affirmed.

Because Texas Rule of Civil Procedure 21a(b)(1) requires trial notices to be “properly addressed,” and the notice here was not, the supreme court reversed, holding that proceeding to trial in derogation of the former executive’s right to properly-addressed notice was reversible error, violated basic principles of due process, and warranted a new trial. The supreme court rejected the argument that the former executive’s failure to request a continuance constituted a voluntary, knowing, and intelligent waiver of the due process right to reasonable notice.

## DISCOVERY

*In re Liberty Cnty. Mut. Ins. Co.*, 679 S.W.3d 170 (Tex. 2023) (per curiam). Following a motor-vehicle accident, a driver settled for the policy limits of the other individual involved in the accident. The driver then sued her insurer for underinsured motorist (UIM) benefits, alleging that her damages exceeded the settlement amount. Her insurer subpoenaed the driver’s primary care physician seeking all documents, records, and films pertaining to the driver’s care, treatment, and examination during a fifteen-year period. The driver moved to quash both subpoenas as facially overbroad and for sanctions. In its written response, and again at the hearing, the insurer agreed to reduce the timeframe of the requests to a total of ten years—five years before the accident and five years after. The trial court granted the driver’s motion to quash and sanctioned the insurer’s counsel. The court of appeals denied the insurer mandamus relief.

The supreme court conditionally granted mandamus relief on the following grounds. First, the supreme court held that the trial court clearly abused its discretion because Liberty’s requests sought relevant information and—as modified—were not so overbroad or disproportionate as to justify an order

precluding all discovery from the driver's primary care physician. Second, by suing the insurer for UIM benefits, the driver placed the existence, causation, and extent of her injuries from the accident at issue. Third, the supreme court determined that mandamus relief was appropriate because the trial court's order denied the insurer a reasonable opportunity to develop a defense that went to the heart of its case, and it would be difficult to determine on appeal whether the discovery's absence would affect the outcome at trial. Finally, the supreme court set aside the sanctions order because it was supported only by the erroneous order quashing the insurer's discovery requests.

**In re Peters**, 699 S.W.3d 307 (Tex. 2024) (per curiam). After a night out drinking, a driver caused a multi-car accident that injured the plaintiffs. After being admitted to the hospital, the driver told the responding police officer that he had visited two bars whose names he had forgotten, consumed three beers, and felt "buzzed." After a breathalyzer test revealed that the driver had a blood-alcohol concentration above the legal limit, the officer arrested the driver and charged him with intoxication assault with a motor vehicle.

After suing the driver for negligence, the plaintiffs served interrogatories inquiring about the names of the bars that served the driver alcohol in order to bring a dram shop action. The driver invoked the Fifth Amendment and refused to provide the information sought. The trial court granted the plaintiffs' motion to compel and the court of appeals denied the driver's mandamus petition.

The supreme court conditionally granted mandamus relief, holding that the constitutional privilege against self-incrimination applies in civil litigation and can bar discovery—no matter how critical the need for that discovery is. Here, the driver's discovery responses could be used against him in the criminal case by leading to evidence that the driver, in fact, drank more than the three beers that he claimed. The supreme court also rejected the plaintiffs' argument that the driver waived the privilege by disclosing to the police that he had visited two bars, drank three beers, and felt buzzed. To this end, the supreme court determined that the plaintiffs failed to show a voluntary, knowing, and intelligent waiver of the privilege in the record, in part, because the officer's notes about the driver's condition militated against the finding of voluntary waiver.

#### FORUM NON CONVENIENS

**In re Weatherford Int'l, LLC**, 688 S.W.3d 874 (Tex. 2024) (per curiam). The South African-citizen widow and Scottish-

citizen children of a Texas company's employee—himself a U.K. citizen domiciled in South Africa—filed wrongful death claims arising from the company's failure to disclose to the employee the ultimately fatal results of a routine medical examination by the company's Egyptian affiliate. The trial court denied the company's motion to dismiss for forum non conveniens and the court of appeals denied mandamus relief.

The supreme court conditionally granted mandamus relief, concluding that all six statutory forum non conveniens factors in Texas Civil Practices and Remedies Code section 71.051(b) favor dismissal. As a result, the supreme court determined that Egypt is a more appropriate forum for the family's claims because, among other reasons, the company's Egypt's policies and practices governed the handling of the employee's medical information.

#### REMOVABILITY TO THE TEXAS BUSINESS COURT

**XTO Energy, Inc. v. Hous. Pipe Line Co.**, No. 24-BC11B-0008, 2024 WL 4648110 (Tex. Bus. Ct.—11th Div. Nov. 26, 2024). XTO Energy, Inc. sued Houston Pipe Line Co., LP and others (collectively, "Houston Pipe") in 2021 in Harris County district court regarding natural gas transportation charges incurred during Winter Storm Uri in February 2021. After extended motion practice in the district court and two pending mandamus petitions in the First Court of Appeals, Houston Pipe removed the case to the Business Court in October 2024, which XTO sought to remand back to the district court.

XTO argued that section 8 of the of the Business Court's organic act expressly provides that "changes in law made by this Act apply to civil actions commenced on or after September 1, 2024." While this provision was not codified, it was nevertheless passed by both houses of the Texas Legislature and signed into law by the Governor. In turn, Houston Pipe argued that the Legislature must have included the proviso, "only," if it intended to exclude from the Business Court's jurisdiction any actions already on file prior to September 1, 2024.

In one of a handful of opinions (available on the Business Court's website at <https://txcourts.gov/businesscourt/opinions/>) similarly disposing of the same predicate issue, the Business Court determined it lacks jurisdiction to hear disputes that were not commenced on or after September 1, 2024. See *Winans v. Berry*, No. 24-BC04A-0002 (Tex. Bus. Ct.—4th Div. Nov. 7, 2024); *Tema Oil & Gas Co. v. ETS Field Servs., LLC*, No. 24-BC08B-0001 (Tex. Bus. Ct.—8th Div. Nov. 6, 2024).

## STATUTE OF LIMITATIONS

*Sanders v. Boeing*, 680 S.W.3d 340 (Tex. 2023). Texas Civil Practice and Remedies Code section 16.064 provides that, so long as a party refiles an action in a court of proper jurisdiction within sixty days of the original dismissal for lack of jurisdiction becoming final, any applicable statutes of limitation are tolled.

After a pair of flight attendants sustained permanent hearing loss due to a malfunctioning smoke detector on their plane, they sued the Boeing Company and other defendants in federal district court. The federal court later dismissed their suit sua sponte for failure to adequately plead diversity jurisdiction and the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal. Nearly three years after the two-year limitations period expired and ninety-eight days after the Fifth Circuit issued its opinion and judgment—but less than sixty days after the Fifth Circuit denied the rehearing motion and issued its mandate—the flight attendants refiled the action, which was ultimately dismissed for being outside the statute of limitations. The Fifth Circuit certified two questions to the Texas Supreme Court: (1) does Section 16.064 apply where the flight attendants could have invoked the prior district court’s subject matter jurisdiction with proper pleading; and (2) Did the flight attendants file their lawsuit within sixty days of when the prior judgment became “final” under Section 16.064?

The supreme court answered, “yes,” to both questions. As to the first question, the supreme court concluded that Section 16.064(a)(1) requires only that a prior action must be dismissed “because of lack of jurisdiction”—which is satisfied when a court dismisses an action because of lack of jurisdiction regardless of whether the court erred and actually had jurisdiction or could have had jurisdiction had the claims been pled differently. As to the second question, the supreme court held that a dismissal or other disposition “becomes final” under Section 16.064(a)(2) when the parties have exhausted their appellate remedies and the courts’ power to alter the dismissal has ended.

## SUMMARY JUDGMENT

*Gill v. Hill*, 688 S.W.3d 863 (Tex. 2024) (per curiam). Successors-in-interest to a mineral interest that a person purchased at auction following foreclosure by several governmental entities sued the subsequent purchaser twenty years later to quiet title. The trial court granted summary judgment based on the tax code’s one-year statute of limitations to challenge tax sales and a divided court of appeals affirmed.

The supreme court concluded that the purchaser satisfied his summary-judgment burden by conclusively showing that the statute of limitations expired before the suit was filed. Consequently, the successors failed to meet their burden to raise a genuine issue of material fact that the foreclosure judgment was void by failing to present any such evidence. The supreme court vacated the judgment below and remanded for consideration in light of the court’s recent decisions in *Draughon v. Johnson*, 631 S.W.3d 81 (Tex. 2021) addressing the burdens of proof for summary judgments based on limitations, and *Mitchell v. MAP Resources, Inc.*, 649 S.W.3d 180 (Tex. 2022) clarifying the types of evidence that can be used to support a collateral attack on a judgment.

*Verhalen v. Akhtar*, 699 S.W.3d 303 (Tex. 2024) (per curiam). Mother and daughter sued defendants for negligence based upon head injuries the daughter sustained while in the defendant’s care. After the defendants sought traditional and no-evidence summary judgment, the mother and daughter failed to timely file their response—missing the deadline by a single day. Alongside their response, the mother and daughter filed a verified motion for leave, blaming the late filing on a software calendaring error. The trial court denied the motion for leave, granted summary judgment in favor of the defendants, and awarded take-nothing judgments as to the mother and daughter. The court of appeals affirmed.

The supreme court reversed, reiterating that motions for leave must be granted when the movant demonstrates good cause by showing that (1) the failure to timely respond ... was not intentional or the result of conscious indifference, but the result of an accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. Here, counsel for the mother and daughter met the first prong by demonstrating that she did not act with intention or conscious indifference in missing the filing deadline because she promptly investigated, took responsibility for the mistake, and took the initiative to correct it—tendering both the summary judgment response and a motion for leave with an affidavit explaining the delay within twenty-four hours of the deadline. And counsel met the second prong because neither defendant filed a response in opposition to the motion for leave nor asserted prejudice at the summary judgment hearing, and each only had two days fewer than if the filing had been timely to consider the responses, prepare for the hearing, and file replies.

After reiterating that another attorney's mere appearance on a signature line does not demonstrate the attorney was so active in the case that they could have timely filed the response, the supreme court found the trial court abused its discretion in denying the motion for leave.

*Dylan O. Drummond is a former wildlife biologist who practices in San Antonio, Texas as an appellate shareholder with the law firm of Langley & Banack, Inc. He is a former chair of the State Bar of Texas Appellate Section and the Texas Bar College, as well as a former president of the Texas Supreme Court Historical Society. ★*





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**THE ADVOCATE**



# EXHIBIT 4

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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CHAIR

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JAMES C. DEVER III  
CRIMINAL RULES

JESSE M. FURMAN  
EVIDENCE RULES

MEMORANDUM

**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Jesse M. Furman, Chair  
Advisory Committee on Evidence Rules

**RE:** Report of the Advisory Committee on Evidence Rules

**DATE:** December 1, 2024

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**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on November 8, 2024 at New York University Law School. The Committee reviewed severable possible amendments, including amendments relating to Artificial Intelligence and machine learning and an amendment to Rule 609.

A full description of the Committee’s discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

Exhibit 4



## II. Action Items

No action items.

## III. Information Items

### A. Rule 801(d)(1)(A)

At its Spring 2024 meeting, the Standing Committee approved, for publication for public comment, an amendment to Rule 801(d)(1)(A), which provides that all prior inconsistent statements of a testifying witness are admissible over a hearsay objection. Under the existing rule, only prior inconsistent statements made under oath at a formal proceeding are admissible over a hearsay objection. The arguments supporting the amendment are: 1) hearsay concerns are answered by the fact that the person who made the hearsay statement is at trial, under oath, and subject to cross-examination; and 2) the prior inconsistent statement is going to be admitted at any rate for impeachment, so the proposal eliminates the need to provide a potentially confusing limiting instruction.

The public comment period closes on February 15, 2025. The Committee will review and consider any public comments and determine whether to recommend the proposed amendment for final approval at its Spring 2025 meeting.

### B. Rule 609(a)(1)(B)

The Committee discussed a possible amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment reviewed by the Committee would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for change made to, and rejected by, the Committee in the last two years, namely a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness's character for truthfulness. The proposal currently being considered by the Committee focuses on criminal defendant witnesses only.

The Committee appears to be divided about the proposal to add the word "substantially" to Rule 609(a)(1)(B). Most members agree that a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. Those in favor of the change argue that these errant courts have not effectuated the Congressional intent to provide more protection to criminal defendants, so that they will not be deterred from exercising their right to testify, and thus a mildly more protective test should be

employed. Those who oppose the change are concerned that courts that currently correctly apply the rule might end up, under a slightly stricter test, excluding convictions that ought to be admitted.

The possible amendment to Rule 609(a)(1) will be further considered at the next meeting.

### **C. Artificial Intelligence and Deepfakes**

For the past two years the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by AI will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: 1) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake; and 2) evidence that is a product of machine learning, which would be subject to Rule 702 if propounded by a human expert.

At its fall meeting, the Committee considered a number of proposals to amend the Evidence Rules to regulate deepfakes and machine learning. As to machine learning, the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The Committee tentatively agreed on an amendment that would simply apply the standards of Rule 702 to evidence that is the product of machine learning. The proposal — to be considered at the next meeting with the view to approve it for release for public comment — would create a new Rule 707. The current draft language for the new rule is as follows:

#### **Rule 707. Machine-generated Evidence**

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

The Committee agreed that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration.

As to deepfakes, the Committee has tentatively determined that issuing a rule proposal would not be advisable at this early stage — that it would be prudent to wait to see how courts deal with deepfakes because it is quite possible that the existing rules on authenticity are flexible enough to handle the possibility that parties will be submitting manufactured audiovisual evidence. But the Committee believes it would be useful to agree on language for a possible amendment, so as to be able to respond if problems do arise. The proposal for consideration at the Spring 2025 meeting would add a new Rule 901(c). The language of the proposal is as follows:

**Rule 901(c). Potentially Fabricated Evidence Created By Artificial Intelligence.**

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been fabricated, in whole or in part, by artificial intelligence, the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

The proposal protects against the possibility of an opponent demanding an inquiry by simply claiming that the item is a deepfake. The opponent has the burden of making an initial showing that there is something suspicious about the item — enough for a reasonable person to find that it is fabricated. At that point, the burden shifts to the proponent to show, by a preponderance of the evidence, that the item has not been fabricated. The preponderance standard is, of course, higher than the standard ordinarily required for establishing authenticity. That higher standard can be justified if deepfakes become prevalent and exceedingly difficult to detect.

**D. False Accusations of Sexual Misconduct**

The Committee considered whether the Evidence Rules should be amended to address false accusations of sexual misconduct, either by way of an amendment to Rule 412 or a freestanding new Rule 416. As between the alternatives, the Committee agreed that a new Rule 416 would be preferable. But after considerable research and review, the Committee decided not to pursue an amendment and to take the proposal off its agenda. False accusations in sexual assault cases arise more frequently in state and military courts, and research indicates that these courts have procedures and rules in place and are unlikely to adopt a Federal “model.” Moreover, the Committee agreed that courts have adequate tools to address these issues under the existing Evidence Rules, including Rules 404, 412, and 608.

**E. Rule 404(b)**

At the Committee’s fall 2023 symposium, a law professor made the argument that courts are admitting evidence of uncharged misconduct even where the probative value of the bad act is dependent on a propensity inference. He suggested an amendment to Rule 404(b) to prevent this practice. The Committee noted that the notice requirement of Rule 404(b) was amended in 2020 to require the prosecution to articulate a non-propensity purpose for bad act evidence, and it was resolved that the Committee should determine how that amendment was working before proposing another amendment to the rule. Ultimately, the Committee decided to table any proposed amendment to Rule 404(b). The Committee recognized that while some courts may have admitted propensity evidence, other instances raised by the professor as problematic were in fact proper applications of the Rule. Moreover, any attempt to amend Rule 404(b) would run into significant opposition by the Department of Justice, which had compromised on the Rule in 2020.

## **F. Rule 702 and Peer Review**

Two attorneys submitted a proposal to the Committee to amend Rule 702 to address the “peer review” factor as set out in *Daubert* and the Committee Note to the 2000 amendment to Rule 702. Under *Daubert* and the Committee Note, the existence of peer review is relevant to a court’s determination of the reliability of an expert’s methodology. The attorneys argue that peer review is problematic because many peer-reviewed studies cannot be replicated.

The Committee decided not to proceed with an amendment on peer review. Rule 702 is general. It does not mention the *Daubert* factors. Thus, singling out one factor for caution, in text, would be awkward and a possible source of confusion. Moreover, courts currently have, and exercise, discretion to reject peer reviewed studies that have not been replicated. So an amendment to the text was found unnecessary and the issue was removed from the Committee’s agenda.

## **G. Rule 704(b) and the Supreme Court’s Decision in *Diaz v. United States***

Last Term, the Supreme Court decided *Diaz v. United States*, in which the defendant in a drug-smuggling case argued that Rule 704(b) prohibited testimony from an expert that “most people” who transport drugs across the border do so knowingly. The Court found no error because the expert’s testimony was based on probability and not certainty. A question for the Committee is whether the Court’s construction of Rule 704(b) counsels or mandates some amendment to the Rule. After discussion, the Committee determined that no amendment is warranted. The Court’s result is consistent with the language and intent of Rule 704(b), which was directly enacted by Congress.

## **H. The Right to Confrontation, Rule 704(b), and the Supreme Court’s Decision in *Smith v. Arizona***

Last Term, the Supreme Court decided *Smith v. Arizona*, in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst — and the other analyst’s findings were disclosed to the jury. The Court held that an expert’s disclosure to the jury of testimonial hearsay violated the defendant’s right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert’s opinion. At its Fall 2024 meeting, the Committee considered whether the Court’s confrontation analysis counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay, but limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert’s testimony, there would be little to no impact on Federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert’s opinion. But if the Court’s decision is construed to apply also to the expert’s *reliance* on the lab report, it could have a substantial effect on Federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably. A constitutional bar on such

reliance would probably necessitate an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case.

The Committee was of the view that *Smith* concerned disclosure, not reliance. But the Committee decided to monitor the post-*Smith* case law to determine whether and how the lower courts apply *Smith* to reliance as well.

### **I. Rule 902 and Tribal Certificates**

Judge Frizzell submitted a suggestion to the Committee to consider whether federally recognized Indian tribes should be added to Rule 902(1) which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1) does not list Indian tribes, the government must use another route to authenticate proof of a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been at least two recent cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception and authentication under Rule 902(11). Moreover, the problem of authentication has arguably taken on more importance in light of the increase in federal cases resulting from the Supreme Court's decision in *McGirt v. Oklahoma*.

At its fall 2024 meeting, the Committee engaged in an initial discussion of the possibility of amending Rule 902(1) to include federally recognized Indian tribes. While the Committee was informed by the DOJ that many Indian tribes maintain records on a par with the government entities listed in Rule 902(1), it was also informed that many Indian tribes do not have the resources necessary to guarantee accurate recordkeeping. Other members noted that the problem is not with the rules, but rather with untrained prosecutors.

The Committee resolved that it would hear from the DOJ at the next meeting on two issues: 1) whether the problem is one of rulemaking or whether it can be solved by training prosecutors; and 2) whether tribal recordkeeping is sufficiently reliable across the board to warrant the same treatment as the other public bodies currently covered by Rule 902(1).

### **IV. Minutes of the Fall 2024 Meeting**

The draft of the minutes of the Committee's fall 2024 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Draft Minutes of the Fall 2024 meeting of the Advisory Committee on Evidence Rules.

# Tab C



# MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Judicial Administration Subcommittee

DATE: February 28, 2025

RE: Revisions to Procedural Rules for the State Commission on Judicial Conduct

---

The Texas Supreme Court has asked the Advisory Committee to conduct a wholesale review of the Procedural Rules for the State Commission on Judicial Conduct (SCJC or Commission) and draft amendments for the Court’s consideration. This review is requested because the rules “do not reflect recent statutory changes, including changes enacted by the 87th Legislature in HB 4344, and, in some instances, are unclear or unworkable.”

The current rules are attached as **Exhibit 1**. The referral and HB 4344 are attached as **Exhibit 2**. The Commission’s most recent legislative report is attached as **Exhibit 3**.

## Introduction

This memo proceeds in two parts.

Part one focuses on proposed amendments necessary to conform the rules to HB 4344’s requirements.

Part two catalogues proposed legislative changes now pending consideration, which if enacted will require substantial rule amendments.

Potential areas for additional proposed rule amendments include clarification of terminology used in Rule 3; establishment of a deadline for completion of a preliminary investigation under Rule 3 to promote the quick resolution of baseless complaints; clarification of terminology in Rule 4; clarification of procedures under Rule 10, and how “formal proceedings” differ from a “full investigation”; and clarification of circumstances under which proceedings may be expedited. Others may be suggested.

In conjunction with this referral, the Judicial Administration Subcommittee has been in communication with and solicited input on potential rule changes from several sources, including Commission staff; the Judicial Section of the State Bar of Texas; legislative staff; and the Texas District Judges Association. The subcommittee invites input on proposed rule changes from all interested persons and organizations.

Any discussion of rule changes must take into account the crucial interests that are bound up in the Commission's constitutional mandate to investigate and address allegations of misconduct or permanent disability with respect to judges and judicial candidates. Some allegations are baseless, and some are not. The process for evaluating and addressing allegations must be based on accountability; fair to persons who make allegations of misconduct or disability; fair to judges and judicial candidates against whom allegations are made; fair to litigants, lawyers, and justice-involved individuals whose interests are implicated by such allegations; and grounded in the importance of protecting public confidence in the integrity of the court system.

Against this backdrop, the subcommittee has examined proposed rule changes necessary to implement deadlines and other procedures required by statute.

This memo breaks the topic into two parts because it is easier to discuss specific rule changes that are required by already-passed legislation as reflected in Part One; it is harder to discuss possible rule changes that might be required by proposed legislation that may or may not pass—and that may or may not pass in the form in which the proposals currently appear. Part Two of this memo is intended to invite a wider discussion about the structure of the SCJC rules as a whole; issues or concerns regarding the current operation of those rules and the SCJC; and specific aspects of the multiple pending legislative proposals. This larger discussion will be used in drafting wider rule amendments as the legislative requirements from this session come into better focus.

## **Part One: Proposed rule changes to implement HB 4344**

HB 4344 was passed during the 87th Legislature and signed into law by Governor Abbott on June 15, 2021. It took effect on September 1, 2022. Among other things, HB 4344 amended Chapter 33 of the Government Code to create deadlines for action on complaints filed with the Commission.

As currently structured, Rule 3(a) provides for conducting a “Preliminary Investigation” by the Commission upon receipt of a verified statement, upon its own motion, “or otherwise” as is “appropriate to the circumstances relating to an allegation or appearance of misconduct or disability of any judge or judicial candidate to determine that such allegation or appearance is neither unfounded nor frivolous.” Under Rule 3(b), “if the preliminary investigation discloses that the allegation or appearance is unfounded or frivolous, the Commission shall terminate further proceedings.”

Rule 4(a) provides that the Commission “shall conduct a full investigation into the matter” if the preliminary investigation discloses that

- “the allegations or appearances are neither unfounded nor frivolous”;
- “sufficient cause exists to warrant full inquiry into the facts and circumstances indicating that a judge or judicial candidate may be guilty of willful or persistent conduct which is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice”; or
- the judge “has a disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature ....”

Under Rule 4(b), the Commission “shall inform the judge or judicial candidate in writing that an investigation has commenced and of the nature of the matters being investigated.” Under Rule 9, a judge or judicial candidate who has received a sanction from the Commission may request the appointment of a Special Court of Review to challenge a Commission sanction determination. Rule 10 provides for “Formal Proceedings” if “after the investigation has been completed the Commission concludes that formal proceedings should be instituted.” Under Rule 11, the Commission must “promptly file a copy of a request for appointment of a Review Tribunal with the clerk of the Supreme Court” upon “making a determination to recommend the removal or retirement of a judge ....” Rule 13 allows a judge to appeal a decision of the Review Tribunal to the Supreme Court under the substantial evidence rule. Rule 15 allows the

Commission to suspend a judge from office with or without pay “immediately upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct.”

HB 4344 added new procedures and deadlines to Chapter 33 of the Government Code governing the Commission’s activities.

- It added subsection 33.0211(c) requiring that, for each complaint filed with the Commission, each member of the Commission must be notified of the complaint and “briefed and provided detailed information about the complaint.”
- It added section 33.0212 setting deadlines for (1) the Commission’s staff to file with each member of the Commission a report detailing the investigation of the complaint and recommendations for commission action regarding the complaint; and (2) the Commission to determine any action to be taken regarding the complaint.
- It added section 33.0213 allowing the Commission, upon notice by any law enforcement agency investigating an action for which a complaint has been filed with the Commission, to place the Commission’s complaint file on hold and decline any further investigation that would jeopardize the law enforcement agency’s investigation.

HB 4344 also created legislative reporting requirements for the Commission that are not procedural requirements needing to be reflected in the rules.

The deadlines and procedures reflected in HB 4344 do not distinguish between allegations that are addressed via a “Preliminary Investigation” under Rule 3 and those that are addressed via a “Full Investigation” under Rule 4. Accordingly, the subcommittee proposes adding new stand-alone rules incorporating HB 4344’s deadlines and procedures—as opposed to suggesting additions or amendments to the existing Rules 1 through 18.

The proposed rule additions are as follows based upon HB 4344’s language.

**RULE \_\_\_\_.**      **NOTIFICATION**      **TO**  
**COMMISSIONERS OF COMPLAINT**

Each member of the Commission must be notified of each complaint filed with the Commission,<sup>1</sup> and must be briefed and provided with detailed information about the complaint.

**RULE \_\_\_\_ . REPORT AND  
RECOMMENDATIONS ON FILED COMPLAINTS**

- (a) Not later than the 120th day after the date a complaint is filed<sup>2</sup> with the Commission, Commission staff shall prepare and file with each member of the Commission a report detailing the investigation of the complaint and recommendations for Commission action regarding the complaint.
- (b) Not later than the 90th day following the date on which Commission staff files with the Commission the report and recommendation required by Rule \_\_\_\_ (a), the Commission shall determine any action to be taken regarding the complaint, including:
- (1) a public sanction;
  - (2) a private sanction;
  - (3) a suspension;
  - (4) an order of education;
  - (5) an acceptance of resignation in lieu of discipline;
  - (6) a dismissal; or
  - (7) an initiation of formal proceedings.

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<sup>1</sup> This language is taken verbatim from HB 4344 and is used elsewhere in Chapter 33. Consider how this “complaint filed with the Commission” language meshes with existing Rules 3 and 4, which (1) do not reference the filing of a “complaint,” and (2) allow an investigation to be instituted based upon the Commission’s own motion “or otherwise.”

<sup>2</sup> See prior footnote regarding potential disconnect with language in current rules based upon a reference to filing a “complaint.”

- (c) Upon a showing of extenuating circumstances that make compliance with Rule \_\_\_(a)'s 120-day deadline infeasible, Commission staff may request from the Commission members an extension of not more than 270 days from the date the complaint was filed with the Commission within which to file the report and recommendations required by Rule \_\_\_(a). The Commission shall finalize the complaint not later than the 270th day following the date the complaint was filed with the Commission.
- (d) The Commission's executive director may request that the Commission's chairperson grant an additional 120 days to the time provided under Rule \_\_\_(c) for the Commission and Commission staff to complete the report and recommendations and finalize the complaint.
- (e) If the Commission's chairperson grants additional time under Rule \_\_\_(d), the Commission must timely inform the Legislature of the extension. The Commission may not disclose to the Legislature any confidential information regarding the complaint.<sup>3</sup>

### **RULE \_\_\_. NOTIFICATION OF LAW ENFORCEMENT AGENCY**

On notice by any law enforcement agency investigating an action for which a complaint has been filed with the Commission, the Commission may place the complaint on hold and decline any further investigation that would jeopardize the law enforcement agency's investigation. The Commission may continue an investigation that would not jeopardize a law enforcement investigation.

As noted above, there are multiple disconnects between (1) the statutory language used in HB 4344 and Chapter 33; and (2) the terminology used in the existing rules. Fully integrating HB 4344's requirements into the rules will require

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<sup>3</sup> Does this legislative reporting requirement need to be in the rules?



consideration of wider rule amendments, including potential amendments to the definitions in Rule 1 and to the procedures for initiating a matter at the Commission.

## **Part Two: Pending Legislative Proposals**

Multiple bills and resolutions have been filed this session that would change the Commission's operations and procedures. Here is a summary for the Committee's review and discussion prior to a further rewrite of the rules.

### HB 797—Discipline of Judges by the State Commission on Judicial Conduct

- **Summary:** HB 797, filed by Rep. Jeff Leach (R.-Allen) would revise certain procedures of the SCJC related to processing complaints.
- *Complaint procedures:* HB 797 would require SCJC staff to conduct a preliminary investigation and draft recommendations for action as soon as practicable after a complaint was filed. SCJC staff would be required to prepare and file a report with details about certain complaints within 10 business days before a scheduled SCJC meeting, instead of 120 days after the complaint was filed. The bill would require that reports include each complaint in which a preliminary investigation had been conducted but not finalized, the results of the preliminary investigation, and SCJC staff recommendations regarding the complaint.
- HB 797 would increase the amount of time in which SCJC would be required to act on a recommendation from 90 days to within 120 days of the first SCJC meeting in which the complaint was included in a report. SCJC would be required to finalize a report at the same meeting at which it determined action was required. After this meeting, SCJC would provide the judge who was the subject of the complaint with written notice of the action within five days. If determined appropriate, notice of the decision would have to be posted on the SCJC website.
- Upon completion of the investigation and the submission of recommendations, SCJC would be required to provide the judge who was the subject of the complaint with (1) written notice of the complaint, (2) the results of the investigation, (3) recommendations for action, and (4) the judge's right to attend each SCJC meeting at which the complaint would be included in the report.

- The bill would revise the number of days that SCJC could order an extension for finalization of the report in extenuating circumstances from 270 days from the complaint being filed to 240 days from the first SCJC meeting that included the complaint in the report. The bill would remove provisions allowing for further extension.
- *Notification of law enforcement agency investigation:* SCJC would be required, on notice by any law enforcement agency investigating an action related to a complaint, to continue an investigation if it would not jeopardize a law enforcement investigation regarding the conduct made the basis of the complaint. The bill also would allow SCJC to issue a censure or sanction based on the complaint.
- *Review of SCJC decision:* A judge sanctioned or censured by SCJC under the Texas Constitution may request a review of the decision.
- *Lists of retired and former judges subject to assignment:* Judges who had a public reprimand or censure by SCJC reviewed and rescinded would be eligible to be named on the list of retired and former judges subject to assignment by a presiding judge. Judges who received more than one of any other type of public sanction would be ineligible to be named on the list, except for public sanctions that were reviewed and rescinded.
- *Violations of rules for setting bail:* HB 797 would amend the definitions of “willful or persistent conduct that is clearly inconsistent with the proper performance of a judge’s duties” and “incompetency” to include persistent or willful violation of the rules for setting the amount of bail.
- The bill would require SCJC to recommend the suspension of a judge from office to the supreme court within 21 days of initiating formal proceedings against a judge based on the judge’s persistent or willful violation of the rules for setting bail.
- If SCJC issued a public reprimand of a judge based on the judge’s persistent or willful violation of the rules for setting the amount of bail, SCJC would be required to send notice of the reprimand to certain government officials.

*Effective date:* September 1, 2025, and would apply only to an allegation of judicial misconduct received by SCJC on or after the effective date. Former or retired judges who were ineligible to be named on the list of retired and former judges subject to assignment would be struck from the list on the effective date.

SCJC would be required to adopt rules to implement the provisions of the bill as soon as practicable after the effective date.

SB293—Discipline of Judges by the State Commission on Judicial Conduct, Notice of Reprimands, Judicial Compensation and Judicial Transparency Information Reports (Companion HB 1761 and HB 2064).

- **Summary:** SB 293, filed by Sen. Joan Huffman (R.-Houston) would amend multiple sections of the Texas Government Code and do the following:
- *Meaning of Conduct Inconsistent with Proper Performance of Judicial Duties.* SB 293 would add/clarify that a “failure to meet deadlines set by statute or binding court order” falls within the definition of “wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge’s duties” under the Texas Constitution.
  - [Requested amendment from District Judges’ Association: “provided however, that this provision shall take into account the court’s docket, case complexity, requests for continuances, statutory docket priorities, necessity of discovery, alternative dispute resolution, travel time for multi-county judges, shortage of attorneys within a specific district, and extenuating medical circumstances.”]
  - [Requested amendment from District Judges’ Association: Judge to be given notice and opportunity to respond to allegation of persistent or wilful violation of standards for setting bail under Article 17.15 of Code of Criminal Procedure; “continued intentional violation” required.]
- *Imposition of Administrative Sanctions for False Complaints:* SB 293 would authorize the SCJC to impose administrative sanctions (between \$500 and \$10,000 depending on frequency of the complaints) on those who knowingly file false complaints.
- *Complaint procedures:* SB 293 would require SCJC staff to conduct a preliminary investigation and draft recommendations for action as soon as practicable after a complaint is filed. If, after completing a preliminary investigation, SCJC staff determines that a full investigation is necessary, the SCJC may commence the investigation, providing written notice to the judge who is the subject of the complaint. SCJC staff would be required to prepare and file a report with details about each complaint within 10 business days before a scheduled SCJC meeting, instead of 120 days after

the complaint was filed. The bill would require that such reports include each complaint in which a preliminary investigation had been conducted but not finalized, the results of the preliminary investigation, and SCJC staff's recommendations for action regarding the complaint.

- The bill would increase the amount of time in which the SCJC would be required to act on a recommendation from within 90 days to within 120 days of the first SCJC meeting in which the complaint was included in a report. The SCJC would be required to finalize a report at the same meeting at which it determined action was required. After this meeting, the SCJC would provide the judge who was the subject of the complaint with written notice of the action within five days if the SCJC determines no further action will be taken or within seven days if the SCJC intends to take further action on the complaint. If determined appropriate, notice of the decision would have to be posted on the SCJC website.
  - **[Requested Amendment from the District Judges Association: Complaints shall not be made public unless allowed by Chapter 33. A complaint shall remain private when the SCJC determines that the complaint does not meet necessary requirements; does not include action or inaction contemplated by the Canons of Judicial Conduct; does not warrant a preliminary investigation or full investigation; or the complained-of conduct is not a violation of the Canons of Judicial Conduct.]**
- Upon completion of the investigation and the submission of recommendations, the SCJC would be required to provide the judge who was the subject of the complaint with written notice of the complaint, the results of the investigation, recommendations for action, and the judge's right to attend each SCJC meeting at which the complaint was included in the report.
- The bill would revise the number of days that the SCJC could order an extension for finalization of the report in extenuating circumstances from 270 days from the complaint being filed to 240 days from the first SCJC meeting that included the complaint in the report. The SCJC would be required to notify the following individuals or entities if an extension of time is ordered: the governor, lieutenant governor, the speaker of the house of representatives, the presiding officer of each legislative standing committee with primary jurisdiction over the judiciary, the chief justice of the Texas Supreme Court, the Office of Court Administration, and the presiding judge

of the administrative judicial region in which is located the court of the judge who is the subject of the complaint serves. The bill would remove provisions allowing for further extension.

- **[Requested amendment from District Judges Association: SCJC would inform the chief justice of the Texas Supreme Court and the Office of Court Administration; then, OCA would make the information available to the governor, lieutenant governor, speaker of the House of Representatives, and the presiding officer of each legislative standing committee related to the judiciary.]**
- *Notification of law enforcement agency investigation:* The SCJC would be required, on notice by any law enforcement agency investigating an action related to a complaint, to continue an investigation if it would not jeopardize a law enforcement investigation regarding the conduct subject to the complaint. The bill also would allow SCJC to issue a censure or sanction based on the complaint.
- *Dismissal of complaints involving an allegation or appearance of misconduct or disability:* After conducting a preliminary investigation, if SCJC staff determine administrative deficiencies in the complaint preclude further investigation, SCJC staff may terminate the investigation and dismiss the complaint without action by SCJC. The SCJC shall notify the judge in writing of a dismissed complaint not more than five business days after the dismissal date.
- However, if the SCJC does not determine that an allegation or appearance of misconduct or disability is unfounded or frivolous, the SCJC must conduct a full investigation and, no more than seven business days after SCJC staff commences a full investigation, notify the judge in writing of (1) the commencement of the investigation, (2) the nature of the allegation or appearance of misconduct or disability being investigated, and (3) the judge’s right to attend each SCJC meeting at which the complaint is included in the report filed with SCJC members.
- *Review of SCJC decision:* A judge sanctioned or censured by the SCJC may request a review of the decision. If the SCJC issues a public reprimand based on the judge’s “persistent or wilful violation” of article 17.15 of the Texas Code of Criminal Procedure (i.e., rules for setting bail amounts), the SCJC shall provide notice of the reprimand to the governor, lieutenant governor, the speaker of the house of representatives, the presiding officer of



each legislative standing committee with primary jurisdiction over the judiciary, the chief justice of the Texas Supreme Court, the Office of Court Administration, and the presiding judge of the administrative judicial region in which is located the court of the judge who is the subject of the complaint serves.

- **[Requested amendment by the District Judges Association: If the SCJC issues a public reprimand based on the judge’s “persistent or wilful violation” of rules for setting bail amounts, SCJC would inform the chief justice of the Texas Supreme Court and the Office of Court Administration; then, OCA would make the information available to the governor, lieutenant governor, speaker of the House of Representatives, and the presiding officer of each legislative standing committee related to the judiciary.]**
- *Suspension from Office:* No later than the 21st day after the date the SCJC initiates formal proceedings against a judge based on the judge’s “persistent or wilful violation of Article 17.15, Code of Criminal Procedure,” the SCJC shall recommend to the Texas Supreme Court that the judge be suspended from office pursuant to Section 1-a, Article V, Texas Constitution.
  - **[Requested amendment by the District Judges Association: “after notice to the judge, an opportunity for the judge to respond, and the judge’s continued intentional violation of Article 17.15, Code of Criminal Procedure.]**
- *District Court Reporting:* No later than the 20th day of each calendar quarter, each district court judge would be required to submit to the presiding judge of the administrative judicial region in which the judge’s court sits certain information for the preceding quarter. Each judge must attest to: (1) the number of hours the judge presided over the judge’s court at the courthouse or another court facility; and (2) the number of hours the judge performed judicial duties other than those described in (1), including the number of hours the judge performed case-related duties; performed administrative tasks; and completed continuing education. The presiding judge of each administrative region would be required to submit the district judge information to OCA in a manner prescribed by the Texas Supreme Court. The Supreme Court would be required to promulgate rules establishing guidelines and instructions regarding the district judge information.

- **[Requested amendment from the District Judges Association: Reporting will be based on “guidelines for district court performance” developed by the Texas Supreme Court.]**
- *Lists of retired and former judges subject to assignment:* Judges that had a public reprimand or censure by the SCJC reviewed and rescinded would be eligible to be named on the list of retired and former judges subject to assignment by a presiding judge. Judges who received more than one of any other type of public sanction would be ineligible to be named on the list, except for public sanctions that were reviewed and rescinded.
- *Effective date:* September 1, 2025. The changes to the law under SB 293 relating to judicial conduct would apply only to an allegation of misconduct received by the SCJC on or after the effective date, regardless of whether the alleged conduct occurred or was committed before, on, or after the effective date.

SJR 13—Constitutional Amendment Regarding State Commission on Judicial Conduct

- **Summary:** SJR 13 filed by Sen. Royce West (D.-Dallas) would amend the Texas Constitution and change the composition of the SCJC in the following manner: SJR 13 would eliminate the SCJC’s authority to issue private admonitions, warnings, or reprimands. (*See also* SB 221 amending Chapter 33 of the Government Code to eliminate SCJC authority to issue private admonitions, warnings, or sanctions.).
- *Effective date:* January 1, 2026 upon the affirmative vote of Texas voters at an election held on November 4, 2025.

SJR 27—Constitutional Amendment regarding State Commission on Judicial Conduct Membership

- **Summary:** SJR 27 filed by Sen. Joan Huffman (R.-Houston) would amend the Texas Constitution and change the composition of the SCJC in the following manner:
- Two judges drawn from the Court of Criminal Appeals, district courts, county courts at law, or constitutional county courts appointed by the Texas Supreme Court with the advice and consent of the Senate (current law is one court of appeals justice);

- Two members of the State Bar of Texas (SBOT) with at least 10 years of practice appointed by the SBOT Board of Directors with the advice and consent of the Senate (same as current law);
- Seven non-lawyer citizens appointed by the governor with the advice and consent of the Senate (current law is five non-lawyer members appointed by the SBOT Board of Directors); and two members who serve as Justices of the Peace or municipal court judges appointed by the Texas Supreme Court with the advice and consent of the Senate (current law is one JP and one municipal court judge appointed by the governor).
- SJR 27 would eliminate the SCJC's authority to issue private admonitions, warnings, or reprimands and require the SCJC to suspend from office a judge or justice under a state or federal indictment for a felony offense or a misdemeanor involving official misconduct.
- SJR 27 would also authorize the SCJC to recommend to the Texas Supreme Court suspension for judicial misconduct.
- *Effective date:* The constitutional amendments under SJR 27 would become effective upon the affirmative vote of Texas voters at an election held on November 4, 2025.

# EXHIBIT 1

# PROCEDURAL RULES FOR THE STATE COMMISSION ON JUDICIAL CONDUCT

(Adopted and Promulgated Pursuant to Article V, Section 1-a(11), Texas Constitution)

## RULE 1. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

- (a) “Commission” means the State Commission on Judicial Conduct.
- (b) “Judge” means any Justice or Judge of the Appellate Courts and District and Criminal District Courts; any County Judge; any Judge of a County Court-at-Law, a Probate Court, or a Municipal Court; any Justice of the Peace; any Judge or presiding officer of any special court created by the Legislature; any retired judge or former judge who continues as a judicial officer subject to assignment to sit on any court of the state; and, any Master or Magistrate appointed to serve a trial court of this state.
- (c) “Judicial Candidate” means any person seeking election as Chief Justice or Justice of the Supreme Court; Presiding Judge or Judge of the Court of Criminal Appeals; Chief Justice or Justice of a Court of Appeals; Judge of a District Court; Judge of a Statutory County Court; or Judge of a Statutory Probate Court.
- (d) “Chairperson” includes the acting Chairperson of the Commission.
- (e) “Special Master” means an individual appointed by the Supreme Court upon request of the Commission pursuant to Article V, Section 1-a, Paragraph (8) of the Texas Constitution.
- (f) “Sanction” means any admonition, warning, reprimand, or requirement that the person obtain additional training or education, issued publicly or privately, by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution. A sanction is remedial in nature. It is issued prior to the institution of formal proceedings to deter similar misconduct by a judge or judicial candidate in the future, to promote proper administration of justice, and to reassure the public that the judicial system of this state neither permits nor condones misconduct.
- (g) “Censure” means an order issued by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution or an order issued by a Review Tribunal pursuant to the provisions of Article V, Section 1-a, Paragraph (9) of the Texas Constitution. An order of censure is tantamount to denunciation of the offending conduct, and is more severe than the remedial sanctions issued prior to a formal hearing.
- (h) “Special Court of Review” means a panel of three court of appeals justices selected by lot by the Chief Justice of the Supreme Court on petition, to review a censure or sanction issued by the Commission.

(i) “Review Tribunal” means a panel of seven court of appeals justices selected by lot by the Chief Justice of the Supreme Court to review the Commission’s recommendation for the removal or retirement of a judge as provided in Article V, Section 1-a, Paragraph (9) of the Texas Constitution.

(j) “Formal Proceeding” means the proceedings ordered by the Commission concerning the possibility of a public censure of a judge or judicial candidate or the removal or retirement of a judge.

(k) “Examiner” means the person, including appropriate Commission staff or Special Counsel, appointed by the Commission to gather and present evidence before a special master, or the Commission, a Special Court of Review or a Review Tribunal.

(l) “Shall” is mandatory and “may” is permissive.

(m) “Mail” means First Class United States Mail.

(n) The masculine gender includes the feminine gender.

## **RULE 2. MAILING OF NOTICES AND OF OTHER MATTER**

Whenever these rules provide for giving notice or sending any matter to a judge or judicial candidate, the same shall, unless otherwise expressly provided by the rules or requested in writing by the judge or judicial candidate, be sent to him by mail at his office or last known place of residence; provided, that when the judge or judicial candidate has a guardian or guardian ad litem, the notice or matter shall be sent to the guardian or guardian ad litem by mail at his office or last known place of residence.

## **RULE 3. PRELIMINARY INVESTIGATION**

(a) The Commission may, upon receipt of a verified statement, upon its own motion, or otherwise, make such preliminary investigation as is appropriate to the circumstances relating to an allegation or appearance of misconduct or disability of any judge or judicial candidate to determine that such allegation or appearance is neither unfounded nor frivolous.

(b) If the preliminary investigation discloses that the allegation or appearance is unfounded or frivolous, the Commission shall terminate further proceedings.

## **RULE 4. FULL INVESTIGATION**

(a) If the preliminary investigation discloses that the allegations or appearances are neither unfounded nor frivolous, or if sufficient cause exists to warrant full inquiry into the facts and circumstances indicating that a judge or judicial candidate may be guilty of willful or persistent conduct which is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, or that he has a disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature, the Commission shall conduct a full investigation into the matter.

(b) The Commission shall inform the judge or judicial candidate in writing that an investigation has commenced and of the nature of the matters being investigated.



(c) The Commission may request the judge's or judicial candidate's response in writing to the matters being investigated.

## **RULE 5. ISSUANCE, SERVICE, AND RETURN OF SUBPOENAS**

(a) In conducting an investigation, formal proceedings, or proceedings before a Special Court of Review, the Chairperson or any member of the Commission, or a special master when a hearing is being conducted before a special master, or member of a Special Court of Review, may, on his own motion, or on request of appropriate Commission staff, the examiner, or the judge or judicial candidate, issue a subpoena for attendance of any witness or witnesses who may be represented to reside within the State of Texas.

(b) The style of the subpoena shall be "The State of Texas". It shall state the style of the proceeding, that the proceeding is pending before the Commission, the time and place at which the witness is required to appear, and the person or official body at whose instance the witness is summoned. It shall be signed by the Chairperson or some other member of the Commission, or by the special master when a hearing is before the special master, and the date of its issuance shall be noted thereon. It shall be addressed to any peace officer of the State of Texas or to a person designated by the Chairperson to make service thereof.

(c) A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein.

(d) Subpoenas may be executed and returned at any time, and shall be served by delivering a copy of such subpoena to the witness; the person serving the subpoena shall make due return thereof, showing the time and manner of service, or service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena.

## **RULE 6. INFORMAL APPEARANCE**

(a) Before terminating an investigation, the Commission may offer a judge or judicial candidate an opportunity to appear informally before the Commission.

(b) An informal appearance is confidential except that the judge or judicial candidate may elect to have the appearance open to the public or to any person or persons designated by the judge or judicial candidate. The right to an open appearance does not preclude placing of witnesses under the rule as provided by Rule 267 of the Texas Rules of Civil Procedure.

(c) No oral testimony other than the judge's or judicial candidate's shall be received during an informal appearance, although documentary evidence may be received. Testimony of the judge or judicial candidate shall be under oath, and a recording of such testimony taken. A copy of such recording shall be furnished to the judge or judicial candidate upon request.

(d) The judge or judicial candidate may be represented by counsel at the informal appearance.

(e) Notice of the opportunity to appear informally before the Commission shall be given by mail at least ten (10) days prior to the date of the scheduled appearance.

## **RULE 7. COMMISSION VOTING**

A quorum shall consist of seven (7) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, suspension or removal of any Judge shall be by affirmative vote of at least seven (7) members.

## **RULE 8. RESERVED FOR FUTURE PROMULGATION**

## **RULE 9. REVIEW OF COMMISSION DECISION**

(a) A judge or judicial candidate who has received from the Commission a sanction in connection with a complaint filed subsequent to September 1, 1987, may file with the Chief Justice of the Supreme Court a written request for appointment of a Special Court of Review, not later than the 30th day after the date on which the Commission issued its sanction.

(b) Within 15 days after appointment of the Special Court of Review, the Commission shall furnish the petitioner and each justice on the Special Court of Review a charging document which shall include a copy of the sanction issued as well as any additional charges to be considered in the de novo proceeding and the papers, documents, records, and evidence upon which the Commission based its decision. The sanction and other records filed with the Special Court of Review are public information upon filing with the Special Court of Review.

(c) Within 30 days after the date upon which the Commission files the charging document and related materials with the Special Court of Review, the Special Court of Review shall conduct a hearing. The Special Court of Review may, if good cause is shown, grant one or more continuances not to exceed a total of 60 days. The procedure for the hearing shall be governed by the rules of law, evidence, and procedure that apply to civil actions, except the judge or judicial candidate is not entitled to trial by jury, and the Special Court of Review's decision shall not be appealable. The hearing shall be held at a location determined by the Special Court of Review, and shall be public.

(d) Decision by the Special Court of Review may include dismissal, affirmation of the Commission's decision, imposition of a lesser or greater sanction, or order to the Commission to file formal proceedings.

(e) The opinion by the Special Court of Review shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

## **RULE 10. FORMAL PROCEEDINGS**

### **(a) NOTICE**

(1) If after the investigation has been completed the Commission concludes that formal proceedings should be instituted, the matter shall be entered in a docket to be kept for that purpose and written notice of the institution of formal proceedings shall be issued to the judge or judicial candidate without delay. Such proceedings shall be entitled:

“Before the State Commission on Judicial Conduct Inquiry Concerning a Judge or Judicial Candidate, No. \_\_\_\_\_”

(2) The notice shall specify in ordinary and concise language the charges against the judge or judicial candidate, and the alleged facts upon which such charges are based and the specific standards contended to have been violated, and shall advise the judge or judicial candidate of his right to file a written answer to the charges against him within 15 days after service of the notice upon him.

(3) The notice shall be served by personal service of a copy thereof upon the judge or judicial candidate by a member of the Commission or by some person designated by the Chairperson, and the person serving the notice shall promptly notify the Commission in writing of the date on which the same was served. If it appears to the Chairperson upon affidavit that, after reasonable effort during a period of 10 days, personal service could not be had, service may be made by mailing, by registered or certified mail, copies of the notice addressed to the judge or judicial candidate at his last known residence and, if a judge, at his chambers, and the date of mailing shall be entered in the docket.

### **(b) ANSWER**

Within 15 days after service of the notice of formal proceedings, the judge or judicial candidate may file with the Commission an original answer, which shall be verified, and twelve legible copies thereof.

### **(c) SETTING DATE FOR HEARING AND REQUEST FOR APPOINTMENT OF A SPECIAL MASTER**

(1) Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall set a time and place for hearing before itself or before a special master and shall give notice of such hearing by mail to the judge or judicial candidate at least 20 days prior to the date set.

(2) If the Commission directs that the hearing be before a special master, the Commission shall, when it sets a time and place for the hearing, transmit a written request to the Supreme Court to appoint a special master for such hearing, and the Supreme Court shall, within 10 days from receipt of such request, appoint an active or retired District Judge, a Judge of a Court of Civil Appeals, either active or retired, or a retired Justice of the Court of Criminal Appeals or Supreme Court to hear and take evidence in such matters.

(d) HEARING

(1) At the time and place set for hearing, the Commission, or the special master when the hearing is before a special master, shall proceed with the hearing as nearly as may be according to the rules of procedure governing the trial of civil causes in this State, subject to the provisions of Rule 5, whether or not the judge or judicial candidate has filed an answer or appears at the hearing. The examiner or other authorized officer shall present the case in support of the charges in the notice of formal proceedings.

(2) The failure of the judge or judicial candidate to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal or retirement. The failure of the judge or judicial candidate to testify in his own behalf or his failure to submit to a medical examination requested by the Commission or the master may be considered, unless it appears that such failure was due to circumstances unrelated to the facts in issue at the hearing.

(3) The proceedings at the hearing shall be reported by a phonographic reporter or by some qualified person appointed by the Commission and taking the oath of an official court reporter.

(4) When the hearing is before the Commission, not less than seven members shall be present while the hearing is in active progress. The Chairperson, when present, the Vice-Chairperson in the absence of the Chairperson, or the member designated by the Chairperson in the absence of both, shall preside. Procedural and other interlocutory rulings shall be made by the person presiding and shall be taken as consented to by the other members unless one or more calls for a vote, in which latter event such rulings shall be made by a majority vote of those present.

(e) EVIDENCE

At a hearing before the Commission or a special master, legal evidence only shall be received as in the trial of civil cases, except upon consent evidenced by absence of objection, and oral evidence shall be taken only on oath or affirmation.

(f) AMENDMENTS TO NOTICE OR ANSWER

The special master, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge or judicial candidate shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

(g) PROCEDURAL RIGHTS OF JUDGES AND JUDICIAL CANDIDATES

(1) In the proceedings for his removal or retirement a judge shall have the right to be confronted by his accusers, the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine

witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers and other evidentiary matter.

(2) When a transcript of the testimony has been prepared at the expense of the Commission, a copy thereof shall, upon request, be available for use by the judge or judicial candidate and his counsel in connection with the proceedings, or the judge or judicial candidate may arrange to procure a copy at his expense. The judge or judicial candidate shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(3) If the judge or judicial candidate is adjudged insane or incompetent, or if it appears to the Commission at any time during the proceedings that he is not competent to act for himself, the Commission shall appoint a guardian ad litem unless the judge or judicial candidate has a guardian who will represent him. In the appointment of a guardian ad litem, preference shall be given, so far as practicable, to members of the judge's or judicial candidate's immediate family. The guardian or guardian ad litem may claim and exercise any right and privilege and make any defense for the judge or judicial candidate with the same force and effect as if claimed, exercised, or made by the judge or judicial candidate, if competent.

(h) REPORT OF SPECIAL MASTER

(1) After the conclusion of the hearing before a special master, he shall promptly prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings had and his findings of fact based on a preponderance of the evidence with respect to the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, his findings of fact with respect to the allegations in the notice of formal proceedings. The report shall be accompanied by an original and two copies of a transcript of the proceedings before the special master.

(2) Upon receiving the report of the special master, the Commission shall promptly send a copy to the judge or judicial candidate, and one copy of the transcript shall be retained for the judge's or judicial candidate's use.

(i) OBJECTIONS TO REPORT OF SPECIAL MASTER

Within 15 days after mailing of the copy of the special master's report to the judge or judicial candidate, the examiner or the judge or judicial candidate may file with the Commission an original and twelve legible copies of a statement of objections to the report of the special master, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for removal or retirement. A copy of any such statement filed by the examiner shall be sent to the judge or judicial candidate.

(j) APPEARANCE BEFORE COMMISSION

If no statement of objections to the report of the special master is filed within the time provided, the findings of the special master may be deemed as agreed to, and the Commission may adopt them without a hearing. If a statement of objections is filed, or if the Commission in the absence of such statement proposes to modify or reject the findings of the special master, the Commission shall give the judge or judicial candidate and the examiner an opportunity to

be heard orally before the Commission, and written notice of the time and place of such hearing shall be sent to the judge or judicial candidate at least ten days prior thereto.

(k) EXTENSION OF TIME

The Chairperson of the Commission may extend for periods not to exceed 30 days in the aggregate the time for filing an answer, for the commencement of a hearing before the Commission, and for filing a statement of objections to the report of a special master, and a special master may similarly extend the time for the commencement of a hearing before him.

(l) HEARING ADDITIONAL EVIDENCE

(1) The Commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent to the judge or judicial candidate at least ten days prior to the date of the hearing.

(2) The hearing of additional evidence may be before the Commission itself or before the special master, as the Commission shall direct; and if before a special master, the proceedings shall be in conformance with the provisions of Rule 10(d) to 10(g) inclusive.

(m) COMMISSION RECOMMENDATION

If, after hearing, upon considering the record and report of the special master, the Commission finds good cause therefore, it shall recommend to the Review Tribunal the removal, or retirement, as the case may be; or in the alternative, the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition.

**RULE 11. REQUEST BY COMMISSION FOR APPOINTMENT OF REVIEW TRIBUNAL**

Upon making a determination to recommend the removal or retirement of a judge, the Commission shall promptly file a copy of a request for appointment of a Review Tribunal with the clerk of the Supreme Court, and shall immediately send the judge notice of such filing.

**RULE 12. REVIEW OF FORMAL PROCEEDINGS**

(a) A recommendation of the Commission for the removal or retirement, of a judge shall be determined by a Review Tribunal of seven Justices selected from the Courts of Appeals. Members of the Review Tribunal shall be selected by lot by the Chief Justice of the Supreme Court from all Appeals Justices sitting at the time of selection. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made, except that no Justice who is a member of the Commission shall serve on the Review Tribunal. The Justice whose name is drawn first shall be chairperson of the Review Tribunal. The clerk of the Supreme Court will serve as the Review Tribunal's staff, and will notify the Commission when selection of the Review Tribunal is complete.

(b) After receipt of notice that the Review Tribunal has been constituted, the Commission shall promptly file a copy of its recommendation certified by the Chairperson or Secretary of the Commission, together with the transcript and the findings and conclusions, with



the clerk of the Supreme Court. The Commission shall immediately send the judge notice of such filing and a copy of the recommendation, findings and conclusions.

(c) A petition to reject the recommendation of the Commission for removal or retirement of a judge or justice may be filed with the clerk of the Supreme Court within thirty days after the filing with the clerk of the Supreme Court of a certified copy of the Commission's recommendation. The petition shall be verified, shall be based on the record, shall specify the grounds relied on and shall be accompanied by seven copies of petitioner's brief and proof of service of one copy of the petition and of the brief on the Chairperson of the Commission. Within twenty days after the filing of the petition and supporting brief, the Commission shall file seven copies of the Commission's brief, and shall serve a copy thereof on the judge.

(d) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the Commission.

(e) Rules 4 and 74, Texas Rules of Appellate Procedure, shall govern the form and contents of briefs except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

(f) The Review Tribunal, may, in its discretion and for good cause shown, permit the introduction of additional evidence, and may direct that the same be introduced before the special master or the Commission and be filed as a part of the record in the Court.

(g) Oral argument on a petition of a judge to reject a recommendation of the Commission shall, upon receipt of the petition, be set on a date not less than thirty days nor more than forty days from the date of receipt thereof. The order and length of time of argument shall, if not otherwise ordered or permitted by the Review Tribunal, be governed by Rule 172, Texas Rules of Appellate Procedure.

(h) Within 90 days after the date on which the record is filed with the Review Tribunal, it shall order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation. The Review Tribunal, in an order for involuntary retirement for disability or an order for removal, may also prohibit such person from holding judicial office in the future.

(i) The opinion by the Review Tribunal shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

### **RULE 13. APPEAL TO SUPREME COURT**

A judge may appeal a decision of the Review Tribunal to the Supreme Court under the substantial evidence rule.

## **RULE 14. MOTION FOR REHEARING**

A motion for rehearing may not be filed as a matter of right. In entering its judgment the Supreme Court or Review Tribunal may direct that no motion for rehearing will be entertained, in which event the judgment will be final on the day and date of its entry. If the Supreme Court or Review Tribunal does not so direct and the judge wishes to file a motion for rehearing, he shall present the motion together with a motion for leave to file the same to the clerk of the Supreme Court or Review Tribunal within fifteen days of the date of the judgment, and the clerk of the Supreme Court shall transmit it to the Supreme Court or Review Tribunal for such action as the appropriate body deems proper.

## **RULE 15. SUSPENSION OF A JUDGE**

(a) Any judge may be suspended from office with or without pay by the Commission immediately upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. However, the suspended judge has the right to a post-suspension hearing to demonstrate that continued service would not jeopardize the interests of parties involved in court proceedings over which the judge would preside nor impair public confidence in the judiciary. A written request for a post-suspension hearing must be filed with the Commission within 30 days from receipt of the Order of Suspension. Within 30 days from the receipt of a request, a hearing will be scheduled before one or more members or the executive director of the Commission as designated by the Chairperson of the Commission. The person or persons designated will report findings and make recommendations, and within 60 days from the close of the hearing, the Commission shall notify the judge whether the suspension will be continued, terminated, or modified.

(b) Upon the filing with the Commission of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission (under Rule 6), may recommend to the Supreme Court the suspension of such person from office.

(c) When the Commission or the Supreme Court orders the suspension of a judge or justice, with or without pay, the appropriate city, county, and/or state officials shall be notified of such suspension by certified copy of such order.

## **RULE 16. RECORD OF COMMISSION PROCEEDINGS AND EDUCATION NONCOMPLIANCE**

(a) The Commission shall keep a record of all informal appearances and formal proceedings concerning a judge or judicial candidate. In all proceedings resulting in a recommendation to the Review Tribunal for removal or retirement, the Commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding.

(b) The Commission must publicly list on its website judges who have been suspended for noncompliance with judicial-education requirements set forth in governing statutes or rules.

#### **RULE 17. CONFIDENTIALITY AND PRIVILEGE OF PROCEEDINGS**

All papers filed with and proceedings before the Commission shall be confidential, and the filing of papers with, and the giving of testimony before the Commission shall be privileged; provided that:

(a) The formal hearing, and all papers, records, documents, and other evidence introduced during the formal hearing shall be public.

(b) If the Commission issues a public sanction, all papers, documents, evidence, and records considered by the Commission or forwarded to the Commission by its staff and related to the sanction shall be public.

(c) The judge or judicial candidate may elect to open the informal appearance hearing pursuant to Rule 6(b).

(d) Any hearings of the Special Court of Review shall be public and held at the location determined by the Special Court of Review. Any evidence introduced during a hearing, including papers, records, documents, and pleadings filed in the proceedings, is public.

#### **RULE 18. *EX PARTE* CONTACTS BY MEMBERS OF THE COMMISSION**

A Commissioner, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* contacts with any judge or judicial candidate who is the subject of an investigation being conducted by the Commission or involved in a proceeding before the Commission.

# EXHIBIT 2



# The Supreme Court of Texas

CHIEF JUSTICE  
NATHAN L. HECHT

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

CLERK  
BLAKE A. HAWTHORNE

JUSTICES  
DEBRA H. LEHRMANN  
JEFFREY S. BOYD  
JOHN P. DEVINE  
JAMES D. BLACKLOCK  
J. BRETT BUSBY  
JANE N. BLAND  
REBECA A. HUDDLE  
EVANA A. YOUNG

GENERAL COUNSEL  
NINA HESS HSU

EXECUTIVE ASSISTANT  
NADINE SCHNEIDER

DIRECTOR OF PUBLIC AFFAIRS  
AMY STARNES

September 16, 2024

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

Re: Referral of Rules Issue

Dear Chip:

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

**Procedural Rules for the State Commission on Judicial Conduct.** The Procedural Rules for the State Commission on Judicial Conduct do not reflect recent statutory changes, including changes enacted by the 87th Legislature in HB 4344, and, in some instances, are unclear or unworkable. The Court asks the Committee to conduct a wholesale review of the Procedural Rules for the State Commission on Judicial Conduct and draft amendments for the Court's consideration.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht", written in a cursive style.

Nathan L. Hecht  
Chief Justice

Attachment

AN ACT

relating to a complaint filed with the State Commission on Judicial Conduct.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 33.0211, Government Code, is amended by adding Subsection (c) to read as follows:

(c) For each complaint filed with the commission under this chapter, each member of the commission must be:

(1) notified of the complaint; and

(2) briefed and provided detailed information about the complaint.

SECTION 2. Subchapter B, Chapter 33, Government Code, is amended by adding Sections 33.0212, 33.0213, 33.040, and 33.041 to read as follows:

Sec. 33.0212. REPORT AND RECOMMENDATIONS ON FILED COMPLAINTS. (a) Not later than the 120th day after the date a complaint is filed with the commission, commission staff shall prepare and file with each member of the commission a report detailing the investigation of the complaint and recommendations for commission action regarding the complaint.

(b) Not later than the 90th day following the date commission staff files with the commission the report required by Subsection (a), the commission shall determine any action to be taken regarding the complaint, including:



- 1           (1) a public sanction;
- 2           (2) a private sanction;
- 3           (3) a suspension;
- 4           (4) an order of education;
- 5           (5) an acceptance of resignation in lieu of  
6 discipline;
- 7           (6) a dismissal; or
- 8           (7) an initiation of formal proceedings.

9           (c) If, because of extenuating circumstances, commission  
10 staff is unable to provide an investigation report and  
11 recommendation to the commission before the 120th day following the  
12 date the complaint was filed with the commission, the staff shall  
13 notify the commission and propose the number of days required for  
14 the commission and commission staff to complete the investigation  
15 report and recommendations and finalize the complaint. The staff  
16 may request an extension of not more than 270 days from the date the  
17 complaint was filed with the commission. The commission shall  
18 finalize the complaint not later than the 270th day following the  
19 date the complaint was filed with the commission.

20           (d) The executive director may request that the chairperson  
21 grant an additional 120 days to the time provided under Subsection  
22 (c) for the commission and commission staff to complete the  
23 investigation report and recommendations and finalize the  
24 complaint.

25           (e) If the chairperson grants additional time under  
26 Subsection (d), the commission must timely inform the legislature  
27 of the extension. The commission may not disclose to the

1 legislature any confidential information regarding the complaint.

2 Sec. 33.0213. NOTIFICATION OF LAW ENFORCEMENT AGENCY  
3 INVESTIGATION. On notice by any law enforcement agency  
4 investigating an action for which a complaint has been filed with  
5 the commission, the commission may place the commission's complaint  
6 file on hold and decline any further investigation that would  
7 jeopardize the law enforcement agency's investigation. The  
8 commission may continue an investigation that would not jeopardize  
9 a law enforcement investigation.

10 Sec. 33.040. ANNUAL REPORT. Not later than September 1 of  
11 each year, the commission shall prepare and submit to the  
12 legislature a report of:

13 (1) the total number of complaints the commission  
14 failed to finalize not later than the 270th day following the date  
15 the complaint was filed with the commission; and

16 (2) the total number of complaints included in  
17 Subdivision (1) that the commission declined to further  
18 investigate because of a law enforcement agency investigation.

19 Sec. 33.041. LEGISLATIVE REPORT. (a) The commission shall  
20 prepare a report for the 88th Legislature regarding any statutory  
21 changes that would improve the commission's effectiveness,  
22 efficiency, and transparency in filing, investigating, and  
23 processing any complaint filed with the commission.

24 (b) This section expires September 1, 2023.

25 SECTION 3. Section 33.0212, Government Code, as added by  
26 this Act, applies only to a complaint filed with the State  
27 Commission on Judicial Conduct on or after the effective date of

H.B. No. 4344

1 this Act.

2 SECTION 4. This Act takes effect September 1, 2022.

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President of the Senate

---

Speaker of the House

I certify that H.B. No. 4344 was passed by the House on April 27, 2021, by the following vote: Yeas 147, Nays 0, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 4344 on May 28, 2021, by the following vote: Yeas 147, Nays 0, 1 present, not voting.

---

Chief Clerk of the House

I certify that H.B. No. 4344 was passed by the Senate, with amendments, on May 25, 2021, by the following vote: Yeas 31, Nays 0.

---

Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

---

Governor

# EXHIBIT 3

# TEXAS

## STATE COMMISSION ON JUDICIAL CONDUCT



## ANNUAL REPORT 2023

# STATE COMMISSION ON JUDICIAL CONDUCT

## COMMISSION MEMBERS

**Gary Steel, Chair**

**Janis Holt, Vice-Chair**

**Ronald E. Bunch, Secretary**

**Valerie Ertz**

**Clifton Roberson**

**Kathy P. Ward**

**Wayne Money**

**Andrew M. "Andy" Kahan**

**Ken Wise**

**Carey F. Walker**

**Tano E. Tijerina**

**Clifford T. Harbin**

**Chace Craig**

P.O. Box 12265 ★ Austin, Texas ★ 78711  
Telephone (512) 463-5533 ★ Fax (512) 463-0511  
Toll Free (877) 228-5750 ★ TDD (800) RELAY-TX

Website: [scjc.texas.gov](http://scjc.texas.gov)

SCAC Meeting - March 7, 2025

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# COMMISSIONER INFORMATION

## OFFICERS

### CHAIR

#### **Hon. Gary L. Steel**

District Judge, Seguin  
Appointed by Texas Supreme Court  
Term Expires: 11/19/2023

### VICE-CHAIR

#### **Hon. Janis Holt**

Public Member, Silsbee  
Appointed by Governor  
Term Expires: 11/19/2025

### SECRETARY

#### **Hon. Ronald E. Bunch**

Attorney, Waxahachie  
Appointed by State Bar of Texas  
Term Expires: 11/19/23

## MEMBERS

#### **Hon. Valerie Ertz**

Public Member, Dallas  
Appointed by Governor  
Term Expires: 11/19/2023

#### **Hon. Ken Wise**

Appeals Court Justice, Dallas  
Appointed by Texas Supreme Court  
Term Expires: 11/19/2025

#### **Hon. Clifton Roberson**

Attorney, Tyler  
Appointed by State Bar of Texas  
Term Expires: 11/19/2025

#### **Hon. Carey F. Walker**

County Court at Law Judge, Fort Worth  
Appointed by Texas Supreme Court  
Term Expires: 11/19/2027

#### **Hon. Kathy P. Ward**

Public Member, Plano  
Appointed by Governor  
Term Expires: 11/19/2027

#### **Hon. Tano E. Tijerina**

County Judge, Laredo  
Appointed by Texas Supreme Court  
Term Expires: 11/19/2023

#### **Hon. Wayne Money**

Justice of the Peace, Greenville  
Appointed by Texas Supreme Court  
Term Expires: 11/19/27

#### **Hon. Clifford T. Harbin**

Public Member, Montgomery  
Appointed by Governor  
Term Expires: 11/19/2023

#### **Hon. Andrew M. "Andy" Kahan**

Public Member, Houston  
Appointed by Governor  
Term Expires: 11/19/2027

#### **Hon. Chace A. Craig**

Municipal Judge, Abilene  
Appointed by Texas Supreme Court  
Term Expires: 11/19/2027

# STATE COMMISSION ON JUDICIAL CONDUCT

## COMMISSION STAFF

**Jacqueline Habersham**, Executive Director

**Zindia Thomas**, General Counsel

**Ron Bennett**, Chief Investigator

**Lorin Hayes**, Senior Commission Counsel

**Erin Morgan**, Commission Counsel

**James Parsons**, Commission Counsel

**Katherine Mitchell**, Senior Investigator

**Cherie Thomas**, Commission Investigator

**Crystal Lopez**, Commission Investigator

**Elizabeth Trevino**, Commission Investigator

**Patricia Ortiz**, Staff Services Officer

**Connie Paredes**, Administrative Assistant

**Patricia Leal**, Administrative Assistant

# PHILOSOPHY

The members of the State Commission on Judicial Conduct and Commission staff take their obligations to the citizens and judges of Texas seriously. The political affiliation, gender, ethnicity, religious background, sexual orientation, socioeconomic status, geographical location, or the position of a complainant or a judge are not considered in the Commission's review of cases. The Commission's ability to fulfill its constitutional mandate requires that each Commissioner and staff member act with honesty, fairness, professionalism and diligence.

The agency reviews every allegation of misconduct made against a Texas judge. Each complaint alleging misconduct on its face is thoroughly investigated and analyzed by Commission staff before being presented to the Commissioners. This process helps preserve the public's confidence in the integrity of the judicial process. Judges are held to the highest standards of ethical conduct, both on and off the bench, and both Commission and its employees strive to conduct themselves in a similar manner.

# OVERVIEW OF THE COMMISSION

## **Authority of the Commission**

Created in 1965 by an amendment to Article V of the Texas Constitution, the State Commission on Judicial Conduct is the independent judicial branch agency responsible for investigating and addressing allegations of judicial misconduct or permanent disability.

The Commission's jurisdiction includes all sitting Texas judges, including municipal judges, justices of the peace, criminal magistrates, county judges, county court at law judges, statutory probate judges, district judges, appellate judges, masters, associate judges, referees, retired and former judges who sit by assignment, and judges *pro tempore*. The Commission has no jurisdiction over federal judges and magistrates, administrative hearing officers for state agencies or the State Office of Administrative Hearings, or private mediators or arbitrators. A judicial candidate, who is not already a sitting judge, is also required to comply with the Texas Code of Judicial Conduct. Effective September 1, 2022, the Texas Constitution was amended and provides that the Commission may, in its discretion, investigate and sanction a judicial candidate for an alleged violation of the canons.

## **Members of the Commission**

There are thirteen members of the Commission, each of whom serves a staggered six-year term, as follows:

- Six judges, one from each of the following courts: appellate, district, county court at law, constitutional county, justice of the peace and municipal, appointed by the Supreme Court of Texas;
- Five citizen members who are neither attorneys nor judges, appointed by the Governor; and
- Two attorneys who are not judges, appointed by the State Bar of Texas.

By law, the appellate, district, constitutional and statutory county judges and the two attorney members who serve on the Commission must be appointed from different appellate districts in Texas. Meanwhile, the justice of the peace, municipal court judge and public members are at-large appointments. The Texas Senate confirms all appointees. Commissioners meet six times each year and receive no pay for their service.

## **Laws Governing the Commission**

The Commission is governed by Article V, Section 1-a, of the Texas Constitution, Chapter 33 of the Texas Government Code, the Texas Procedural Rules for the Removal or Retirement of Judges, and the Texas Code of Judicial Conduct. As a part of the judicial branch with its own constitutional and statutory provisions regarding confidentiality of papers, records and proceedings, the Commission is not governed by the Texas Public Information Act, the Texas Open Meetings Act, or the Texas Administrative Procedures Act.

## **Defining Judicial Misconduct**

Article V, Section 1-a(6)A of the Texas Constitution defines judicial misconduct as the “willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of [the judge’s] duties or casts public discredit upon the judiciary or administration of justice.”

Accordingly, a judge’s violation of the Texas Constitution, the Texas Penal Code, the Texas Code of Judicial Conduct, or rules promulgated by the Supreme Court of Texas may constitute judicial misconduct. Specific examples of judicial misconduct include:

- failure to cooperate with the Commission’s investigation
- inappropriate or demeaning courtroom conduct, including yelling, use of profanity, demonstrated gender bias or the use of racial slurs
- improper *ex parte* communications with only one side in a case
- a public comment regarding a pending case
- presiding over a case in which the judge has an interest in the outcome, or in which any of the parties, attorneys or appointees are related to the judge within a prohibited degree of kinship
- out of court activities, including criminal conduct, engaging in improper financial or business dealings, improper fundraising activities, sexual harassment or official oppression

## **Sources of Complaints and Allegations**

The Commission considers allegations from any source, including an individual, a news article, or information obtained during an investigation. There is no requirement that a person who files a complaint be the target or victim of the alleged misconduct, nor does the Commission require a complainant to have firsthand knowledge of the alleged misconduct. Complaints may be made anonymously, or a complainant may request confidentiality; however, anonymous complaints and requests for confidentiality may restrict the Commission’s ability to fully investigate the allegations. Furthermore, while the Commission strives to maintain confidentiality to those complainants who request it, the Commission may, in its discretion, reveal the identity of a confidential complainant when doing so serves the Commission’s interest in protecting the public by addressing misconduct.

## **Commission Limitations**

The Commission does not have the power or authority of a court in this state, cannot change the decision or ruling of any court, nor can the Commission intervene in any pending case or proceeding. The Commission is also unable to remove a judge from a case. If the Commission determines that a judge has committed misconduct in an ongoing case, the Commission may only issue a sanction against the judge, or institute proceedings that would authorize the eventual removal of the judge from the bench. Nonetheless, it is the strong preference of the Commission not to make any finding that would impact or alter the outcome of an ongoing case. Neither the Commission nor its staff can provide legal assistance or advice to a complainant, nor can it award damages or provide monetary or other relief to anyone.

## **Commission Investigations and Actions**

Complaints are reviewed, analyzed and investigated by Commission staff. An investigation may include a review of court records and witness interviews. The Commission also endeavors to obtain a

respondent judge's perspective before contemplating issuing any discipline against the judge. Once all the information is obtained through the investigation, the materials are presented to the Commission for deliberation. Typically, the Commission will either dismiss or sanction a judge at that point. Occasionally, as the facts and law warrant, the Commission may seek to suspend a judge, accept a voluntary resignation agreement from a judge in lieu of disciplinary action, or institute formal proceedings, as appropriate.

## **Commission Organization and Staff**

In fiscal year 2023, the Commission had fourteen authorized staff positions (Full Time Equivalents, or "FTEs"). For the year, Commission's staff included the Executive Director, the General Counsel, four staff attorneys, Chief Investigator, four investigators, a staff services officer, and two administrative assistants. All Commission staff members are full time State employees.

The Commission's legal staff, which consists of attorneys and investigators, is responsible for the evaluation and investigation of complaints. The investigators and legal assistants handle in-house and field investigations, screen all new cases and are also responsible for preparing legal documents and assisting the attorneys in the prosecution of disciplinary proceedings. The attorneys are responsible for investigating allegations of judicial misconduct or incapacity, presenting cases to the Commission, prosecuting disciplinary cases before Special Courts of Review, Special Masters, and Review Tribunals, responding to ethics calls, and speaking about judicial ethics at judicial educational and training seminars.

The Commission staff attorneys serve as Examiners, or trial counsel, during formal proceedings and on appeals from Commission actions. The Examiner is responsible for all aspects of preparing and presenting a case before the Commission, Special Master, Special Court of Review or Review Tribunal. The Commission may also employ Special Counsel, chosen from distinguished members of the bar, to assist staff in preparing and presenting these cases. Attorneys from the Office of the Attorney General have also represented the Commission as Special Counsel in formal proceedings and Special Courts of Review.

The Executive Director heads the agency and reports directly to the Commission. The Executive Director is also the primary liaison between the Commission and the judiciary, legislators, other government officials, the public and the media.

## **Outreach and Education**

In fiscal year 2023, the Executive Director and staff attorneys participated in over 20 presentations at judicial training courses, bar conferences, outreach programs, and court staff workshops, describing the Commission and its operations and discussing various forms of judicial misconduct.

## **Ethics Calls**

In fiscal year 2023, the Executive Director and staff attorneys responded to more than 300 inquiries from judges, judicial candidates, attorneys, legislators, the media and citizens regarding judicial ethics. Callers are informed that Commission staff cannot issue an opinion on behalf of the Commission, and that the Commission is not bound by any comments made during the conversation. As appropriate, a caller's question may be researched before the call is returned so that the specific canon, statute, rule or ethics opinion can be identified. When appropriate, staff will send the caller a Complaint Form (in English or Spanish) and other relevant material. In some instances, staff may refer callers to other resources or agencies better able to address their concerns.

## Commission Website

The Commission's website also provides downloadable complaint forms in English and Spanish. The website offers: answers to frequently-asked questions regarding the Commission's composition, structure and jurisdiction; information about the judicial complaint process; a description of the range of decisions the Commission can make; explanations of the procedures for a judge or a complainant to appeal a decision by the Commission. Further, the website provides statistical information about the Commission and updated sanctions, resignations, suspensions, and Opinions issued by Special Courts of Review and Review Tribunals.

The Commission's governing provisions (the Texas Code of Judicial Conduct; Article V, Section 1-a of the Texas Constitution; Chapter 33 of the Texas Government Code; and the Texas Procedural Rules for the State Commission on Judicial Conduct) are all linked on the website as well.

## Public Information

The availability of information and records maintained by the Commission is governed by Rule 12 of the Texas Rules of Judicial Administration, the Texas Constitution and the Texas Government Code. Commission records are not subject to public disclosure pursuant to the Public Information Act (formerly the Open Records Act) or the Freedom of Information Act.

Generally, Commission records are confidential, with the following exceptions:

- Constitution: Article V, Section 1-a(10) of the Texas Constitution provides that "All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by law..."
- Government Code:
  - When the Commission issues a public sanction against a judge, Section 33.032 of the Texas Government Code provides that "the record of the informal appearance and the documents presented to the commission during the informal appearance that are not protected by attorney-client or work product privilege shall be public."
  - This Section also provides that suspension orders and voluntary agreements to resign in lieu of disciplinary proceedings are publicly available.
  - Section 33.032 also authorizes the release to the public of papers filed in a formal proceeding upon the filing of formal charges.
- Judicial Administration: Rule 12 of the Texas Rules of Judicial Administration provides for public access to certain records made or maintained by a judicial agency in its regular course of business, *but not pertaining to its adjudicative function*. Commission records relating to complaints, investigations, and its proceedings are not judicial records and are not subject to public disclosure pursuant to Rule 12.

When the Commission takes action on a complaint, whether dismissing it, issuing a private or public sanction, accepting a voluntary agreement to resign in lieu of disciplinary action, or instituting formal proceedings, the complainant is notified in writing. However, the Texas Government Code requires that the Commission omit the judge's name from the notice to the complainant unless a public sanction has been issued.



Additionally, the Constitution provides that in instances where issues concerning a judge or the Commission have been made public by sources other than the Commission, the Commission may make a public statement. In such a situation, the Commission determines whether the best interests of a judge or the public will be served by issuing the statement. No public statements were issued in fiscal year 2023.

# THE COMPLAINT PROCESS

## Introduction

Each complaint stating an allegation of judicial misconduct is thoroughly reviewed, investigated and analyzed by the Commission staff. Complaints must be filed with the Commission in writing. Complaints sent by fax or through email are generally not accepted.

Complaint forms are available in English and Spanish from the following sources:

- Download from the Commission's website at <http://www.scjc.texas.gov/complaints/>
- Telephone requests to the Commission at (512) 463-5533 or toll free at (877) 228-5750

The Commission may also initiate a complaint based upon a media report, court documents, the internet or other sources. A complainant may request that the Commission keep his or her identity confidential. Additionally, the Commission accepts anonymous complaints.

After a complaint is filed, the Commission sends an acknowledgment letter to the complainant and staff begins its investigation and analysis of the allegations. Complainants may be asked to provide additional information or documents. As appropriate, staff conducts legal research and contacts witnesses. If the evidence obtained during the investigation calls for a response from the judge, an attorney will contact the judge to obtain a response to the allegations before presenting the matter to the Commission for consideration. When deemed appropriate by staff, an attorney or investigator may travel to the judge's county for further investigation and interviews.

When the investigation is completed, the case is presented to the Commission for its consideration. In some cases, the Commission may invite a judge, complainant, or other witnesses to appear and discuss the allegations. Based on the specific constitutional provisions, statutes and canons under which the Commission operates, it considers and votes on every complaint investigated by staff.

If the Commission chooses to issue a public sanction, an order describing the Commission's findings is prepared and distributed to the respondent judge, with a copy provided to the complainant. The order is then publicly disseminated to ensure public awareness. If the Commission votes to issue a private sanction, the appropriate order is prepared and tendered to the respondent judge, and the complainant is notified by letter of the Commission's action. Because the Commission is controlled by constitutional and statutory provisions that prohibit the release of information regarding investigation and resolution of a case, the only details released to the public are a summary of the operative facts of the matter posted on the Commission's website. However, in cases where a judge has voluntarily agreed to resign in lieu of disciplinary action, that agreement becomes public upon the Commission's acceptance of it, and the complainant is so notified.

Likewise, whenever the Commission suspends a judge after he or she has been indicted for a criminal offense, or charged with a misdemeanor involving official misconduct, the Commission releases the order of suspension and all records related to any post-suspension proceedings to the public.

## Commission Decisions

Commission members review, deliberate and vote on each investigated complaint. This may result in a dismissal, a public or private order of additional education either alone or in combination with a public or private sanction, a public or private admonition, warning or reprimand, the acceptance of a voluntary agreement to resign from judicial office in lieu of disciplinary action, or formal proceedings for removal or retirement of the judge from the bench. If the judge appeals a decision of the Commission, the Texas Supreme Court randomly appoints three appellate judges to serve as a Special Court of Review. That Court's decision-making authority includes dismissal, affirmation of the Commission decision, imposition of a greater or lesser sanction, or the initiation of formal proceedings. The decision of the Special Court of Review is final and may not be appealed.

The Commission's decisions and actions in responding to allegations or complaints of judicial misconduct fall into one of the following categories:

### 1. Administrative Dismissal Report ("ADR")

A case is dismissed administratively when a complainant's writing fails to state an allegation which, if true, would constitute one or more of the following: (a) a willful or persistent violation of rules promulgated by the Supreme Court of Texas, (b) incompetence in performing the duties of the office, (c) willful violation of the Texas Code of Judicial Conduct, or (d) willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Generally, the fact that a judge made a legal error while ruling on a motion, an objection, the admission or exclusion of evidence, or in the ultimate outcome of the case, does not constitute judicial misconduct unless there is evidence of bad faith, persistent legal error, or the legal error was egregious. Only an appellate court has the power to review and change a judge's decision in any case. In addition, gratuitous claims of misconduct unsupported by any facts or evidence will often be administratively dismissed. These cases are dismissed following an initial review without an investigation. In letters of dismissal sent to these complainants, the Commission provides an explanation for the decision and provides Complainants the opportunity to have the Commission reconsider the decision to dismiss the case before investigation. Staff may grant a complainant's ADR reconsideration request, but only the Commission has the authority to deny an ADR reconsideration request.

### 2. Dismissal

The Commission may dismiss a case after conducting a preliminary or full investigation of the allegations. Reasons for these dismissals include insufficient or no evidence of misconduct,<sup>1</sup> the judge demonstrated that he or she took appropriate actions to correct the conduct at issue, or the conduct, though problematic, did not rise to the level of sanctionable misconduct. In letters of dismissal sent to these complainants, the Commission provides an explanation for the dismissal, and describes the steps the complainant may take for the Commission to reconsider its decision. The Commission may also include cautionary advice to judges whose complaints have been dismissed after the judge has taken appropriate corrective action or in those cases where disciplinary action was deemed unwarranted given the facts and circumstances surrounding the alleged infraction.

<sup>1</sup> In contrast to cases dismissed administratively following an initial review, cases dismissed following a preliminary investigation in which it was determined that there was no evidence of judicial misconduct are classified as "frivolous" pursuant to Section 33.022 of the Texas Government Code.

### 3. Order of Additional Education

Legal and procedural issues are often complex, so it is not surprising that some judges take judicial action beyond their authority or contrary to procedural rules. In these situations, the Commission may conclude that the judge has demonstrated a deficiency in a particular area of the law, warranting an order of additional education. The Commission then coordinates the assignment of a mentor judge for one-on-one instruction with the judge, to be completed within a specified time on particular subjects. The mentor judge then reports to the Commission on the respondent judge's progress. The Commission may also order the judge to obtain education on other issues, such as anger management, gender or racial sensitivity, or sexual harassment. The Commission may issue an order of additional education alone or as part of a private or public sanction.

### 4. Private or Public Sanction

The Commission issues disciplinary sanctions when a preponderance of evidence supports a finding of judicial misconduct. The most severe disciplinary action available to the Commission is a *public censure*, which may be issued only after formal proceedings have been initiated by the Commission. If, after a public fact-finding trial, the Commission determines that the underlying allegations of the complaint are true but do not support a recommendation for removal from office, a *censure* may be issued as a public denunciation of the judge's conduct. Alternatively, the Commission may also issue a public reprimand, warning, or admonition following a formal proceeding.

The next most severe sanction is a *public reprimand*. A *reprimand* is the most severe sanction available to the Commission at the informal stage of disciplinary proceedings. A less severe sanction is a *public warning*, followed by a *public admonition*. A *warning* puts the judge on notice that the actions identified in the sanction are improper. An *admonition* is the lowest level of sanction.

A judge may appeal any sanction or public censure to a Special Court of Review. The process for appealing a public censure, reprimand, warning or admonition issued by the Commission after formal proceedings is different than that of a *de novo* review of a sanction issued after informal proceedings.

If a *public sanction* or *censure* is issued, all information considered by the Commission, including the judge's name, is made public. Public sanctions are issued not only to identify the specific conduct, but to educate judges that such conduct is inappropriate. This also ensures that the public is made aware of actions that violate the Code of Judicial Conduct. When the Commission elects to issue a *private sanction*, the judge's name and all information considered by the Commission remain confidential.

### 5. Suspension

The Commission has the power to suspend a judge from office, with or without pay, after the judge has been either indicted by a grand jury for a felony, or charged with a misdemeanor involving official misconduct. In these cases, the suspended judge has the right to a post-suspension hearing before one or more of the Commission members or the Executive Director, as designated by the Commission Chair.

In cases other than formal criminal charges, the Commission, upon the filing of a sworn complaint and after giving the judge notice and an opportunity to appear before the Commission, may recommend to the Supreme Court of Texas that a judge be suspended from office, with or without pay, for persistent violation of rules promulgated by the Supreme Court, incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his or her duties, or that casts public discredit on the judiciary or the administration of justice.

## 6. Voluntary Agreement to Resign in Lieu of Discipline

In some cases, a judge subject to a Commission investigation may decide to resign in lieu of disciplinary action. In that event, the judge may tender to the Commission a voluntary agreement to resign from judicial office. Upon the Commission's acceptance, the agreement is made public and the judge vacates the bench. The agreement and any agreed statement of facts relating to it are admissible in subsequent proceedings before the Commission. While the agreement, including any documents referenced in the agreement, is public, any other records relating to the underlying case remain confidential and are only released to the public if the judge violates a term of the agreement.

## 7. Formal Proceedings

In certain circumstances, the Commission may decide that a complaint against a judge is so egregious that it should be handled and resolved through a formal proceeding. The Commission itself may conduct such a fact-finding hearing, or it may request the Supreme Court of Texas to appoint a Special Master (who must be a sitting or retired district or appellate judge) to hear the matter. Such proceedings are governed by the Texas Rules of Civil Procedure and the Texas Rules of Evidence to the extent practicable.

Although there is no right to a trial by jury in a formal proceeding, the judge is afforded certain other rights in a formal proceeding under the Texas Procedural Rules for the State Commission on Judicial Conduct, including the following:

- to be confronted by the judge's accusers
- to introduce evidence
- to be represented by counsel
- to examine and cross-examine witnesses
- to subpoena witnesses
- to obtain a copy of the reporter's record of testimony

If the formal proceeding has been conducted before a Special Master, he or she reports the findings of fact to the Commission. If either party files objections to the Master's Report, the Commission will hold a public hearing to consider the report of the Special Master and any objections. The Commission may adopt the Special Master's findings in whole or in part, modify the findings, totally reject them and enter its own findings, or order a hearing for the taking of additional evidence.

After adopting findings of fact, the Commission issues its conclusions of law. The Commission may dismiss the case, issue a public censure, reprimand, warning or admonition, or recommend removal or involuntary retirement to a seven-member Review Tribunal appointed by the Supreme Court of Texas. The Commission itself cannot permanently remove a judge; only the Review Tribunal can order a judge removed from the bench. The Review Tribunal may also enter an order prohibiting the judge from ever holding a judicial office again.

Although the Commission's recommendation for removal cannot be appealed, the judge may appeal the decision of the Review Tribunal to the Texas Supreme Court. A judge may also appeal the Commission's decision to issue a public censure or sanction to a Special Court of Review.<sup>2</sup>

<sup>2</sup> In 2009, Section 33.034 of the Texas Government Code was amended to provide judges the right to appeal a public censure issued by the Commission following a formal proceeding. In 2013, Section 33.034 was amended further to provide the right to

## **Appellate Review of Commission Action**

A judge may appeal the Commission's issuance of any public or private sanction, order of additional education, or public censure within thirty days of the date the Commission issues the sanction by filing a written notice with the Chief Justice of the Supreme Court of Texas and requesting the appointment of three appellate justices to act as a Special Court of Review.

Within fifteen days after the Special Court of Review is appointed, the Commission, through its Examiner, must file with the Clerk of the Texas Supreme Court a "charging document," which includes a copy of the sanction issued, as well as any additional charges to be considered in the *de novo* proceeding.<sup>3</sup> These records become public upon filing with the Clerk, who is responsible for furnishing a copy to the petitioning judge and to each justice on the Special Court of Review.

In an appeal of a sanction issued following the informal proceeding stage, a trial *de novo* is scheduled within thirty days after the charging document is filed. The Special Court of Review considers the case from the beginning, as though it were standing in the place of the Commission (though the Special Court of Review is made aware of the Commission's decision). The Texas Rules of Civil Procedure apply, insofar as practicable, except that the judge is not entitled to a jury trial. All documents filed and evidence received in the review process are public.

The Special Court of Review may dismiss or affirm the Commission's decision, impose a greater or lesser sanction, or order the Commission to file formal proceedings against the subject judge for removal or involuntary retirement. The decision of the Special Court of Review is final and cannot be appealed.

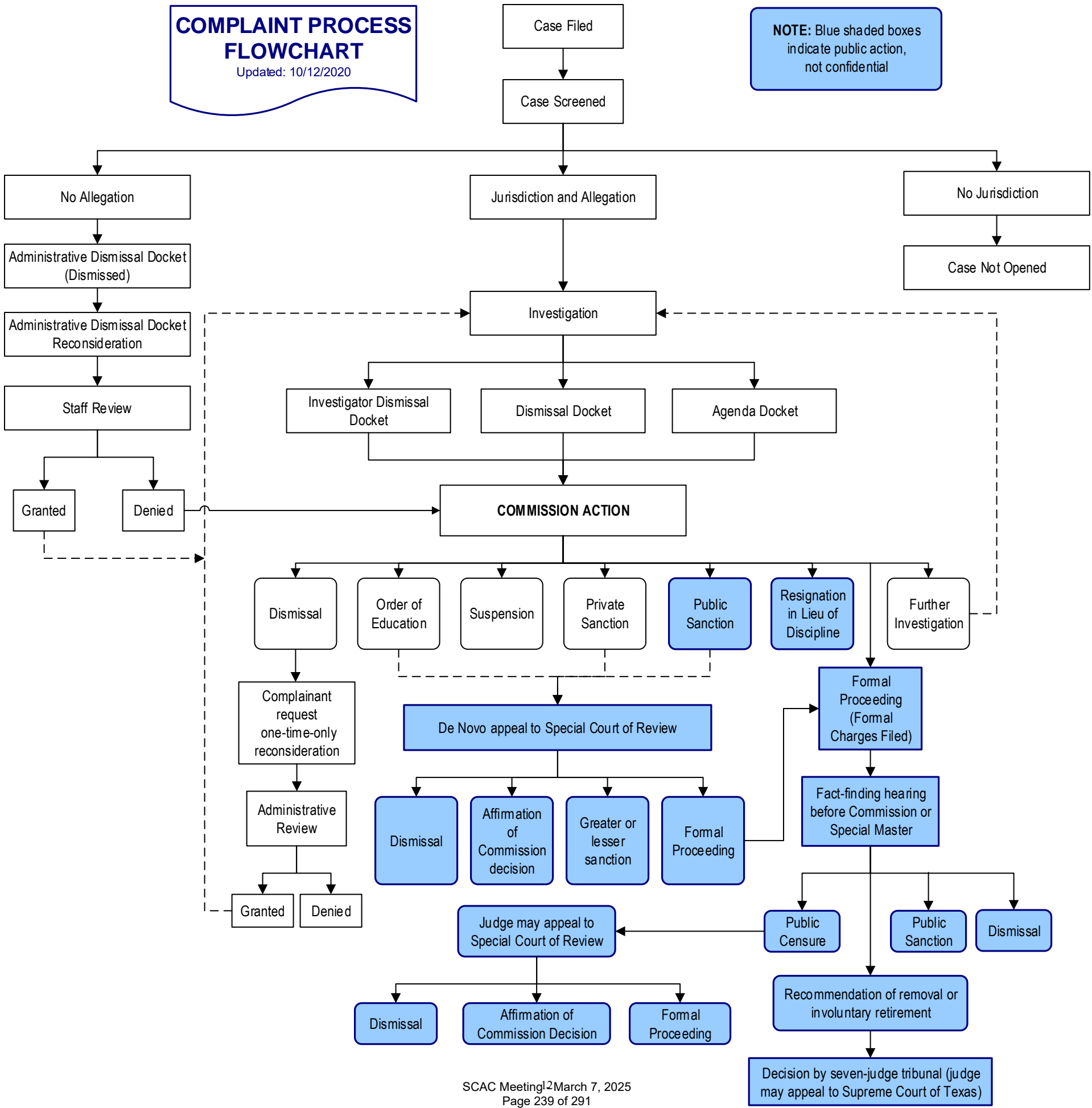
appeal a public reprimand, warning, or admonition issued after a formal proceeding. The Texas Supreme Court has been charged with the responsibility of drafting the procedural rules that will govern this process.

<sup>3</sup> Sanctions issued in the informal proceeding stage may be reviewed in a trial *de novo*, in the same way that a case tried in a justice court may be appealed to a county court. By contrast, the appeal of a sanction or censure issued following a formal proceeding is a "review of the record of the proceedings that resulted in the sanction or censure and is based on the law and facts that were presented in the proceedings and any additional evidence that the Special Court of Review in its discretion may, for good cause shown, permit." *See* Section 33.034(e)(1), Texas Government Code.

# COMPLAINT PROCESS FLOWCHART

Updated: 10/12/2020

**NOTE:** Blue shaded boxes indicate public action, not confidential





# STATISTICAL ANALYSIS

An outline of the statistical activity for the Commission through the end of fiscal year 2023 is shown in **Table 1** immediately following this section. In compliance with Section 33.005 of the Texas Government Code, the chart on **Table 2** provides a breakdown of the dispositions of the 1,173 cases closed during fiscal year 2023, including the number of cases dismissed following preliminary investigation with a determination that the allegation was frivolous or unfounded, or because the facts alleged did not constitute judicial misconduct or the evidence did not support the allegation of judicial misconduct. **Table 3** shows, in order of prevalence, the types of allegations or canon violations that resulted in disciplinary action during fiscal year 2023. Graphic representations of the data are also presented in **Figures 1** through **7** to further illustrate the activities of the Commission.

According to Office of Court Administration records, approximately 3,880 judges were under the jurisdiction of the Commission in fiscal year 2023, (less than a 4% increase from fiscal year 2022 – 3,775.)

**Figure 1** illustrates the makeup of the Texas judiciary by the number of judges in each category. **Figure 2** shows the number and percentage of cases filed with the Commission by judge type. **Figure 3** shows the number of complaints resulting in disciplinary action by the Commission against each judge type. **Figure 4** shows the number of cases disposed by type of complainant in fiscal year 2023.

In fiscal year 2023, the Commission acted in 62 cases involving Texas judges. The Commission disposed of 45 cases through public sanction, private sanction, orders of additional education or a combination of a sanction with an order of additional education. 4 cases were resolved by a voluntary agreement to resign from judicial office. The Commission issued 4 orders of suspension in fiscal year 2023. Additionally, 9 cases were resolved by Special Court of Review orders.

**Figures 5a and 5b** show the total number of cases filed and disposed by the Commission between fiscal years 2019 and 2023. In fiscal year 2023, the Commission opened 925 cases – a 47% decrease over the number of filings in fiscal year 2022. The Commission disposed of 1173 cases in fiscal year 2023, representing a 52% decrease in dispositions over fiscal year 2022. With 925 complaints received and 1173 dispositions, the Commission’s disposition rate for fiscal year 2023 was 126.81%.

A comparison of public discipline, private discipline and interim actions taken by the Commission in fiscal years 2019 through 2023 is shown in **Figures 6a and 6b**.

Of the 1128 cases closed in fiscal year 2023, 46 were dismissed with language advising the judge about technical or *de minimus* violations, or violations of aspirational canons, and cautioning the judge to avoid similar conduct in the future. Additionally, 2 cases were dismissed after the judge demonstrated that he or she took appropriate measures to correct conduct that resulted in an investigation. Approximately 40% of the cases closed in fiscal year 2023 alleged no judicial misconduct. The percentage (48%) of cases closed following a preliminary investigation increased in 2023 relative to 2022 by 17%. Additionally, the percentage (14%) of full investigations requiring a response from the judge increased (marginally) in fiscal year 2023 relative to 2022 by 1%. A comparison of initial, preliminary, and full investigations conducted by the Commission in fiscal years 2019 through 2023 is shown in **Figures 7a and 7b**.

During fiscal year 2023, the Commission referred 1 complaint against 1 judge to law enforcement. At the end of fiscal year 2023, the Commission had 165 open cases which were pending for a year or

more, in which no tentative sanction had been issued, (approximately the same as 2023), but a 40% decrease from 2022.

Finally, the Commission receives hundreds of items of correspondence (i.e., mail, email, submissions through its website) every year that do not pertain to the conduct of Texas judges. In fiscal year 2023, over people wrote to the Commission countless times (via mail or email) complaining of individuals or entities that were outside of the Commission's jurisdiction, requesting legal advice/representation by the Commission or other assistance. Commission Staff was responsive to such correspondence, and whenever possible, provided those complainants additional written information and referred to other resources to help them resolve their concerns.

## **HB 4344 Reporting**

During the 87<sup>th</sup> Legislative Session, the Texas Legislature passed HB 4344 amending Chapter 33 of the Texas Government Code which imposed a 270-day statutory timeframe to resolve complaints filed with the Commission. Effective September 1, 2022, Section 33.041 of the Texas Government Code requires that the Commission to prepare and submit to the Texas Legislature a report of: (i) the total number of complaints the Commission failed to finalize not later than the 270<sup>th</sup> day following the date the complaint was filed with the Commission and (ii) the total number of complaints that the Commission declined to further investigate because of a law enforcement agency investigation. During Fiscal Year 2023, the Commission failed to finalize twenty-two (22) complaints within 270 days imposed by statute. Additionally, the Commission declined to further investigate one (1) complaint because of a law enforcement agency investigation. (Note: Most often, the Commission will investigate a complaint that was investigated by law enforcement, if the result of law enforcement's investigation did not result in a conviction disqualifying the judge from the bench.)

## Table - Commission Activity Report

Item	FY 2020	FY 2021	FY 2022	FY 2023
<b>Cases Pending (Beginning FY/Current)</b>	806/1067	1067/1040	1099/575	575/326
<b>Cases Filed</b>	1518	1724	1764	925
<b>Total Number of Cases Disposed</b>	1240	1656	2229	1173
<b>% of Cases Disposed/Filed</b>	81.69%	96.06%	126.36%	126.81%
<b>Average Age of Case Disposed (in months)</b>	6.28	7.62	8.02	6.00
<b>Disciplinary Action (total)<sup>1</sup></b>	64 <sup>1</sup>	94	122	62
<b>Cases Disposed through:</b>				
Criminal Conviction <sup>2</sup>	0	7	2	0
Review Tribunal Order	0	0	0	0
Special Court of Review Order	8	3	9	9
Voluntary Agreement to Resign in Lieu of Disciplinary Action	1	8	2	4
<b>Public Sanction</b>				
Censure	0	0	0	0
Reprimand	2	1	10	14
Reprimand and Order of Add'l Education	0	3	5	0
Warning	5	21	10	1
Warning and Order of Add'l Education	1	15	0	2
Admonition	8	10	12	1
Admonition and Order of Add'l Education	4	6	3	1
Order of Add'l Education	0	0	0	0
<b>Private Sanction</b>				
Reprimand	4	1	0	2
Reprimand and Order of Add'l Education	0	3	2	4
Warning	25	5	6	3
Warning and Order of Add'l Education	3	8	12	7
Admonition	2	5	7	4
Admonition and Order of Add'l Education	5	2	7	3
Order of Add'l Education	0	3	4	3
<b>Interim Disciplinary Action (total)</b>				
Order of Suspension [15(a)]	1	1	6	3
Recommendation of Suspension to Supreme Court [15(b)]	0	0	1	1
Cases in Formal Proceedings	3	1	24 <sup>3</sup>	27 <sup>3</sup>
<b>Dismissals (ADRs)<sup>4</sup></b>	1180 (763)	1573 (1022)	2151 (1239)	1128 (446)
<b>Requests for Reconsideration Received</b>	19	37	68	67
Reconsideration Granted/Denied	01/18	1/36	2/66	1/66
Pending	0	0	0	0
<b>Cases Appealed to Special Court of Review</b>	4	8	13	13
Informal Hearings held	15	18	55	26
Public Statements Issued	0	0	0	0

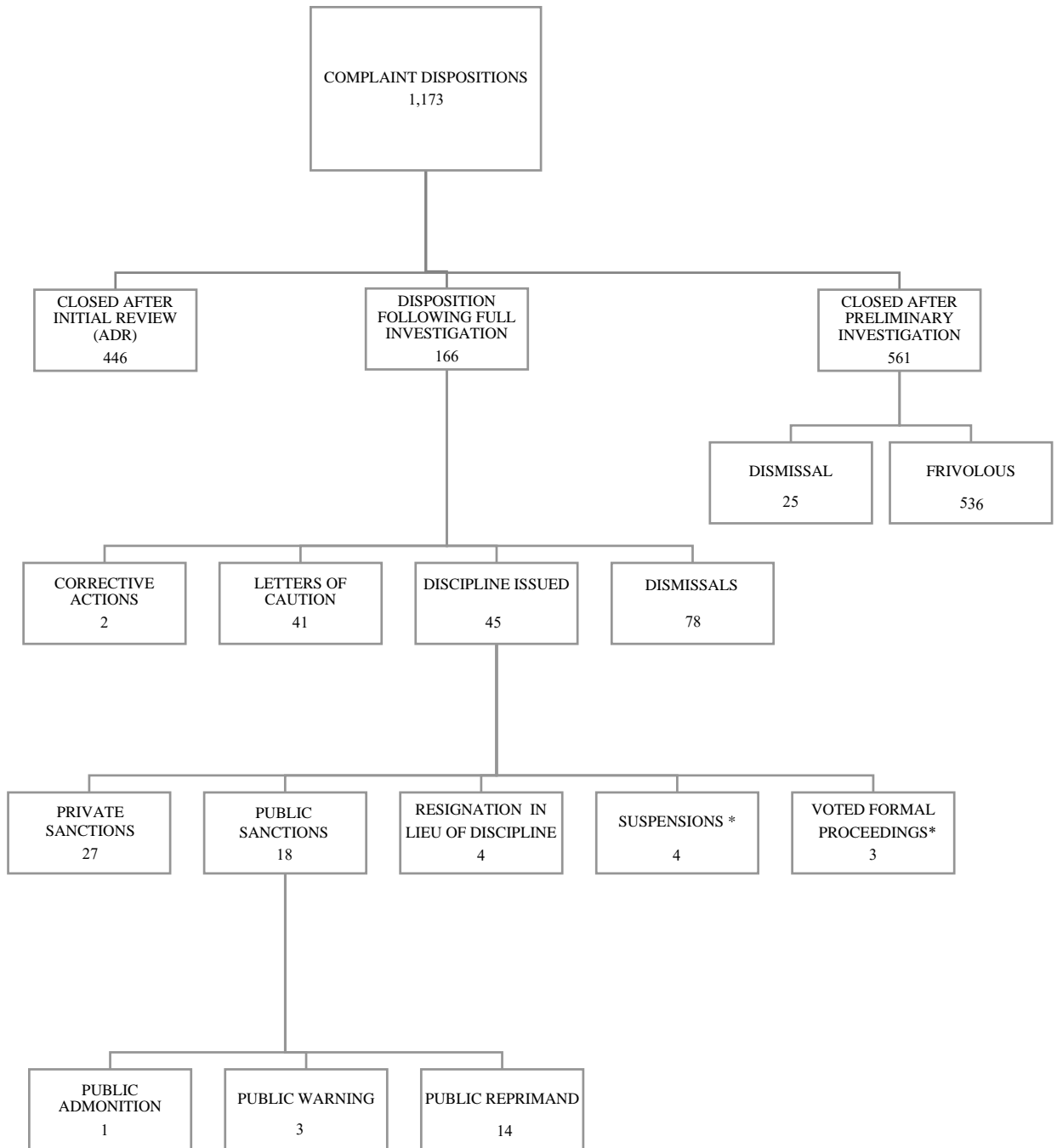
<sup>1</sup> Disciplinary Action includes sanctions, special court of review orders, voluntary agreements to resign in lieu of disciplinary action, orders of suspension, and formal proceedings.

<sup>2</sup> Cases resolved through criminal convictions are dismissals.

<sup>3</sup> 22 of the 27 cases in formal proceedings concern one judge.

<sup>4</sup> Dismissals include regular dismissals, administrative dismissal reports (ADR), dismiss with letter of caution, dismiss as moot criminal (criminal conviction), dismiss as moot (deceased).

TABLE 2  
2023 COMPLAINT  
DISPOSITIONS



*\*Not a final disposition.*

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**TABLE 3 – TYPES OF CONDUCT RESULTING IN DISCIPLINE IN  
FISCAL YEAR 2023**

The types of conduct are listed in order of prevalence. The numbers indicate the number of cases each type of conduct resulted in discipline. *(Includes public and private discipline.)*

*Willful or Persistent  
Conduct Cast Public  
Discredit upon the  
Judiciary  
[32]*

*Failed to Comply  
with Law [26]*

*Incompetence  
[23]*

*Extra-Judicial Activity  
Casts Doubt on  
Impartiality  
[12]*

*Using Prestige of  
Judicial Office/  
Influential  
Relationship  
[12]*

*Right to be Heard  
[10]*

*Improper  
Demeanor  
[8]*

*General Bias/  
Prejudice  
[5]*

*Improper Ex Parte  
Communications  
[5]*

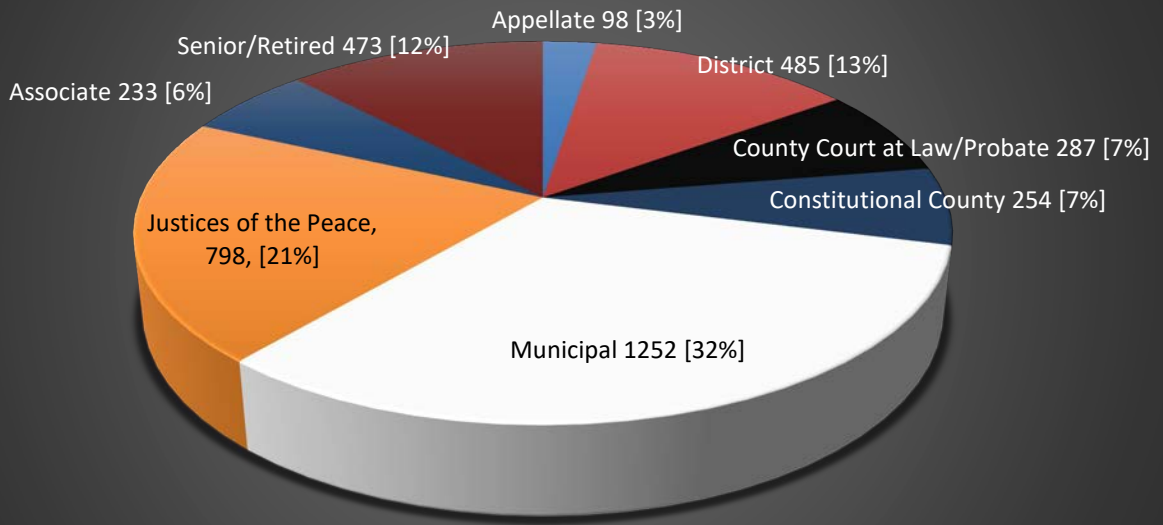
*Failure to  
Obtain Judicial  
Education  
[4]*

*Failure to  
Cooperate with  
the Commission  
[3]*

*Bias/Prejudice  
Based on  
Protected Class  
[2]*

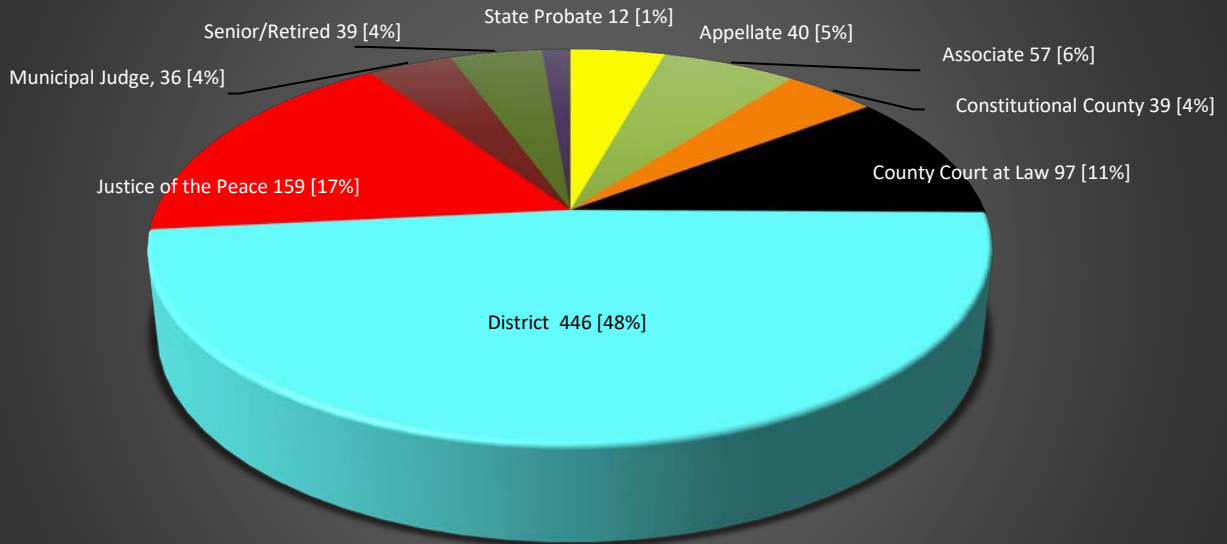
*Authorize Name  
to Endorse Candidate  
[1]*

Fig. 1 Total Number of Texas Judges\*



\*3,880 Total Judges  
 Source: Texas Office of Court Administration, October 2023

Fig. 2 Number and Percentage of Cases Filed by Judge Type



\*925 Total Complaints Filed

Fig. 3 Number and Percentage of Disciplinary Actions by Judge Type\*

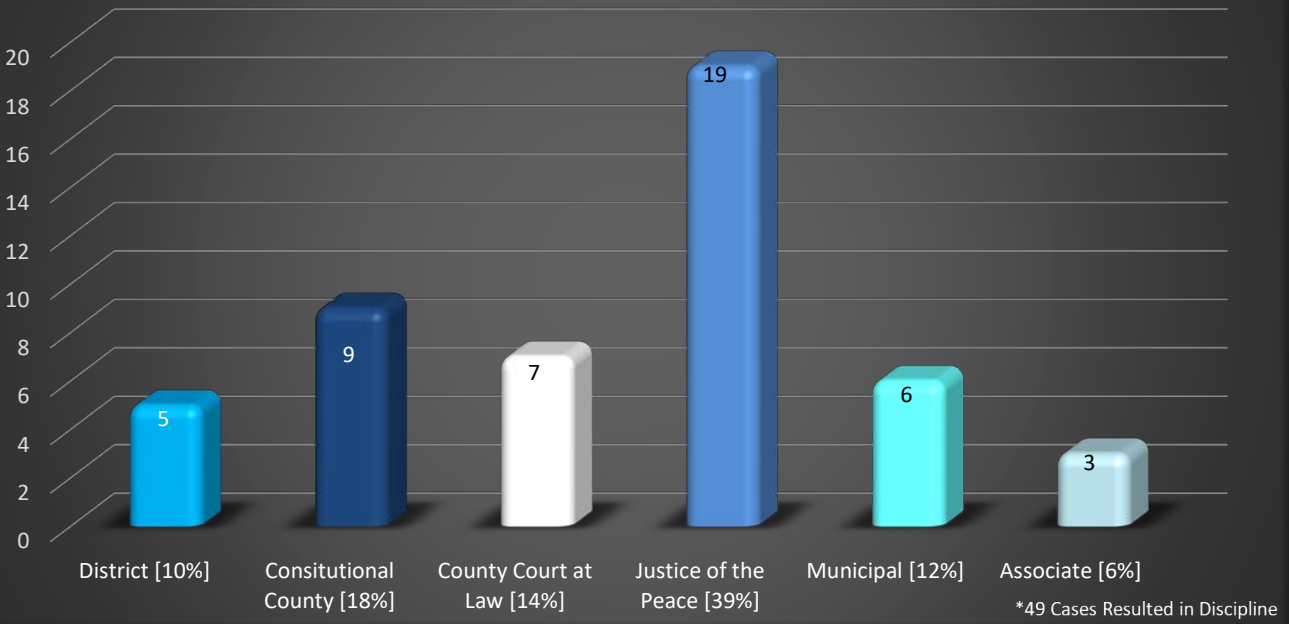


Fig. 4 Number and Percentage of Cases Disposed by Complainant Type\*

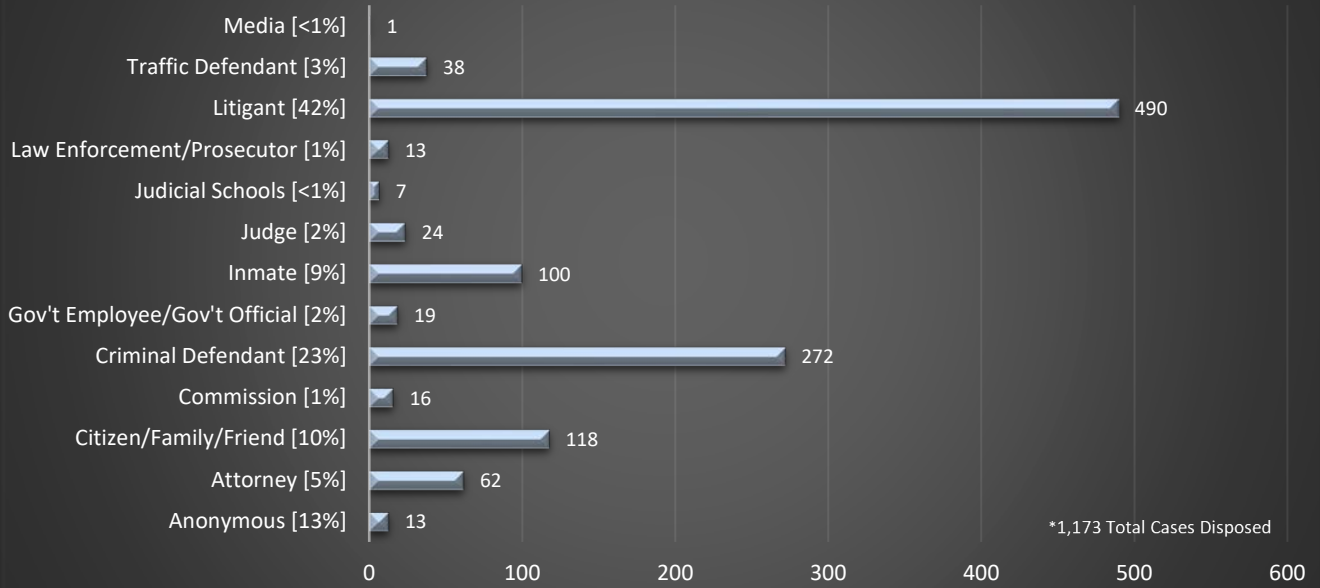




Fig. 5a Cases Filed and Disposed (FY19 - FY23)

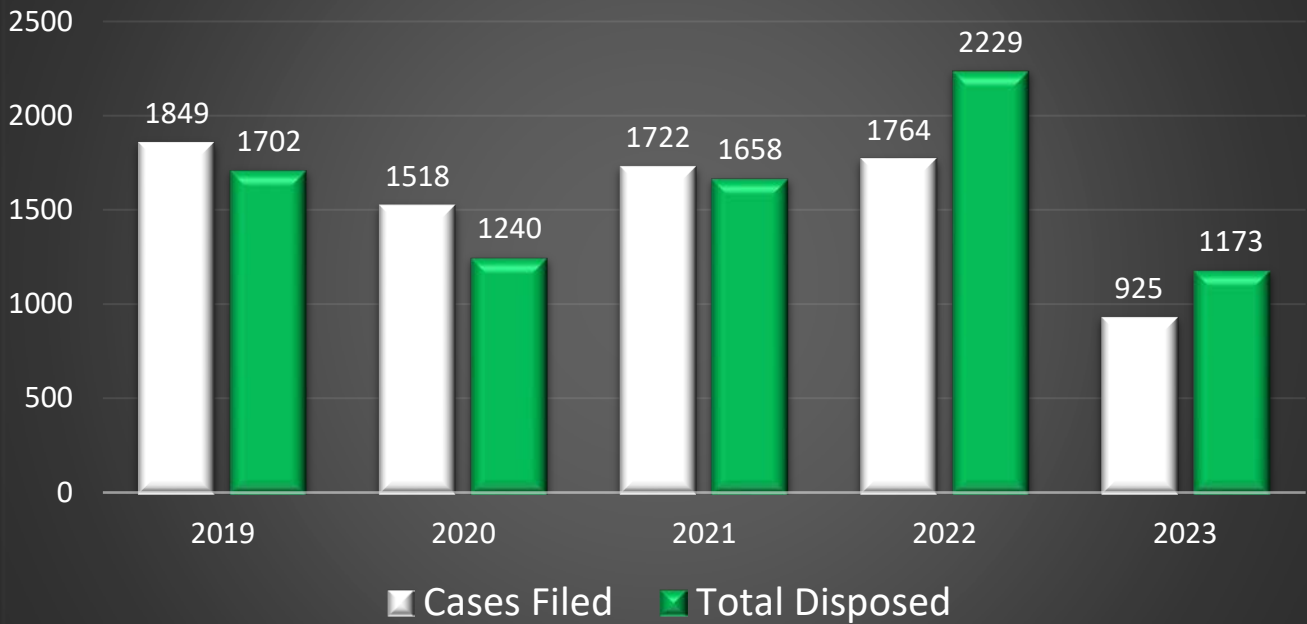


Fig. 5b Cases Filed and Disposed Trend (FY19 - FY23)

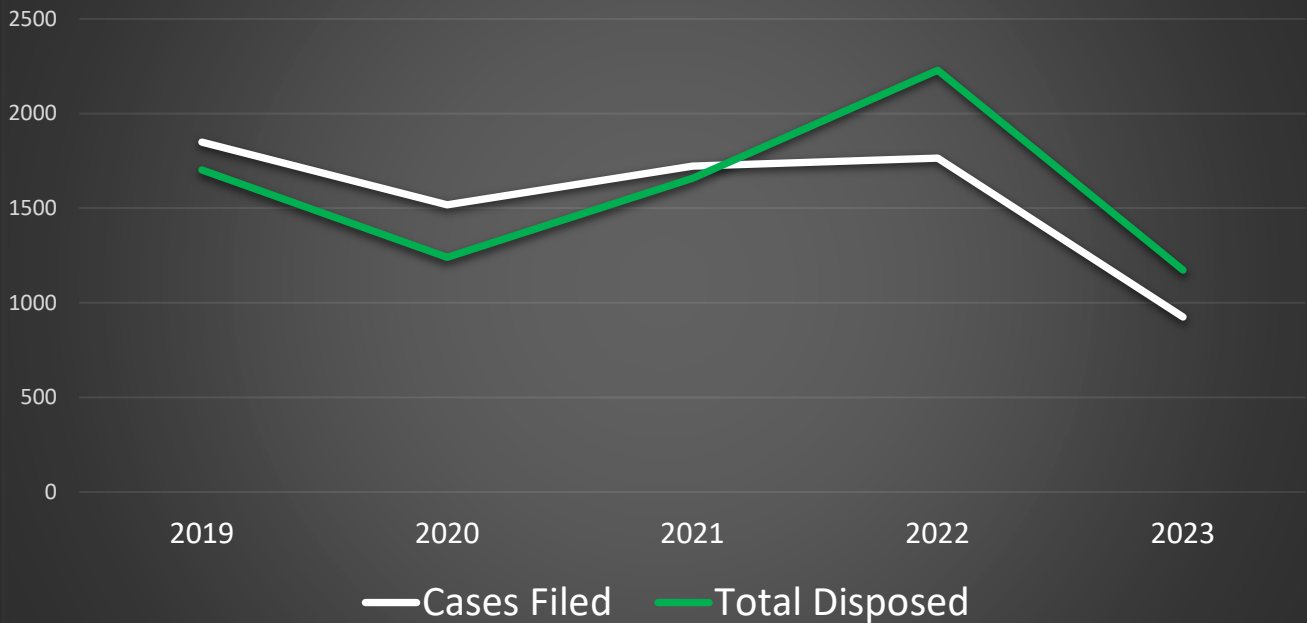
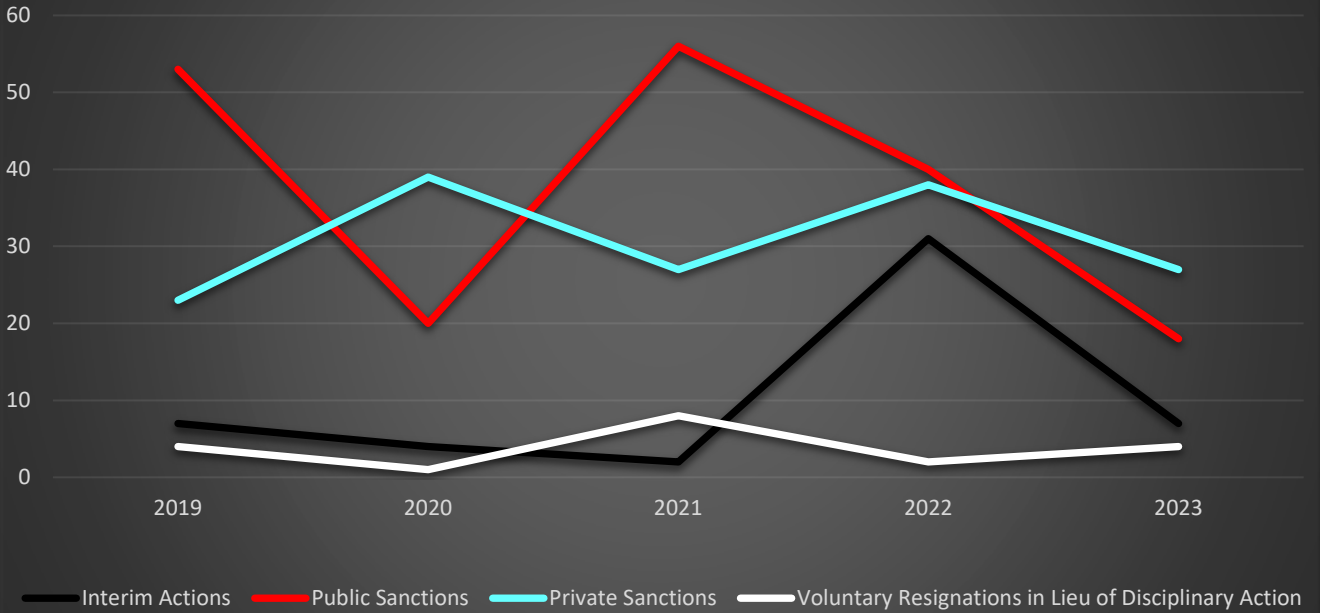
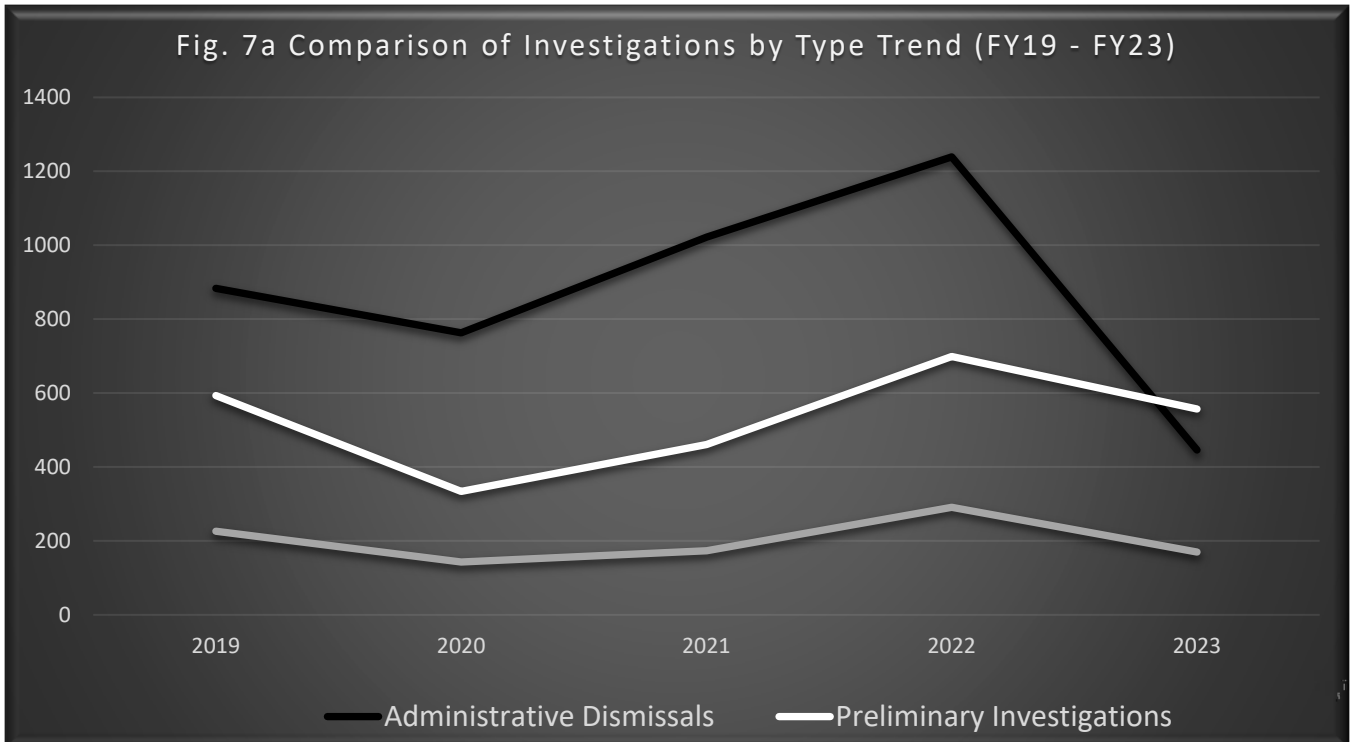
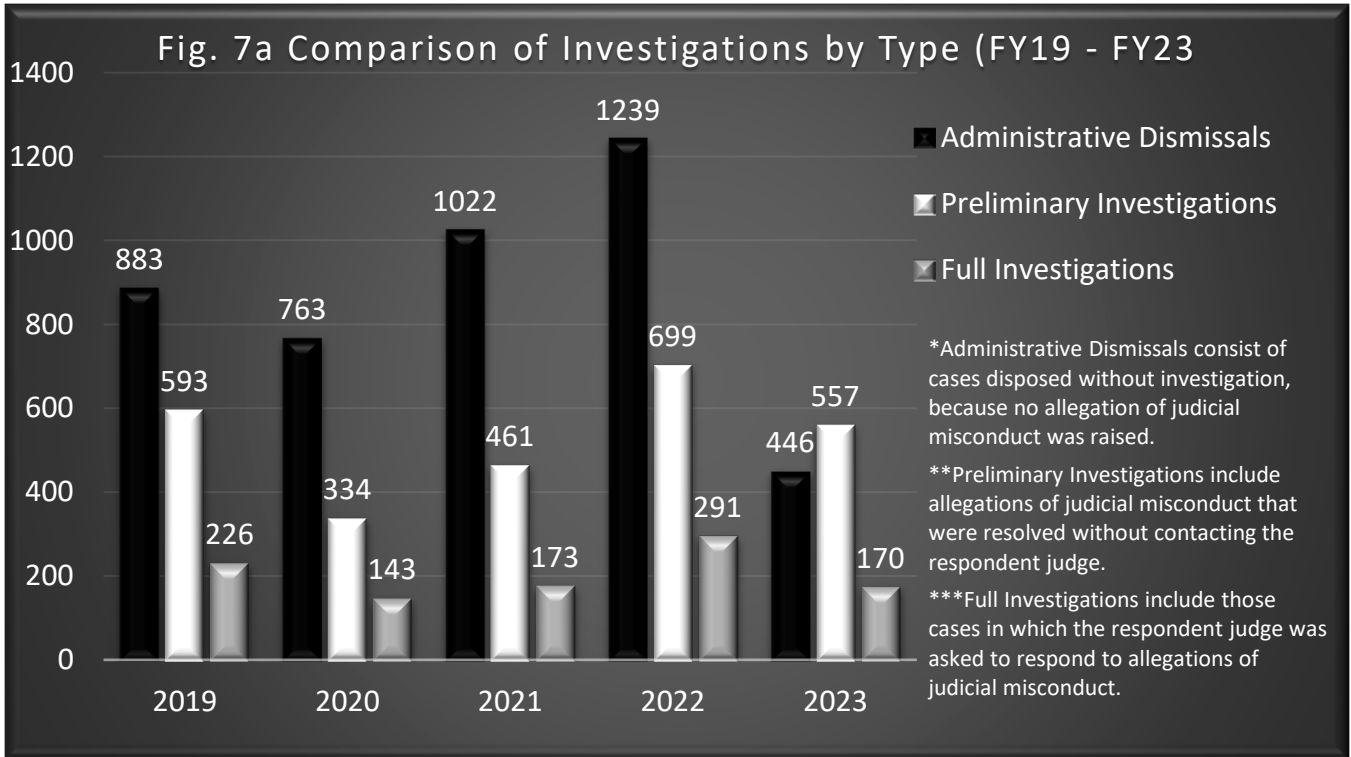


Fig. 6a Commission Activity (FY19 - FY23)



Fig. 6b Commission Activity Trend (FY19 - FY23)





# EXAMPLES OF IMPROPER JUDICIAL CONDUCT

The following are examples of judicial misconduct that resulted in disciplinary action by the Commission in fiscal year 2023. These are illustrative examples of misconduct, and do not represent every disciplinary action taken by the Commission in fiscal year 2023. The summaries below are listed in relation to specific violations of the Texas Code of Judicial Conduct, the Texas Constitution, and other statutes or rules. They are listed in no particular order of severity of the disciplinary action imposed, and may involve more than one violation. The full text of every public sanction is published on the Commission website. A copy of any public record relating to any public sanction may also be requested by contacting the Commission.

These sanction summaries are provided with the intent to educate and inform the judiciary and the public regarding misconduct that the Commission found to warrant disciplinary action in fiscal year 2023. The reader should note that the summaries provide only general information and may omit mitigating or aggravating facts the Commission considered when determining the level of sanction to be imposed. Additionally, the reader should not make any inference from the fact situations provided in these summaries.

It is important to remember that the purpose of judicial discipline is not solely to punish a judge for engaging in misconduct, but to protect the public by making clear that the Commission does not condone judicial conduct that violates the public trust. However, the reader should note that not every transgression reported to the Commission will result in disciplinary action. The Commission has broad discretion to determine whether disciplinary action is appropriate, and the degree of discipline to be imposed. Factors such as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system, will inform and impact the Commission's decision in each case. It is the Commission's sincere desire that providing this information will protect and preserve the public's confidence in the competence, integrity, impartiality and independence of the judiciary and further assist the judiciary in establishing, maintaining and enforcing the highest standards of conduct – both on the bench and in their personal lives.

**ARTICLE V, Section 1-a(6)A, Texas Constitution: A judge may be disciplined for willful or persistent violation of the rules promulgated by the Supreme Court of Texas, willful violation of the code of Judicial Conduct, incompetence in performing the duties of office, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice.**

The judge engaged in willful and persistent conduct that cast public discredit upon the judiciary and the administration of justice when the judge made public statements that appeared to denigrate and demean the office to which the judge serves and lent the prestige of judicial office to advance the judge's own private interests by allowing the display/distribution of the judge's campaign materials outside the judge's office. [Violation of Canon 2B and Article V, Section 1-a(6)A of the Texas Constitution] *Private Reprimand and Order of Additional Education of a Justice of the Peace (6/21/23).*

The judge failed to comply with the law, maintain professional competence in the law and engaged in conduct that is clearly inconsistent with the proper performance of the judge's duties and cast public

discredit upon the judiciary or the administration of justice by denying an appeal bond and failing to forward a case to the proper appellate court. [Violations of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Reprimand of a Justice of the Peace* (3/2/23).

**CANON 2A: A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.**

The judge failed to comply with the law when the judge operated a motor vehicle while intoxicated which resulted in a car accident that caused damage to others, in violation of Section 49.04(a) of the Texas Penal Code. [Violation of Canon 2A of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Public Warning of a District Judge* (8/16/23).

The judge failed to comply with the law and failed to maintain competence in the law when the judge questioned a defendant without his attorney present or contacting the defendant's attorney for permission to speak with the defendant either before or after the conversation and for failing to comply with the judge's reporting requirements pursuant to Section 113.022 and 114.044 of the Texas Local Government Code. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Public Reprimand of a Justice of the Peace* (8/2/23).

The judge failed to comply with the law when a member of the public was denied copies of court records, pursuant to a proper request, by a court clerk under the supervision of the judge. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge* (6/21/23).

The judge failed to comply with law and maintain professional competence in the law by ignoring and failing to enforce mandates from an appellate court. [Violations of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Warning of a District Judge* (3/2/23).

The judge failed to comply with the law and maintain professional competence in the law when the judge displayed the defendant's sensitive personal information during a Zoom hearing that was livestreamed on the Court's YouTube channel. [Violations of Canon 2A and 3B(2).] *Private Warning and Order of Additional Education of a County Court at Law Judge* (10/13/22).

**CANON 2B: A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.**

The judge lent the prestige of judicial office to advance the judge's own private interest by maintaining a website advertising both the judge's private legal services and the judge's position as a justice of the peace. [Violation of Canon 2B] *Public Admonition and Order of Additional Education of a Justice of the Peace* (6/21/23).

The judge lent the prestige of judicial office to advance the private interests of others by actively interjecting himself into and interfering with the legal service of process of a warrant for seizure of cattle. [Violation of Canons 2B and 4A(1) of the Texas Code of Judicial Conduct.] *Public Reprimand of a County Judge* (8/16/23).

The judge failed to comply with the law and maintain competence in the law and lent the prestige of judicial office to advance the private interests of the judge and others when the judge appeared and voluntarily testified as a character witness on behalf of the judge's staff at the hearing on a motion to recuse the judge. [Violation of Canons 2A, 2B and 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Probate Judge. (1/3/23).*

**CANON 3B(2): A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.**

The judge failed to comply with the law and failed to maintain professional competence in the law when the judge failed to complete the required judicial education for the 2020-2021 and 2021-2022 academic years and failed to cooperate with the Commission in violation of Section 33.001(b)(5) of the Texas Government Code. [Violations of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Public Reprimand of a Justice of the Peace (6/8/23).*

The judge failed to comply with the law and maintain professional competence in the law, failed to perform judicial duties without bias or prejudice and failed to accord the plaintiff the right to be heard when the judge vacated a judgment, dismissed an eviction case and a perfected appeal based on extraneous information the judge received out of court and after the court's jurisdiction has expired. [Violations of Canons 2A, 3B(2), 3B(5) and 3B(8) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Order of Additional Education of a Justice of the Peace (5/12/23).*

The judge failed to comply with the law and maintain professional competence in the law when the judge failed to refer a Motion to Recuse to the presiding judge within the required three business days; failed to perform judicial duties without bias and prejudice and manifesting bias and prejudice through the judge's words and conduct toward the plaintiff while presiding over a guardianship case; denied the parties the right to be heard regarding the judge's improper *ex parte* communications with an attorney concerning a trust agreement; engaged in *ex parte* communications and allowed court personnel to engage in *ex parte* communications with one of the attorneys in the case. [Violations of Canons 2A, 3B(2), 3B(5), 3B(6) and 3B(8) of the Texas Code of Judicial Conduct.] *Private Warning and Order of Additional Education of a County Court at Law Judge (5/12/23).*

The judge failed to comply with the law and maintain professional competence in the law when the judge denied a litigant's Statement of Inability to Afford Payment of Court Costs without conducting a hearing or issuing a written order listing the reasons for such determination and denied a litigant the right to be heard regarding the denial. [Violations of Canons 2A, 3B(2), and 3B(8).] *Private Reprimand and Order of Additional Education of a Justice of the Peace (5/12/23).*

**CANON 3B(4): A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.**

The judge failed to be patient, dignified and courteous toward a court reporter regarding the court reporter's resignation from employment in the judge's court. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct] *Private Warning of a County Court at Law Judge (6/21/23).*

The judge failed to be patient, dignified and courteous towards a law enforcement officer by referring to the officer as a "dirty cop" and accusing the office of resolving a matter "illegally." The judge further cast

reasonable doubt on the judge's capacity to act impartially as a judge by giving advice on a civil matter, that was not pending in the judge's court. [Violations of Canons 3B(4) and 4A of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Reprimand and Order of Additional Education of a Justice of the Peace* (3/2/23).

The judge failed to be patient, dignified and courteous with whom the judge deals in an official capacity by the judge's poor management and treatment of the judge's court employees. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Admonition of a Justice of the Peace* (10/15/22).

**CANON 3B(5): A judge shall perform judicial duties without bias or prejudice.**

The judge failed to comply with the law and maintain professional competence in the law, when, after ejecting a criminal defense attorney, the judge compelled the attorney's client to proceed with the hearing in the absence of the attorney. The Commission further concluded that the judge failed to treat the attorney with patience, dignity and courtesy, performed judicial duties with bias against the attorney and his client, and failed to accord the attorney and his client the right to be heard according to law. [Violation of Canons 2A, 3B(2), 3B(4), 3B(5), 3B(6), and 3B(8) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge* (3/2/23).

The judge failed to be patient, dignified and courteous, exhibited bias and prejudice towards a prosecutor when the judge ordered the prosecutor out of her courtroom because of an alleged "conflict of interest" and had the bailiff escort the prosecutor out of the courtroom, and failed to comply with the law and maintain professional competence in the law regarding the open court policy. [Violations of 2A, 3B(2), 3B(4) and 3B(5) of the Texas Code of Judicial Conduct.] *Private Reprimand of a Former District Court Judge* (11/7/22).

**CANON 3B(8): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications . . .**

The judge denied an attorney the right to be heard on a pending motion and allowed court personnel to engage in improper *ex parte* communication with the attorney and provide advice as if the advice was authorized by the judge. [Violation of Canon 3B(8) of the Texas Code of Judicial Conduct.] *Private Admonition of a County Court at Law Judge* (5/12/23).

The judge failed to comply with the law or maintain competence in it, allowed a relationship with the prosecution to influence the judge's judicial conduct or judge, conveyed the impression that the prosecution was in a special position to influence the judge, for considering *ex parte* communications with an attorney for the state; and supplementing an appellate record with unfiled documents. [Violation of Canons 2A, 2B, 3B(2), 3B(8) and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Reprimand and Order of Additional Education of a District Judge* (10/24/22).

**CANON 5(2): A judge shall not authorize the use of his or her name endorsing another candidate for any public office.**

The judge lent the prestige of judicial office to advance the interest of and authorizing the public use of the judge's name and judicial title to endorse a candidate in a special election by hosting a political event and making introductory remarks that a reasonable person, either in attendance at the event or watching a video of the judge's remarks on social media, would believe was the judge's public endorsement of the



candidate. [Violation of Canons 2B and 5(2) of the Texas Code of Judicial Conduct.] *Private Admonition and Order of Additional Education of a District Court Judge.* (1/3/23).

# COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
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## APPELLATE JUDGE MEMBERS

Texas Supreme Court	Honorable Charles Barrow	66 - 69	4 Year Term
Texas Supreme Court	Honorable Spurgeon Bell	66 - 71	Served as Chair
Texas Supreme Court	Honorable Homer Stephenson	70 - 75	Served as Chair
Texas Supreme Court	Honorable Phil Peden	72 - 77	Served as Secretary Served as Chair
Texas Supreme Court	Honorable Edward Coulson	78 - 81	Served as Vice Chair
Texas Supreme Court	Honorable Charles L. Reynolds	78 - 81	Unexpired Term Served as Vice Chair
Texas Supreme Court	Honorable Esco Walter	75 - 77	
Texas Supreme Court	Honorable John Boyd	82 - 87	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable William Junell	77 - 81 81 - 83	Unexpired Term Reappointed Served as Chair
Texas Supreme Court	Honorable William Bass	89 - 94	Retired
Texas Supreme Court	Honorable William "Bud" Arnot	95 - 95 95 - 01	Unexpired Term Reappointed Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Joseph B. Morris	01 - 07	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Jan P. Patterson	07 - 13	Served as Vice Chair
Texas Supreme Court	Honorable David Gaultney	11 - 13	Unexpired Term
Texas Supreme Court	Honorable Douglas S. Lang	13 - 18	Served as Chair Served as Vice Chair Served as Secretary
Texas Supreme Court	Honorable Lee Gabriel	19 - 19	Unexpired Term
Texas Supreme Court	Honorable David Schenck	20 - 22	Unexpired Term Served as Chair

## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
Texas Supreme Court	Honorable Ken Wise	23 -	Unexpired Term

### DISTRICT JUDGE MEMBERS

Texas Supreme Court	Honorable Connally McKay	66 – 68	Served as Vice Chair
Texas Supreme Court	Honorable Truett Smith	66 – 69	Served as Vice Chair
Texas Supreme Court	Honorable Clarence Guittard	68 – 69	Unexpired Term Served as Secretary Resigned (appointed Appellate Judge)
Texas Supreme Court	Honorable Howard Davison	68 – 75	Served as Vice Chair
Texas Supreme Court	Honorable R. C. Vaughan	69 – 71 71 – 77	Unexpired Term Reappointed Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Walter E. Jordan	78 – 81	Served as Chair
Texas Supreme Court	Honorable Darrell Hester	76 – 81	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Raul Longoria	82 – 87	
Texas Supreme Court	Honorable Harry Hopkins	82 – 83 83 – 89	Unexpired Term Reappointed Served as Vice Chair Resigned (appointed Appellate Judge)
Texas Supreme Court	Honorable Homer Salinas	88 – 93	Served as Vice Chair
Texas Supreme Court	Honorable Merrill Hartman	93 – 99	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Kathleen Olivares	99 – 05	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Sid Harle	05 – 11	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Orlinda L. Naranjo	11 - 18	

## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
Texas Supreme Court	Honorable Ruben G. Reyes	18 - 20	Deceased
Texas Supreme Court	Honorable Gary L. Steel	21 -	Unexpired Term Serving as Chair

## COUNTY COURT AT LAW MEMBERS

Texas Supreme Court	Honorable J. Ray Kirkpatrick	85 -89	New Position
Texas Supreme Court	Honorable Hilda Tagle	89 - 91 91 - 94	Unexpired Term Reappointed Resigned (elected District Judge)
Texas Supreme Court	Honorable Martin Chiuminatto	95 – 97 97 - 03	Unexpired Term Reappointed Served as Secretary
Texas Supreme Court	Honorable Michael R. Fields	03 - 09	Served as Vice Chair
Texas Supreme Court	Honorable M. Sue Kurita	10 - 15	Served as Vice Chair
Texas Supreme Court	Honorable David C. Hall	15 - 23	Unexpired Term Served as Secretary Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Carey F. Walker	23 -	Unexpired Term

## CONSTITUTIONAL COUNTY JUDGE MEMBERS

Texas Supreme Court	Honorable Ernie Houdashell	07 – 09	New Position
Texas Supreme Court	Honorable Joel P. Baker	09 – 11 11 - 16	Unexpired Term Reappointed Served as Vice Chair Resigned (2016)
Texas Supreme Court	Honorable Tramer J. Woytek	16 – 17 17 - 20	Unexpired Term Reappointed Served as Secretary (Resigned 2020)
Texas Supreme Court	Honorable Lucy M. Hebron	21 - 22	Unexpired Term

## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
Texas Supreme Court	Honorable Tano E. Tijerina	23 -	Unexpired Term

### JUSTICE OF THE PEACE MEMBERS

Texas Supreme Court	Honorable Wayne LeCroy	78 – 83	New Position
Texas Supreme Court	Honorable James Dinkins	83 – 83	Unexpired Term
Texas Supreme Court	Honorable Jack Richburg	84 – 85 85 – 90	Unexpired Term Reappointed
Texas Supreme Court	Honorable Charles McCain	91 – 91	Unexpired Term
Texas Supreme Court	Honorable Tom Lawrence	91 – 97	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable Keith Baker	97 – 03	
Texas Supreme Court	Honorable Rex Baker	03 – 07	Served as Vice Chair Served as Chair Resigned
Texas Supreme Court	Honorable Tom Lawrence	07 – 09	Unexpired Term
Texas Supreme Court	Honorable Steven L. Seider	10 - 15	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable David M. Patronella	15 - 22	
Texas Supreme Court	Honorable Wayne Money	22 -	

### MUNICIPAL JUDGE MEMBERS

Texas Supreme Court	Honorable Elinor Walters	85 – 91	New Position Served as Secretary
Texas Supreme Court	Honorable Bonnie Sudderth	91 – 96	Resigned (appointed District Judge)
Texas Supreme Court	Honorable Michael O'Neal	96 – 97 97 – 02	Unexpired Term Reappointed Resigned

## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
Texas Supreme Court	Honorable Monica A. Gonzalez	02 – 03 03 – 09	Unexpired Term Reappointed Served as Vice Chair Served as Chair Resigned in '09 (appointed to CCL)
Texas Supreme Court	Honorable Edward J. Spillane, Jr.	09 – 15	
Texas Supreme Court	Honorable Catherine N. Wylie	15 - 19	Served as Vice Chair Served as Chair
Texas Supreme Court	Honorable M. Patrick Maguire	20 - 22	Unexpired Term
Texas Supreme Court	Honorable Chace A. Craig	23 -	Unexpired Term

## PUBLIC MEMBERS

Governor	William Blakemore	66 - 69	
Governor	Lewis Bond	66 - 70	
Governor	Robert Whipkey	66 - 72	
Governor	F. Howard Walsh	70 - 74	
Governor	Vernon Butler	70 - 75	
Governor	F. Ray McCormick	73 - 77	
Governor	Carl Dillard	74 - 81	Served as Secretary
Governor	Crawford Godfrey	76 - 81	
Governor	Mike Maros	78 - 83	Served as Secretary Replaced McCormick
Governor	Robert Rogers	81 - 85	
Governor	Scott Taliaferro	81 - 85	Served as Secretary
Governor	Col.(R) Nathan I. Reiter	81 - 87	Served as Secretary Resigned 5/14/87
Governor	Max Emmert, III	83 - 89	

## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
Governor	Lowell Cable	85 - 91	
Governor	Gary Griffith	88 - 91	Unexpired Term
Governor	Dr. Roderick Nugent	87 - 93	
Governor	Al Lock	89 - 95	Served as Secretary
Governor	Carol MacLean	94 - 97	Resigned
Governor	Rosa Walker	91 - 97	
Governor	Jean Birmingham	93 - 99	
Governor	L. Scott Mann	95 - 01	Served as Vice Chair Served as Chair
Governor	Dee Coats	98 - 03	Served as Secretary
Governor	Gilbert M. Martinez	98 - 03	
Governor	Wayne Brittingham	00 - 01	Resigned
Governor	Faye Barksdale	01 - 07	
Governor	R.C. Allen III	02 - 05	
Governor	Ann Appling Bradford	03 - 09	Served as Secretary
Governor	Buck Prewitt	04 - 06	Resigned
Governor	Gilbert Herrera	05 - 05	Resigned
Governor	Janelle Shepard	05 - 11	Served as Secretary
Governor	Cynthia Tauss Delgado	07 - 07	Resigned
Governor	William Lawrence	07 - 09	Unexpired Term
Governor	Conrado De La Garza	08 - 08	Resigned
Governor	Karry Matson	09 - 13	Unexpired Term
Governor	Patty Johnson	09 - 11 11 - 18	Unexpired Term Reappointed Served as Secretary
Governor	Martha Hernandez	10 - 15	
Governor	Diane DeLaTorre Threadgill	10 - 15	
Governor	Valerie E. Ertz	11 - 17	Served as Secretary Served as Chair
Governor	David M. Russell	13 - 19	
Governor	Darrick L. McGill	17 - 21	



## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
Governor	Sujeeth B. Draksharam	17 - 23	
Governor	Maricela Alvarado	18 - 19	Resigned
Governor	Amy Suhl	18 - 19	Resigned
Governor	Valerie Ertz	19 -	Unexpired Term
Governor	Frederick C. Tate	19 - 23	Unexpired Term Serving as Secretary
Governor	Janis Holt	19 -	Served as Secretary Serving as Vice-Chair
Governor	Kathy P. Ward	21 -	
Governor	Andrew M. "Andy" Kahan	23 -	Unexpired Term
Governor	Clifford T. Harbin	23 -	Unexpired Term

## ATTORNEY MEMBERS

State Bar	J. E. Abernathy	66 – 69	
State Bar	Fred Werkenthin	66 – 72	Served as Secretary
State Bar	Donald Eastland	69 – 75	Served as Chair
State Bar	Robert C McGinnis	71 – 77	
State Bar	O. J. Weber	75 – 81	Served as Vice Chair
State Bar	W. Truett Smith	78 – 83	Served as Chair
State Bar	Robert Parsley	81 – 87	
State Bar	Jamie Clements	83 – 89	Served as Vice Chair
State Bar	Charles Smith	87 – 93	Served as Chair
State Bar	Charles R. Dunn	89 – 95	Served as Chair
State Bar	Jack Pasqual	93 – 99	
State Bar	Blake Tartt	95 – 01	

## COMMISSION MEMBERS PAST AND PRESENT

(Last Updated 11/29/23)

APPOINTED BY	NAME	DATES OF SERVICE	COMMENTS
State Bar	Wallace Jefferson	99 – 01	Resigned (appointed Supreme Court Justice)
State Bar	Ron Krist	01 – 07	
State Bar	James Hall	01 – 05	Unexpired Term Served as Vice Chair Served as Chair
State Bar	Jorge Rangel	05 – 11	Served as Vice Chair Served as Chair
State Bar	Tom Cunningham	07 – 13	Served as Vice Chair Served as Chair
State Bar	Ricky A. Raven	11 - 17	Served as Secretary
State Bar	Demetrius K. Bivins	13 - 19	
State Bar	Ronald E. Bunch	17 -	Served as Secretary Served as Vice-Chair
State Bar	Steve Fischer	19 - 20	Resigned
State Bar	Clifton Roberson	21 -	Unexpired Term

# Tab D

# Memorandum



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**To:** Supreme Court Advisory Committee

**From:** Appellate Rules Subcommittee

**Date:** February 28, 2025

**Re:** February 7, 2025 Referral Regarding Petition for Review Practice

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## I. Matter referred to subcommittee

**Eliminating Pre-Grant Merits Briefing.** The Court requests that the Committee study the elimination of the Court's current practice of requesting merits briefing before granting a petition for review. The Court further requests that the Committee propose draft rule amendments accomplishing this objective.

## II. Relevant materials

The following materials are attached to this memo:

- A memo prepared by Justice Busby, Justice Young, and Melissa Davis Andrews
- A memo prepared by Justice Young
- A summary of Martha Newton's review of practices in state courts of last resort

Note that Justice Busby and Justice Young were *not* members of the Supreme Court when these memos were prepared. These memos may not reflect their current views and certainly do not necessarily represent the views of the Court or any member of the Court.

## III. Subcommittee recommendation

As discussed below, the Subcommittee discussed the benefits and drawbacks of the Court's current practice and implications of changing that practice. The

Subcommittee does not make a recommendation about the advisability of changing the Court's current practice. Instead, we look forward to a discussion at the Committee meeting regarding the view of the Committee as a whole.

This memo also outlines some of the changes to the Rules that may be necessary or advisable if the Court's current practice is changed. If the Committee as a whole is of the view that the Court should consider a change to the current practice, the Subcommittee will prepare proposed amendments to the Rules.

#### **IV. Discussion**

##### **A. Background**

Before 1997, a party seeking review in the Supreme Court filed a writ of error, which was a full merits brief of the issues that the party sought to raise in the Court. Law clerks read the writs, responses, and replies and prepared memos for the Court summarizing the parties' arguments and making a recommendation about whether to grant or deny review.

In 1997, the Court adopted the current practice, in which the petitioner files a short petition for review (initially limited to 15 pages and now limited to 4,500 words). The purpose of the petition is to show the Court that the case involves important issues that warrant the Court's attention. The respondent can choose to file a response or wait to see if the Court requests a response. Under the Supreme Court's internal procedures, a response is requested if one of more justices vote to do so. If a response is filed or requested, the petitioner can file a reply. The Court then (generally) decides whether to ask for full merits briefing, which takes the vote of at least three justices.

If the Court requests merits briefing, a law clerk analyzes the merits briefs and prepares a 10-page study memo summarizing the parties' arguments and making a recommendation about whether to grant or deny the petition. It takes the vote of at least four justices to grant the petition and set it for argument. It takes the vote of at least six justices to grant the petition and issue a per curiam opinion without argument.

Part of the rationale for the change from the writ system to the petition system was that the justices would be able to read the shorter petitions for review rather than relying on memos prepared by their law clerks. But then the parties would still have the length of a merits brief to fully brief their arguments to the Court (if the Court voted to request merits briefing).

As shown in the memo from Martha Newton, it appears that Texas is unique in requesting full merits briefing before deciding whether to grant review.

## **B. Recent Statistics**

The following statistics come from a CLE paper prepared by Don Cruse for the 2024 UT Conference on State and Federal Appeals.

The Court requests responses to about 42% of petitions for review.

Historically, the Court requested merits briefing in about 50% of the cases in which it requested a response to the petition for review. But that rate has been trending down recently:

- 2018 - 57%
- 2019 - 47%
- 2020 - 34%
- 2021 - 40%
- 2022 - 40%
- 2023 - 40%
- 2024 - 32% (through May 31, 2024)

Historically, the Court granted review and issued an opinion (either after oral argument or per curiam) in about 40% of the cases in which it requested full merits briefing. But that rate has been trending up recently:

- 2021 - 51%
- 2022 - 57%
- 2023 - 52%
- 2024 - 57% (through May 31, 2024)

The Court has recently granted a few petitions for review before requesting full merits briefing. It has also recently issued a few substantive per curiam opinions without requested full merits briefing.

## **C. Benefits and Drawbacks of the Current System**

In the interest of fostering discussion in the Committee as a whole, the Subcommittee presents the following list of benefits and drawbacks of the current system that the Subcommittee identified in our discussions.

## Benefits

- Texas Supreme Court gets different kinds of cases than the US Supreme Court and for some kinds of cases even a longer petition for review would not be enough to explain fully why the Court should grant review. The mere fact that the US Supreme Court grants before merits briefs is not a reason to abandon our practice.
- Before it grants review, the Supreme Court is fully aware of all of the arguments (including any issues that could prevent the Court from getting to the issues it is interested in). This minimizes the DIG (dismiss as improvidently granted) phenomenon that occasionally occurs at the US Supreme Court.
- Even if the Court ultimately denies a petition after obtaining merits briefing (and the internal study memo), the process is useful. The Court can return to prior study memos when issues recur. And the spent reviewing merits briefs and study memos aids the Court in determining which cases are most important to the jurisprudence of the State.
- The shorter petitions for review make it easier for the justices to read all petitions before deciding whether to deny the petition or ask for a response and perhaps ultimately merits briefing. This allows the Court to make quick decisions about whether the petition merits further consideration.
- Because the case is not set for oral argument when merits briefs are requested, there is more flexibility in granting extensions of time for the briefing. And requests for merits briefing are not as tied to the Court's argument schedule as they are in the US Supreme Court.
- The practice of allowing unbriefed issues in the petition for review allows petitioners to flag less important issues in the petition without fully briefing them.
- Petitioners can file a relatively short brief and get a quick indication about whether the Court is interested in the issues.
- Cases in which the Court requests merits briefing can provide insight to the bar and to litigants into what the Court is interested in. A lawyer who watches requests for merits briefing can also alert the Court to other cases that could affect the Court's decision to grant or deny, which helps the Court discuss those cases together in making that decision.
- A decision to request briefs before a grant can inform settlement decisions.
- The petition stage briefing gives the Court a flavor of the issues without the petitioner having to persuade that the petitioner is right or even that the case should be granted.



## Drawbacks

- The system sometimes causes expense and frustration for clients where the Court requests merits briefing and then denies the petition without explanation. Cases that get close, but ultimately get denied cost clients almost the same as cases that get granted.
- Court and staff have to spend time reading and considering merits briefs in cases that do not get granted.
- The current system extends the timeline between court of appeals judgment and a grant of review. It can be up to a year depending on extensions, the Court's conference schedule, etc.
  - Statistic from Don Cruse – median time to disposition for cases in which the Court requests merits briefs is 385 days (this includes both petitions that are denied and petitions that are granted)
  - Most cases are in the range of 305 days and 477 days (it is a pretty good assumption that the denials are on the low end of that range)
- Merits briefs still have to address whether the Court should grant review.
- The merits briefing cannot be focused solely on the merits of the case.
  - Petitioners' briefs have to argue that they clearly win while still arguing that the Court's guidance is needed.
  - Respondents' briefs have to argue the merits while still trying to convince the Court that "there's nothing to see here."
- The Court and staff read merits briefs not just to decide the merits, but to decide whether to grant and then have to read them again to consider the merits (if review is granted).
- "Unbriefed issues" practice delays discussion of all issues to the merits briefing.
- Currently, there is a short time between granting review and oral argument. Changing the system would allow the parties to prepare the merits briefs with an eye to oral argument and have more time to prepare for oral argument.

## Other Alternatives?

The Subcommittee also discussed whether the concerns about the current system could be addressed without completely changing it. For example, the Court could consider increasing the number of votes required to request merits briefing. The Court could also consider a pilot program in which it implements changes to the system only for certain cases (for example, cases from the Fifteenth Court of Appeals). The Court could also consider a change to internal procedures that would allow for granting a petition before requesting merits briefs on the vote of 5 justices. This would allow the Court to grant review in cases where the need for review is obvious from the petition

while still preserving the ability to ask for merits briefs where additional analysis is needed before granting review.

#### **D. Possible Changes to the Rules to Implement Any Changes**

The Subcommittee has identified the following potential changes to the Rules if the petition process is to be modified. We offer these changes as an outline for potential discussion by the Committee as a whole at the meeting. Once we have a sense of the Committee's views, the Subcommittee will prepare proposed amendments for the Committee's consideration.

- Deadline for the PFR
  - Stick with 45 days or extend to 60 or longer?
- Length of Petition
  - 4,500 words is likely too short to decide whether to grant review
  - US Supreme Court cert petition limit is 9,000 words
- Contents of Petition
  - Order of Items
    - Put Issues Presented right after the cover (similar to cert petitions)?
    - Put Reasons to Grant the Petition closer to the front (perhaps before TOC)?
  - Appendix
    - Any additional items to be included?
  - Note that the Rules were recently amended to require an Introduction that states the reasons the Court should grant review
- Response Practice
  - Retain Respondent's option to file a response or have them filed only on the Court's request?
  - Impose a deadline to inform the Court whether a response will be filed?
- Changes to Contents of Merits Briefs?
  - Since review has been granted, eliminate Statement of Jurisdiction?
  - Issues Presented
    - Current rules allow a restatement of the issues (though not adding new ones)
    - Should the issues be identical because the Court has already granted review?
- Timing of Merits Briefs
  - Should the rules continue to include standard deadlines for merits briefing?

- Orders granting merits briefing already set deadlines; that may be more important when the case has already been set for argument
- Does the rule about extensions of time need to address getting the briefs in a certain amount of time before argument?
- US Supreme Court rules provide that the reply brief must be filed at least 10 days before oral argument
- Current Rules do not provide any deadline for reply briefs on the merits
- Dismissing a Petition as Improvidently Granted
  - Should the Rules specifically address the Court's ability to dismiss a petition as improvidently granted as one of the actions the Court can take on a petition?
- The Record
  - Is Rule 54 still necessary where the record is online and available without being physically sent to the Supreme Court?
  - Perhaps consider amending the rule to address only physical parts of the record that are not electronic
- Mandamus (and Other Original Proceeding) Practice
  - The Court considers mandamus petitions using a similar process to petitions for review
  - But the mandamus rules do not as clearly address the bifurcated process in the Supreme Court:
    - Rule 9.4(i)(2)(D) provides that a petition in an original proceeding in the Supreme Court is limited to 4,500 words (just like a petition for review)
    - Rule 52.8(b)(2) provides that the Supreme Court can request full merits briefing under Rule 55
  - Should the rules more specifically address the two-step process in the Supreme Court?
  - Should the mandamus rules also provide for merits briefs only after the Court has decided to set the petition for writ of mandamus (or other original proceeding) for argument?

# EXHIBIT 1

To: Martha Newton, Supreme Court of Texas  
From: Justice Brett Busby, Evan Young, Melissa Davis  
Re: Potential Changes in Petition for Review Process

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The Court has asked us to address several aspects of two potential changes to its process of accepting cases for plenary review: (1) adopting a procedure for granting or denying petitions for review without the intermediate step of calling for full briefing on the merits, and (2) reserving the option to grant review only as to specific issues that a petition may present, as opposed to the current all-or-nothing approach in which granting review means reviewing the entire case. We have discussed each of the questions given to us by Martha Newton and present our recommendations to the Court in this short memorandum.

### **1. Would the deadline for filing a PFR be different or the same?**

We recommend extending the time to file a PFR from 45 days to 60 (or even 75) days. In our view, this slight increase in the default amount of time authorized for preparing a PFR would be offset by significant efficiency gains and would properly signal the significance of the new rules to the bar.

Under the new rules, PFRs would need to provide sufficiently comprehensive analysis to allow the Court to make a final decision on plenary review without full briefing. In many cases, a PFR would also increase in length—no more unbriefed issues or oblique hints of coming explanations of jurisprudential significance if the Court would just call for full briefing. A modest increase from 45 to 60 or 75 days would signal the Court’s awareness that it is asking for more than counsel can provide (at least in complex cases) under the current rules.

We think that the new rule as a whole would generate greater efficiency and speed, while reducing the burdens on both the Court and the parties. Granting or denying review at the PFR stage will mean that more cases will end at that stage and become final. For the category of cases in which, under the current rules, a denial only follows briefs on the merits, the new rule would shave off months. An extra 15 or 30 days to prepare a PFR is a small cost compared to the months and months that would have to be dedicated to both parties preparing full merits briefs (further lengthened because one or both parties will often seek extensions)—only to eventually learn that the Court will not actually even consider the merits. Some lawyers may regret not being asked to prepare what turn out to be fruitless briefs, but the avoidance of wasted time by lawyers (at expense to clients) and by the Court and its staff should generate more efficiency, so that time expended in filings for the

Supreme Court of Texas will far more likely benefit the decisional process. Additionally, while Texas appellate lawyers may have fewer BOMs to prepare, they may also have more PFRs to prepare. Important legal issues do not always arise in high-dollar cases. In cases where the amount in controversy does not justify the cost of preparing both a PFR and merits briefing in exchange for a slim chance at review, it might justify the cost of preparing only a PFR before knowing whether review will be granted.

Finally, we are ambivalent as to the choice between 60 or 75; the *fact* of the greater authorized time is probably more important than *how much* the greater time is. The U.S. Supreme Court allows 90 days for a petition for a writ of certiorari, but we believe that the Court need not go so far for three reasons. First, the Court is already (we think wisely) generous with extensions. Second, many petitions will not need substantially more time than already permitted. And third, unlike in federal practice, our rules delay the issuance of the court of appeals' mandate until this Court has disposed of a PFR (or the time for one has run). As noted in point 3 below, we propose mitigating the time delay by requiring respondents to notify the Court within a set period (perhaps 7 days of receiving the PFR) if they intend to file a response. Taken together, we think that extending the current 45 days to 60 or 75 days would best satisfy the interests addressed above while avoiding undue delays in finality for cases that are not suitable for plenary review.

## **2. What would be the page/word limit? Should the list of contents in 53.2 be adjusted?**

We recommend increasing the word limit (and page limit for the small category of people who follow that standard) in order to ensure that the Court is in full possession of the information it needs to make a final decision regarding plenary review. As described below, we believe that the Court should authorize at least 7,500 words and perhaps as many as 9,000 (the word limit for a petition for a writ of certiorari in the U.S. Supreme Court). Given that the PFR would no longer merely be a trigger for additional briefing, we also recommend modifying the list of required content as follows:

### **a. Issues Presented**

We think that the Court would benefit from the U.S. Supreme Court's practice of requiring on the very first page of the petition a statement of the issue(s) presented in clear and concise language. Currently, the Court permits "unbriefed" issues, but because this proposal dispenses with briefs on the merits before a grant-deny decision, the parties should list all issues up front and address them all as appropriate in the PFR.

### **b. Executive Summary**

The "Executive Summary" (which could also be entitled Summary of Reasons to Grant Review, or Introduction) is the proposal's chief innovation and likely the most significant tool to allow the Court to separate the wheat from the chaff in a materially time-saving fashion.

Our proposal is that the Court require—immediately after the Issues Presented or after the Statement of the Case—an Executive Summary of no more than 1,000 words (or 1,500 words together with the Issues Presented and Statement of the Case, or a similar length as deemed appropriate by the Court). The theory behind the Executive Summary, which would replace a summary of the argument, is that it would allow a Justice to turn quickly from the Issues to the petitioner's own best "pitch" for why its case belongs in the Supreme Court of Texas. If in 1,000 words the petitioner cannot show the intended audience—each Justice—why further scrutiny is at least plausible, then the Justice should feel confident in voting to deny the petition. On the other hand, if the Justice reads the Executive Summary and believes that further review is warranted, all that the Justice (or staff member, upon a Justice's direction) need do is turn to the next page. Whereas today a PFR that seems compelling leads to a call for full briefing, the Executive Summary as part of an extended PFR means that the two stages can be collapsed without requiring additional months and full 15,000-word briefs.

### **c. Statement of the Case with Jurisdictional Basis**

We propose that the rules require a very concise "statement of the case" that lists the basic data behind the petition—perhaps in a tabular format even more consistent than current practice. The statement of the case should count against word limits to avoid excessive or narrative use of what should be a place for the Court or its staff to simply verify core information.

Because of recent legislative changes in the Court's jurisdiction, establishing jurisdiction may be less critical in appeals from final



judgments, but we also believe that the parties should at least include a citation to the statutory basis for jurisdiction (mostly useful for interlocutory appeals, perhaps).

In addition, the Court may wish to consider requiring a citation to the record, without argument, showing where each issue was preserved below (when required). This information could allow the Court to make a grant decision—including a decision to grant review of fewer than all issues presented—without taking the time to request and review the full record in certain cases, particularly if the rule requires the cited record material to be included in the Appendix.<sup>1</sup> The State Bar Rules Committee is currently considering revisions to Tex. R. App. P. 38 and 9.4 to include such a requirement. That proposed rule change (attached) could serve as a model for a similar change to Rule 53.2. Alternatively, the rule could require that the preservation citations be included in the Factual Background section (discussed below).

Note that we propose delaying the table listing parties and counsel until the Appendix, as described below.

#### **d. Table of Contents**

Notably, we think that all the materials above should *precede* the table of contents. They are the materials that the Justices most likely would want to review, and knowing that they immediately follow the cover should facilitate that review. For petitions that survive that screening round, the rest of the petition—starting with the table of contents and index of authorities—will look like more typical briefing.

#### **e. Index of Authorities**

#### **f. Factual Background**

This familiar section should be where the petitioner describes the factual background of the case, with record citations, and describes the proceedings in the courts below.

#### **g. Reasons to Grant Review**

This is the body of the petition—effectively the “Argument” section. The “Reasons to Grant” portion of the petition should key off the principles articulated in Texas Rule of Appellate Procedure 56.1(a)

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<sup>1</sup> Currently, the Court receives the merits briefs and the record before deciding whether to grant a petition. Under the proposed system, merits briefs and the record would be filed following the grant of a petition, although the Court may request the record at any time. *See* TEX. R. APP. P. 54. The U.S. Supreme Court currently uses this system, and it frequently grants certiorari without first requesting the record.

(comparable to the considerations in the U.S. Supreme Court’s Rule 10). In this section, the petitioner should focus on why the judgment below poses a question of significant jurisprudential importance to warrant space on this Court’s limited plenary docket (including divisions about legal questions among the courts of appeals). The petitioner should also explain why the judgment below appears to be wrong.

**h. Prayer**

**i. Certificate of Compliance**

**j. Appendix**

We propose requiring the “Identify of Parties and Counsel” to appear as a first appendix that would immediately follow the text of the petition. That way, staff could readily screen out any petitions that pose conflicts for the Justices, and the Justices would be able to find the chart readily should they wish to review it. We propose specifying that the list include *all* past and present parties and counsel to facilitate this review.

We then recommend retaining the required appendices in current practice: the opinions and judgments of the lower courts and other important materials (texts of contracts or statutes), etc.

As noted above, we recommend increasing the word limit from 4,500 words to at least 7,500 and perhaps as much as 9,000 words. We further recommend that the Court impose the additional limit that the materials preceding the Table of Contents (i.e., Issues; Statement of the Case; Executive Summary) take up no more than 1,000 to 1,500 words. If the petitioner chooses to use fewer than that limit, it could use the remaining balance in the body of the petition (aware that if the Executive Summary is insufficiently persuasive, the body of the petition may not be read at all).

**3. Should parties still be able to file a response voluntarily, or should we only permit parties to file a response if requested by the Court?**

We recommend continuing to allow parties to file either a voluntary response or a waiver—with one important proposed modification. We recommend that the Court consider imposing a comparatively quick deadline for parties to notify the Court of their election between responding and waiving. For example, within 7 days of the PFR’s filing, the respondent should notify the clerk either that it intends to file a voluntary response within 30 days (subject to extensions) *or* that it waives the response pending an order from the Court. In the latter instance, many PFRs can be forwarded to the Court rapidly, without awaiting the full 30 days to discover whether the respondent will waive. Such a requirement would greatly facilitate finality for a

large number of cases, because many of them will be petitions in which no response is required; but when a response would be helpful, knowing well in advance that the respondent will only file if the Court directs will streamline the process of notifying the respondent of the Court's order.

#### **4. Should the Court grant or have the option of granting on particular issues, rather than review the entire case?**

We believe that the benefits of allowing the Court to grant review of fewer than all issues presented would outweigh any potential detriments. The U.S. Supreme Court has long followed that practice without controversy, even though Article III limits on advisory opinions and “case or controversy” requirements would seem to pose at least as great an obstacle as any Texas justiciability requirements. From the perspective of the jurisprudence of the State, rather than the parochial interests of particular parties, granting as to a single issue has multiple virtues and few vices. The Court's limited resources could range further if it could dispense with tedious or insignificant legal issues that would nonetheless be resource-intensive were the Court to consider them. Petitioners themselves should welcome such a development, because the alternative to taking selected issues may be denial, rather than (as they may suppose) granting the entire case.

To be clear, we assume that, if the Court were to grant only as to a single question, it would be one in which reversal *could* change the judgment below—i.e., if the respondent has prevailed on two alternative grounds, granting review on just one of them could not possibly change the judgment, and the Court should grant either on the whole case or deny. But for the common circumstance in which the petitioner could prevail on any of multiple grounds, granting review as to only *one* (or more) such grounds would be entirely appropriate, even if the Court were ultimately to affirm.

Of course, because this would mark a change in practice, we suggest that the Court ensure (at least initially) that the internal review process is unusually robust, thus minimizing the potential for advisory opinions and other jurisdictional issues that might lead to dismissal of a cause and end up wasting more energy than it saved. *See, e.g., Hall v. McRaven*, 508 S.W.3d 232, 250 n.18 (Tex. 2017) (citing *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 767 (Tex. 2014)); *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 567 n.27 (Tex. 2016); *Lone Star Gas Co. v. R.R. Comm'n of Tex.*, 767 S.W.2d 709, 711 (Tex. 1989).

**5. Until internal access can be provided amongst the Courts, should the Court require Petitioners to file the CA briefs?**

Yes, in a separate filing. The Court may want to consider making an exception for pro se petitioners who elect not to file electronically, commensurate with the exception in Rule 9.2(c)(1). We believe that this problem will soon be alleviated by routine electronic access, as most of the Courts of Appeals already have the briefs available on their public websites. Another option would be to require all Courts of Appeals to post briefs on their websites, and only have the parties supply copies if the briefs were redacted or filed under seal.

**6. How would your proposal affect the length and content requirements for mandamus petitions?**

We believe that the mandamus process should continue to parallel the PFR process, and if anything, mandamus cases are typically more urgent and would benefit even more from the streamlining that the proposed rules would achieve. Motions for a stay can provide a vehicle to preserve the status quo, as they do currently.

**7. Would the Court need to make any changes to the rules that govern procedures in the CA?**

We do not believe any changes would need to be made to the rules governing the courts of appeals.

We note that our recommendations would require at least some changes to the rules governing proceedings in this Court:

- a. the list of contents in Tex. R. App. P. 53.2 & 53.3
- b. the deadlines for filing in Tex. R. App. P. 53.7
- c. the word limits in Tex. R. App. P. 9.4(i)(D) & (E)
- d. the options for disposing of a PFR in Tex. R. App. P. 56.1 might need to be revised to expressly allow for partial grant/denial

**Other Notes:**

Melissa suggests that the Court consider changes to the study memo process to allow for mini-memos at the PFR stage if the above suggestions are implemented. If jurisdiction and error preservation are reviewed at the PFR stage, they could be eliminated from the study memo at the BOM stage. Additionally, the number of study memos required presumably would be cut by approximately 2/3rds if the Court were to grant or deny review at the PFR stage, while the average number of issues requiring

analysis in each study memo would presumably decrease if the Court were to grant review as to only certain issues in some cases.

# EXHIBIT 2

## Notes on Potential Reforms to the Petition for Review Process

**Background.** The current Petition for Review process is predicated on a well-known agreement with the Bar—that the petitions, while short, would actually be read by each Justice. It is unclear whether this “deal” has been regularly honored—and, frankly, given the volume of materials before the Court, it would be surprising if every Justice could read every petition.

On the other hand, the current rules were drafted based on the anticipation that each Justice *does* read each petition. Most importantly, that premise understandably led the Court to limit the length of the petitions (at present, they are exactly 1/2 the length of a petition for a writ of certiorari—4,500 and 9,000 words respectively). This relative shortness, in turn, means that the Court is unable or unwilling to decide, solely from a petition for review standing alone, whether a case should receive plenary consideration by the Court.

This, in turn, explains the need for the current practice, with the Court almost never granting a case without full merits briefing. As a corollary, parties must brief the case on the merits without knowing whether or not the Court will actually end up deciding on the merits. Instead of the single-minded focus on the merits—as in a U.S. Supreme Court brief—a “merits” brief in the Texas Supreme Court is necessarily also focused on the anterior question of granting or denying.

**Advantages and Disadvantages.** The current system has advantages and disadvantages. The main advantages include:

- The briefing is sufficiently short that Justices can, in theory, read the whole petition (and response, and reply).
- Many cases are patently unworthy of review by the Supreme Court; a short PFR followed by a quick denial minimizes the costs to the parties, and a denial can be issued in many cases even without requesting a response.
- Having full merits briefing before deciding whether to grant or deny helps flesh out issues that might not be apparent from petition-stage briefing alone, helping the Court to pick only the best cases for plenary review, and helping it to avoid cases with jurisdictional or other defects that might not be as clear at the petition stage.

On the other hand, there are also serious disadvantages to the current system. They are listed here non-exhaustively and in no particular order:



- The current system comparatively rewards petitions that are frivolous. That is because a case that is patently unworthy of the Supreme Court’s review can be disposed of without anything more than the short petition itself, thus making the cost of filing a petition relatively low. By contrast, the *more* meritorious a petition is, the greater the likelihood of a response, and then briefing on the merits—and the greater the risk of wasted time and legal fees. In other words, cases that get close to the mark, yet are ultimately denied, are every bit as costly as cases that the Court grants, except for the final step of oral argument preparation.
- This also burdens the Court and its staff, because the Court solicits many lengthy merits briefs in cases where the Court will not ultimately decide the merits. Although this investment in time fills the role of helping to screen out unworthy cases, this is attributable only to the inadequacies of the petitions; reading merits briefs in denied cases is otherwise a dead-weight loss. Notably, it is something that the U.S. Supreme Court never suffers, because that Court only accepts merits briefs after granting plenary review.
- The short petition of the current system systematizes incompleteness. Parties often must list “unbriefed issues.” That practice is necessary solely to preserve important (but potentially word-intensive) issues in case the Court calls for full briefing. But the very fact that they are “unbriefed” throughout the petition stage means that the Court has no idea what the parties are asking the Court to do on those issues until the full merits briefs have been filed.
- Parties must file a supposed “merits” brief without being able to exclusively focus on the merits, because they are still focused on trying to persuade the Court to grant (or deny) the petition. Consciously or unconsciously, parties may adjust their briefs on the merits based on the fear that a full-on merits discussion might have the effect of diminishing or enhancing (petitioners and respondents, respectively) the Court’s interest in the case. By contrast, a post-grant merits brief would leave neither party with any incentive but to make the absolute best merits arguments that they can.
- Justices, correspondingly, cannot read merits briefs solely for the purpose of deciding the merits; they are still trying to decide whether or not to grant the case. Arguably, this leads to a very different form of preparation than if merits briefs were only read incident to deciding the merits. When Justices read merits briefs without knowing whether enough of their colleagues will

vote to grant a case, they almost surely do so in a very different way than if they knew that the case was on the submission docket. This means either the Justices will need to duplicate the work of reading the merits brief, or go without reading the merits brief from the perspective of caring only about the merits result.

- Because parties don't know whether the Court is going to actually consider the case at all until after merits briefs have all been filed, counsel is often in the position of knowing to prepare for oral argument only weeks before that argument. By contrast, if the case is granted *before* the merits stage briefing, then the parties and the lawyers know that the work on the brief on the merits will be followed by oral argument, thus allowing better preparation of both the brief and the argument. That is, the period from the grant until the argument will be spaced out far more, and will assure clients and counsel that the time invested in briefing will not be wasted.

**Proposal.** I think that the process can be streamlined to preserve all of the advantages of the current system while eliminating all of its disadvantages—and to do so in a way that avoids unnecessary expense to parties and helps limit the need for the Court and the law clerks to read lengthy briefs that ultimately will never result in an opinion or judgment.

A new system could discard the old (and presumably frequently unkept) promise that each Justice will read each petition. In place of that understanding, I would propose creating a new 1,000-word-maximum executive-summary style section of the petition, with the expectation that each Justice would read that up-to-1,000 word section (roughly 4 pages, and only 22% of the length of a current petition). The title for that section could be decided later, but I will call it the “Basis for Review” section here. It would immediately follow the “Issues Presented” page, and counsel for the petitioner could use the Basis for Review in any way he or she deemed advisable—its goal would be to explain enough about the case and its importance to motivate the Justice *to continue reading* beyond that opening section.

I would then propose expanding the current 4,500 word limit for a petition—possibly up to the 9,000 words that the U.S. Supreme Court allows for cert petitions. (The Basis for Review section would count against the limit.). The purpose of the expanded word count for a petition for review would be to allow the Texas Supreme Court to decide whether to grant a petition *based entirely on the petition-stage briefing*. This would mean no more “unbriefed” issues, and it would

also mean that the parties would be fully incentivized to flesh out jurisdictional or other problems from the outset.

Although this would mean that petitions could (not must) be twice as long as they currently are, this reform would greatly *diminish* the workload for Justices and clerks, while accelerating the time-line for plenary consideration. After all, Justices would not be obliged to read beyond the 1,000-word Basis for Review section unless they determined from that section that the petitioner had made a serious case for continued consideration. If not, they could deny the petition based solely on the Basis for Review section. But if they did see some merit, they would not have to call for full merits briefs to be able to have the case fleshed out adequately to make the grant decision—it would all be there in the same document, which they could continue reading immediately, rather than awaiting another filing in several months.

In cases where the Justices find sufficient merit to call for a response, both the petition and the response will be sufficiently detailed to ensure that the Court knows everything that it needs to know to make the grant-or-deny decision without needing anything else from the parties. Accordingly, even though this would amount to *less* overall reading for the Justices, it would allow them to far more quickly and efficiently identify the small subset of cases that should be granted full review. And it would mean that the Court would *never* need to read a full merits brief unless the case were actually going to be argued and decided—a vast reduction in work load.

This reform would also improve the quality of merits briefs. It would entirely eliminate the current divided focus of so-called merits briefs, which must also continue to advocate for or against a grant. Instead, merits briefs would truly be *merits briefs*, with the only goal being to give the Court the best arguments on the law. Because parties would know in advance, and with sufficient time, that the case would be given merits consideration, there would be less hesitation in investing in top-quality briefing. In turn, parties in cases that are ultimately denied would be spared the expense (and delay) of going through merits briefing for no ultimate purpose. This would also reverse the current practice of effectively rewarding comparatively frivolous petitions; currently, reasonably strong petitions must go through the enormously costly full-merits-briefing process even if they are ultimately denied, while weak petitions are spared that burden. The new system would likewise spare the good-but-not-quite-good-enough petitioners of that burden.

# EXHIBIT 3

## Discretionary Review Process by State Courts of Last Resort

### Summary

- Forty state courts of last resort have some discretionary jurisdiction. Of these, *SCOTX appears to be the only court that routinely requires parties to file merits briefs—separate from the briefs filed in the intermediate court of appeals and in addition to an initiating petition urging review—before the court even decides whether to grant review in a discretionary appeal.*
- The page limit for initiating petitions ranges from three pages (AR) to 50 pages (MI, TN), but in most states, the limit is between 10 and 20 pages or the equivalent in words. A few states (CA, GA, VA, WI) permit an initiating petition in the 30-35 page range or equivalent word count.
- At least one state (ID) does not permit a response to the petition unless one is requested by the supreme court.
- In several states, additional merits briefs may only be filed after the granting of review if requested or permitted by the court (HI, ID, KS, ME, MA, NV, NJ, MN, NJ, NM).
- In several states, the court specifies the issues on which it is granting review (e.g., GA, SC).

### Courts Omitted From the Table

- Nine states (DE, ME, MT, NH, RI, SD, VT, WV, and WY) do not have any intermediate appellate court. The supreme courts in those states have mandatory appellate jurisdiction.
- In North Dakota, the supreme court has the power to appoint a temporary court of appeals to hear cases assigned to it by the supreme court. It is not clear from the North Dakota Rules of Appellate Procedure or the information on the court’s website whether there is any further review of assigned cases to the supreme court.
- The Oklahoma Court of Criminal Appeals, which is the state’s court of last resort in criminal cases, does not have discretionary jurisdiction and has been omitted from the table.

State	Review Process
Alabama Supreme Court	Mandatory review in civil cases worth more than \$50,000. Discretionary review of civil cases worth \$50,000 or less.  Discretionary review is initiated by a petition for a writ of certiorari (15 pages). ALA. R. APP. P. 39. “No briefs shall be filed by the petitioner or the respondent before the writ issues unless ordered by the Court.” <i>Id.</i> R. 39(b)(4). The parties file merits briefs after the writ issues. <i>Id.</i> R. 39(g).
Alaska Supreme Court	Mandatory review in civil cases with an amount in controversy of more than \$100,000. Discretionary review in civil cases worth \$100,000 or less. ALASKA R. APP. P. 302(a)(1); ALASKA STAT. § 22.07.020(e).  Discretionary review initiated by a petition for hearing (15 pages). ALASKA R. APP. P. 303(b). The parties file merits briefs after the court issues an order granting the petition. <i>Id.</i> R. 305(a)(2).
Arizona Supreme Court	Discretionary review is initiated by a petition for review that cannot exceed 3500 words. ARIZ. R. CIV. APP. P. 23(a), (g)(2). When a petition is filed, the

	court of appeals sends to the supreme court the briefs filed in the court of appeals. <i>Id.</i> R. 23(i). If the supreme court grants the petition for review, it <i>may</i> permit the parties to file additional briefs. <i>Id.</i> R. 23(i)(3).
Arkansas Supreme Court	Discretionary review is initiated by a petition for review, which is limited to three pages. ARK. SUP. CT. R. 1-2(e), 2-4(a)-(b). When the court grants a petition, the parties file in the supreme court copies of their court of appeals briefs. <i>Id.</i> R. 2-4(e). Parties may request permission to file supplemental briefs in the supreme court. <i>Id.</i> R. 2-4(f).
Supreme Court of California	Discretionary review is initiated by a petition for review that is 8,400 words or approx. 30 pages. <i>Id.</i> R. 8.504(d)(1)-(2). The Court of Appeal record is forwarded to the Supreme Court when a petition is filed. <i>Id.</i> R. 8.512(a). The parties file merits briefs only after review is granted. <i>Id.</i> R. 8.516(a)(1), 8.520(a)(1).
Colorado Supreme Court	Discretionary review is initiated by a petition for a writ of certiorari that is limited to 12 pages. COLO. APP. R. 51(a), 53(a). The parties' deadlines to file merits briefs run from the date of the order granting review. <i>See id.</i> R. 54(a), 57, 31(a).
Connecticut Supreme Court	Discretionary review is initiated by a petition for certification. CONN. PRACTICE BOOK § 84-5, <a href="https://jud.ct.gov/Publications/PracticeBook/PB.pdf">https://jud.ct.gov/Publications/PracticeBook/PB.pdf</a> . Petitions are limited to 10 pages. <i>Id.</i> § 84-5(b). It is not clear whether parties ordinarily file additional merits briefs after review is granted or whether the supreme court decides the base based on the intermediate appellate court briefs, but there is no indication in the rules that parties file merits briefs before review is granted.
Supreme Court of Florida	Discretionary review over enumerated categories of cases appealed from the district courts of appeal. FLA. R. APP. P. 9.030(a)(2). Initially, the parties file briefs of up to 10 pages that address only the court's jurisdiction. <i>Id.</i> R. 9.120(d), 9.210(a)(5)(A). If the court accepts jurisdiction, then merits briefs are filed. <i>Id.</i> R. 9.210(f).
Supreme Court of Georgia	Discretionary review is initiated by a petition for certiorari that is limited to 30 pages. GA. SUP. CT. R 20. If the petition is granted, the parties file briefs that address questions posed in the court's order. <i>Id.</i> R. 45.
Supreme Court of Hawai'i	Discretionary review initiated by an application for a writ of certiorari that is limited to 12 pages. HAW. R. APP. P. 40.1(b), (d). The court must act on the application within 30 days or it is deemed denied. <i>Id.</i> R. 40.1(g). If the application is accepted, the case is ordinarily decided on the briefs already on file, but the parties may move to file supplemental briefing, or the court may request it. <i>Id.</i> 40.1(i).
Idaho Supreme Court	Discretionary review is initiated by a petition for review and a brief in support of the petition. IDAHO R. APP. P. 118(a), (c)(1). No response is permitted unless the supreme court requests a response. <i>Id.</i> R. 118(e)(1). If review is granted, the court will ordinarily decide the case based on the briefs filed in the court of appeals. <i>Id.</i> R. 118(c)(2). No additional briefing is permitted unless requested by the court. <i>Id.</i>
Supreme Court of Illinois	Discretionary review is initiated by a petition for leave to appeal that is limited to 20 pages or 7,000 words. ILL. SUP. CT. R. 315(a), (d). If the petition is granted, the parties may file supplemental briefs. <i>Id.</i> R. 315(h).

Supreme Court of Indiana	Discretionary review initiated by a petition to transfer a case from the Court of Appeals after the Court of Appeals has issued a decision. IND. R. APP. P. 56(B), 57. A petition is limited to 10 pages or 4200 words. <i>Id.</i> R. 44(D)-(E). It is not clear from the Rules of Appellate Procedure whether the parties file additional briefs, either before or after a petition is granted.
Iowa Supreme Court	All appeals are filed directly in the supreme court, but the supreme court may transfer a case to the court of appeals. IOWA CT. R. 6.1101(1). The supreme court has discretion to grant further review of a case decided by the court of appeals. <i>Id.</i> R. 6.1103(1)(b). If an application for further review is granted, the supreme court may require the parties to file supplemental briefs on all or some of the issues presented. <i>Id.</i> R. 6.1103(6).
Kansas Supreme Court	Discretionary review is initiated by a petition for discretionary review that is limited to 15 pages. KAN. SUP. CT. R. 8.03(a). “Generally, the only documents considered by the Supreme Court will be the petition for review, cross-petition, response, and reply. The record on appeal and briefs filed in the Court of Appeals or in support of a petition for rehearing or modification generally will not be considered in acting on a petition or cross-petition for review.” <i>Id.</i> R. 8.03(f)(3). If review is granted, “the issues to be reviewed will be considered on the basis of the record and briefs previously filed with the Court of Appeals.” <i>Id.</i> R. 8.03(h)(2). The parties are permitted to file supplemental briefs, but they are limited to one-half the pages permitted for court of appeals’ briefs. <i>Id.</i> R. 8.03(h)(3).
Kentucky Supreme Court	Discretionary review is initiated by a motion for discretionary review that is limited to 15 pages. KY. R. CIV. P. 76.20(1), (3). If the motion is granted, then parties file merits briefs. <i>Id.</i> R. 7.20(9)(b).
Louisiana Supreme Court	Discretionary review is initiated by a 25-page writ application. LA. SUP. CT. R. X, §§ 1, 3(a). When a writ is granted, the case is placed on the oral argument calendar, and briefs are requested. <i>Id.</i> R. X, § 8(a).
Maryland Court of Appeals	Discretionary review is initiated by a petition for a writ of certiorari that is limited to 3900 words. MD. CT. R. 8-303(a), (b)(1). “On review of the petition and any answer, the Court, unless otherwise ordered, shall grant or deny the petition without the submission of briefs or the hearing of argument.” <i>Id.</i> R. 8-303(f).
Massachusetts Supreme Judicial Court	Discretionary review initiated by an application for leave to obtain further appellate review. MASS. R. APP. P. 27.1(a). The application is limited to 10 pages of argument plus some additional sections enumerated in the rule. <i>Id.</i> R. 27.1(b). If further review is granted, any party may apply for permission to file a new brief. <i>Id.</i> R. 27.1(f). If permission is denied or not sought, the case will be decided on the briefs filed in the Appeals Court. <i>Id.</i>
Michigan Supreme Court	Discretionary review initiated by an application for leave to appeal, which is limited to 50 pages. MICH. CT. R. 7.212(B), 7.305(A). The decision to grant is made on the application briefing. <i>Id.</i> R. 7.305(G). The granting of an application starts the clock on merits briefing. <i>See also</i> MICH. SUP. CT. IOP I(B)(2), (F)(1) (linked on the court’s website).
Minnesota Supreme Court	Discretionary review initiated by a petition for review, which is limited to 2,000 words. MINN. R. CIV. APP. 117, subdvs. 1-2. If the petition is granted, a briefing schedule is set in the order granting review. <i>See</i> IOP document

	linked at <a href="https://www.revisor.leg.state.mn.us/court_rules/rule.php?name=apcase">https://www.revisor.leg.state.mn.us/court_rules/rule.php?name=apcase</a> .
Supreme Court of Mississippi	Discretionary review initiated by a cert petition that cannot exceed 10 pages. MISS. R. APP. P. 17(a)-(b). Briefs in support of the petition are not allowed unless requested by the court. <i>Id.</i> R. 17(c). If the petition is granted, a party may file a supplemental brief of up to 10 pages. <i>Id.</i> R. 17(h).
Supreme Court of Missouri	Discretionary review is initiated by an application to transfer the case from the court of appeals; the application is limited to 12 pages. MO. R. CIV. P. 83.04, 83.05(a). If the application is granted, the parties may substitute new merits briefs for the briefs filed in the court of appeals. <i>Id.</i> R. 83.08(c).
Nebraska Supreme Court	Discretionary review is initiated by a petition for further review that is limited to 10 pages. NEB. CT. R. APP. P. § 2-102(F)(2), (G). The supreme court may order additional briefing, or the parties may file additional briefs voluntarily “when further review by the Supreme Court is ordered.” <i>Id.</i> § 2-102(H).
Supreme Court of Nevada	Hears few cases on discretionary review. Until recently, the supreme court was the only appellate court in Nevada. An intermediate court of appeals was created in 2014 and began reviewing cases in January 2015. Nevada has a “deflective model” of review: all appeals are filed initially in the supreme court, which then sends some to the court of appeals for a decision in the first instance. Only about one-third of appeals filed in the supreme court are deflected to the court of appeals.  In cases decided initially by the court of appeals, a party may seek discretionary supreme court review by filing a petition for review, which is limited to 10 pages. NEV. R. APP. P. 40B(a), (d). If the petition is granted, the supreme court will decide the case based on the record and briefs filed in the court of appeals, unless the supreme court requests supplemental merits briefing. <i>Id.</i> R. 40B(g).
New Jersey Supreme Court	Discretionary review is initiated by a petition for certification that is limited to 20 pages. N.J. CT. R. 2:12-3(a), -7(a). If certification is granted, the case will be decided on the briefs filed in the intermediate court of appeals, unless the supreme court orders additional briefing. <i>Id.</i> R. 2:12-11. The parties may also move to file additional briefing. <i>Id.</i>
New Mexico Supreme Court	Discretionary review is initiated by a petition for a writ of certiorari that is limited to 10 pages or 3150 words. N.M. R. APP. P. 12-502(A), (D)(2)-(3). “In the event the writ of certiorari is issued, additional briefs may be filed only as directed by the Supreme Court.” <i>Id.</i> R. 12-502(I).
New York Court of Appeals	Discretionary review is initiated by a motion for leave to appeal. There is no page limit. If the motion is granted, the clerk’s office issues a scheduling order with the due date for briefs. <i>See</i> N.Y. CT. APP. R. PRAC. 500.12, .22.
North Carolina Supreme Court	Discretionary review is initiated by a petition for discretionary review. N.C. R. APP. P. 15(a). The court decides whether to grant review based solely on the petition and response. <i>Id.</i> R. 15(e)(1). If the court grants review (enters a certification order), then the record is transmitted and the parties file new merits briefs. <i>Id.</i> R. 15(g)(2).
Ohio Supreme Court	Discretionary review cases are called <i>jurisdictional appeals</i> . Review is initiated by a notice of appeal and a memorandum in support of jurisdiction;



	the memorandum is limited to 15 pages. OHIO S. CT. PRAC. R. 7.01(A)(1)(a), 7.02(B)(1). After the memo and any response are filed, the court may “[a]ccept the appeal and order that the case be briefed” or take other action authorized by the rules. <i>Id.</i> R. 7.08(B)(1).
Supreme Court Oklahoma	The Supreme Court of Oklahoma is the state’s court of last resort for civil cases. All civil appeals are filed initially in the supreme court, but the court deflects some of them to the court of civil appeals. Discretionary review of a decision of the court of appeals is initiated by a petition for writ of certiorari, which is limited to 10 pages and “shall not reach the merits of the appeal.” OKLA. SUP. CT. R. 1.178(a), 1.179(b), 1.179(d). “The only matters considered in determining whether to grant certiorari are the petition for certiorari and the response to the petition for certiorari. Briefs on appeal and briefs in support of petition for rehearing are not considered in determining whether to grant certiorari.” <i>Id.</i> R. 1.179(d). It is unclear whether the court orders new merits briefing after cert is granted or decides the case on the briefs filed in the court of appeals.
Oregon Supreme Court	Discretionary review is initiated by a petition for review that is limited to 15 pages or 5,000 words. OR. R. APP. P. 9.05(3)(a). After the issues an order allowing review, the parties may file supplemental merits briefs, but the briefs filed in the court of appeals are considered to be the primary briefs. <i>Id.</i> R. 9.17(1), 9.20(4).
Supreme Court of Pennsylvania	Discretionary review is initiated by a petition for allowance of appeal that is limited to 9,000 words. PA. R. APP. P. 1112(c)(1), 1114, 1115(f). Additional briefing in support of the petition is not permitted. <i>Id.</i> R. 1115(c). If the appeal is allowed, the parties may file new merits briefs or stand on the briefs filed in the court of appeals. <i>Id.</i> R. 2139.
South Carolina Supreme Court	Discretionary review is initiated by a petition for a writ of certiorari that is limited to 25 pages. S.C. APP. R. 242(b), (d). If the petition is granted, the court’s order specifies which of the questions presented the court will review, and the parties prepare briefs addressing those questions. <i>Id.</i> R. 242(i).
Tennessee Supreme Court	Discretionary review is initiated by an application for permission to appeal, which has a 50-page limit. TENN. R. APP. P. 11(a)-(b). The appellant may choose to either file a merits brief with the application or wait until the court has issued an order granting the application. <i>Id.</i> R. 11(b), (f). If the appellant files a merits brief with the application, it may file a supplemental brief after the application is granted. <i>Id.</i> R. 11(f).
Texas Court of Criminal Appeals	Merits briefs are not filed until a petition for discretionary review has been granted. TEX. R. APP. P. 70.1.
Utah Supreme Court	Discretionary review is initiated by a petition for a writ of certiorari that is limited to 20 pages. UTAH R. APP. P. 45, 49(d). A merits briefing schedule is set after the court grants the petition. <i>Id.</i> R. 49(c).
Supreme Court of Virginia	Discretionary review is initiated by a petition for appeal that is limited to 35 pages or 6,175 words. VA. R. SUP. CT. 5:17(f). The appellant is entitled to argue orally—in person or by phone—why the petition should be granted, though the appellee is not permitted to participate. <i>Id.</i> R. 5:17(j). Merits briefs are filed only after the petition is granted. <i>Id.</i> R. 5:26(c).

Washington Supreme Court	Discretionary review is initiated by a petition for review that is limited to 20 pages. WASH. R. APP. P. 13.1(a), 13.4(f). If the court accepts review, then the court will decide the case based on the briefs filed in the court of appeals unless the parties file supplemental briefs in accordance with the rules. <i>Id.</i> R. 13.7(a)(2).
Wisconsin Supreme Court	Discretionary review is initiated by a petition for review that is limited to 35 pages or 8,000 words. WIS. R. APP. P. 809.62(4)(a). If the court grants review, the order granting review sets a schedule for merits briefing. SUP. CT. IOP II(B)(1).