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July 17, 2024

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

Re: Referral of Rules Issues

Dear Chip:

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

Recording and Broadcasting Court Proceedings. The Committee discussed the attached proposed changes to Texas Rule of Civil Procedure 18c and Texas Rule of Appellate Procedure 14 at its September 30, 2022 meeting. Since that time, issues have arisen regarding the recording and broadcasting of official court proceedings. Among those reported are extraneous judicial commentary and extrajudicial remarks made in connection with such proceedings; the prolonged availability of proceedings in cases involving sensitive data; permitting the posting of public comments in reaction to official court proceedings and judicial responses to such commentary; and the acceptance of financial compensation in connection with posting official court proceedings. These reports are rare but concerning. The Court requests that the Committee revisit its earlier work in light of these concerns, considering all case types, and recommend amendments.

Transfer on Death Deed Forms. The attached report from the Supreme Court Probate Forms Task Force proposes Transfer on Death Deed forms and instructions. The Committee should review and make recommendations.

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 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.

Third-Party Litigation Funding. The Court has received the attached correspondence regarding third-party litigation funding agreements. The Committee should review, advise whether the Court should adopt rules in connection with third-party litigation funding, and draft any recommended rules.

Error Preservation Citations. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rules of Appellate Procedures 9.4, 38.1, and 38.2 to require appellate briefing to identify in the appellate record where a claimed error was preserved. The Committee should review and make recommendations.

Texas Rule of Appellate Procedure 18.1. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Appellate Procedure 18.1 to clarify when a court of appeals must issue its mandate. The Committee should review and make recommendations.

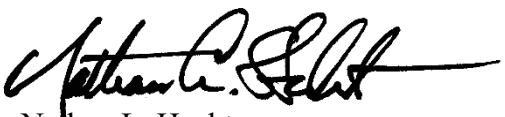
Texas Rule of Civil Procedure 4. The Court has received the attached correspondence that proposes amending Texas Rule of Civil Procedure 4 to address the calculation of deadlines measured backward from the date of an event. The Committee should review and draft any recommended amendments.

Texas Rules of Evidence. The federal rules of evidence were recently updated as shown and explained in the attached packet. The Committee should study whether the Texas Rules of Evidence should be similarly updated and draft any recommended amendments. The Committee should consult with the State Bar Administration of Rules of Evidence Committee.

Courts of Appeals Opinions. Publishers like West do not publish memorandum opinions in civil cases by using a formal reporter citation reference or print them in the bound volumes. Memorandum opinions are publicly available, however, and their citation is permitted under current rules by reference to an online reporter locator number. The Court's practice is to order publication of a court of appeals' memorandum opinion in cases in which the Court has granted review, thus giving those opinions a formal reporter citation reference. The Committee should advise whether the Court should require that court of appeals opinions be designated for formal publication when review is granted.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

November 9, 2021

To: Remote Proceedings Task Force

From: Lisa Hobbs, chair, Subcommittee 1

Re: Subcommittee 1's Report and Recommendations

Subcommittee one met on the following dates:
September 29, 2021
October 12, 2021
November 3, 2021

Our proposed new and amended rules are attached as Exh. A.

Task 1: Recording and Broadcasting Rules

One of the most difficult of our subcommittee's tasks was to review and recommend amendments to the Texas rules governing the recording and broadcasting of court proceedings in light of the trend towards remote proceedings via Zoom, YouTube, etc. The subcommittee reviewed two rules. *See* TEX. R. CIV. P. 18c; TEX. R. APP. P 14 (copies of current rules attached as Exh. B).

In addition to the current rules, the subcommittee also reviewed and relied on two other documents. First, the Office of Court Administration has created a document entitled *Background and Legal Standards – Public Right to Access Remote Hearings During Covid-19 Pandemic*. (See Exh. C.)[1] Second, in the early nineties, the Texas Supreme Court studied and finalized uniform rules for the coverage of court proceedings, which served as a template for many counties who have adopted a local rule on broadcasting. *See, e.g.*, Misc. Docket No. 92-0068 (attached as Exh. D).

The subcommittee observed the differences in approaches to the various rules and standards. Most notably, current Rule 18c appears to require consent of participants before a proceeding can be recorded or broadcast. *See also In re BP Products North America Inc.*, 263 S.W.3d 117 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding)

[1] OCA provided trial courts a wealth of information on remote proceedings during the pandemic, which can be accessed here: TJB | Court Coronavirus Information | Electronic Hearings (Zoom) (txcourts.gov)

(conditionally issuing writ of mandamus in a case where a Galveston trial court allowed the "gavel to gavel" broadcast of a trial over one party's objection). Rule 18c is alone in this approach. The other rules and guidelines, including TRAP 14, leave the decision to record or broadcast to the trial or appellate court, presumably even over an objection by a party or participant.

The variance left a lot for the subcommittee to discuss. Some discussions were more philosophical; some discussions were more practical:

- When these rules were originally drafted, they contemplated a television camera in a physical courthouse to air on an evening newscast. Technology, and thus an individual's expectation of access and to information, has increased dramatically. There is room to completely re-write the rules with those expectations and technological advances in mind.
- Any "right to access" the courthouse is not an unfettered right. Live broadcasts during the pandemic were not an entitlement; they were a practical necessity for the participants and so the judicial process did not grind to a halt. As we get back to "normal," courthouses are and will be physically opened. There is no established "right" for the public to watch a proceeding from the comfort of their own homes.
- When sensitive and protected information is presented in a courtroom, rather than in person or remotely, that information must be protected. Any new rules should address that issue (particularly the issue of trade secrets) directly.
- A definition of "remote proceeding" might be helpful. A remote proceeding is not any proceeding in which any participant is participating remotely. A remote proceeding is one in which the judge is not in the courtroom, *i.e.*, there is no physical courtroom to "open" to the public.
- What is the nature of the public's right to access? What are the parameters of that right? The current rules, though philosophically different, already adopt the basic principle that the public's right to access is not unfettered and is subject to reasonable restrictions. (*See In re M-I L.L.C.*, 505 S.W.3d 569, 577-78 (Tex. 2016) ("To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests.")). We need not start from a blank slate. We should consider the limitations and restrictions already considered in Texas in past studies.
- With the publication of proceedings on a site like YouTube, there is the potential for misuse that was less of a concern under the traditional context of a media

entity recording portions of a proceeding for news broadcast purposes. These readily available, unedited recordings may pose security risks for the participants. They are also easy to manipulate and to be used for nefarious purposes—particularly in a state like Texas that elects judges. The potential for misuse raises practical questions, *e.g.*, should there be time limits for how long footage is stored/accessible?

- Should the procedures and standards for recording or broadcasting be different whether the medium is traditional media versus a court-controlled medium (like You-Tube)? Courts that regularly livestream their docket do not want an unwieldly process that might encourage objections to what is now seen as routine. This philosophy may create tension with business litigants who prefer a more defined procedure to guide a trial court when proprietary or trade secret information is at issue in a lawsuit.
- How detailed should the rule be?
    - Should it be a broad rule, leaving the issue in the trial court's sole discretion?
    - Should it provide time limitations or broader concepts like "reasonableness"/ "opportunity to be heard"?
    - Should the rule be permissive ("may… under these limitations…") or prohibitive ("cannot . . . unless")?
    - Who has the burden? What is the showing? Should findings be required?
    - Should there be an avenue for appellate review? If so, what is the standard of review?
    - Should a local jurisdiction be able to expand or restrict access inconsistent with any new rule?
- A final concern that did not get incorporated in the draft due to time constraints: some subcommittee member would expressly state that the ruling on an objection to recording/broadcasting must be made prior to a proceeding being recorded/broadcast, whether as a matter of good procedure or so that a party would have an express ruling for mandamus purposes. Others felt the ruling would be implicit in the trial court's action to record/broadcast (or not).

Task 2: TRAP recommendations

The subcommittee also reviewed the Texas Rules of Appellate Procedure to consider whether any rules needed to be amended to account for any new rules regarding remote proceedings that are recorded or broadcast.

As a result of its review, the subcommittee proposes amendments to the Texas Rules of Appellate Procedure to (1) conform TRAP 14 with new proposed TRCP 18c; and (2) expressly authorize remote oral argument in all cases. In making these recommendations, the subcommittee reviewed the relevant provisions of Chapter 22 of the Government Code and makes a few observations.

First, the Government Code authorizes any appellate court to "order that oral argument be presented through the use of teleconferencing technology." TEX. GOV'T CODE §22.302.[2] The Government Code also authorizes the two high courts to record and post online their arguments. TEX. GOV'T CODE §22.303 ("If appropriated funds or donations are available in the amount necessary to cover the cost, the supreme court and the court of criminal appeals shall make a video recording or other electronic visual and audio recording of each oral argument and public meeting of the court and post the recording on the court's Internet website."). The Government Code does not appear to authorize livestreaming for any appellate court and, more importantly, does not appear to authorize the intermediate appellate courts to even record and post online their oral arguments. Proposed amendments to TRAP 14 expressly provide that authority for all appellate courts.

Second, generally speaking, transferred cases must be heard in the originating appellate district unless all parties agree otherwise. TEX. GOV'T CODE §73.003. Likewise, some courts of appeals must hold argument in certain cases in a specific city or county. *See* TEX. GOV'T CODE TEX. GOV'T CODE §22.204 (Third CA must hold argument in Travis County in Travis County); §22.205 (Fourth CA must hold argument in Bexar County appeals in Bexar County); §22.207 (Sixth CA must hold argument in Bowie County appeals in Texarkana); §22.209 (Eighth CA must hold argument in El Paso appeals in El Paso county); §22.213 (Twelfth CA must hold argument in Smith County appeals in Tyler); TEX. GOV'T CODE §22.214 (Thirteenth CA must hold argument in Nueces County cases in Nueces County and cases from Cameron, Hidalgo, or Willacy County shall be heard and transacted in Cameron, Hidalgo, or Willacy counties). *See also* Roger Hughes, *The Fixed Locale Requirements for Appellate Court Proceedings: The Importance of Being Somewhere if You're Not Anywhere*, 22 APP. ADVOC. 122 (Winter 2009) (discussing in greater detail "fixed locale requirements" for Texas appellate courts and their history).

[2] There is also a specific authorization for remote proceedings in election proceedings. TEX. GOV'T CODE §22.305(b) (entitled "PRIORITY OF CERTAIN ELECTION PROCEEDINGS," and providing "[i]f granted, oral argument for a proceeding described by Subsection (a) may be given in person or through electronic means"). This is probably unnecessary given the general authorization in Section 22.302.

Even in these situations, however, it appears that appellate courts can hold argument remotely in lieu of in-person argument at a specific location. *See, e.g.*, TEX. GOV'T CODE §73.003(e) (allowing the chief justice of an appellate court to elect to "hear oral argument through the use of teleconferencing technology" in transferred cases); §22.302 (more generally authorizing an appellate "court and the parties or their attorneys [to] participate in oral argument from any location through the use of teleconferencing technology." Nevertheless, the subcommittee recommends adding a provision in proposed amendments to TRAP 39.8 to make clear that the general authority to hear a case remotely applies even when a particular case, by statute, must be heard in a particular location.

The additional notice requirements were added as good policy and to conform with existing practice.

The subcommittee recognized that having a recording of a proceeding, in addition to a transcribed record of the proceeding, may create confusion concerning the "official record" of a proceeding for purposes of appeal. The subcommittee unanimously agreed that the "official record" of a proceeding for purposes of appeal is only the transcribed record. The broadcast/recording is not the official record and should not be made a part of the appellate record. Moreover, any disputes about the "official record," whether prompted by a recording or otherwise, should be resolved by the trial court, not an appellate court. The subcommittee ultimately decided to include in proposed Rule 18c a notation about this issue. A similar provision could be added to TRAP 13.2 (duties of "official recorders").

Task 3: Rule of Judicial Administration 12

Rule of Judicial Administration 12 provides public access to "judicial records." The Rule is essentially the judiciary's version of the Public Information Act. The rule defines "judicial record" to expressly exclude records "pertaining to [a court's] adjudicative function, regardless of whether that function relates to a specific case." TEX. R. JUD. ADMIN. 12.2(d). "A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record." *Id.* Thus, under the current version of the rule, a "Zoom" recording of a hearing or proceeding is not a "judicial record" subject to Rule 12. *See, e.g.*, Rule 12 Decision, Appeal No. 21-009 (May 24, 2021) (available online at 21-009.pdf (txcourts.gov)).

Nevertheless, courts continue to receive requests for recordings of case-specific hearings and proceedings. The subcommittee recommends amending Rule 12 to make the current law more express as it relates to recordings of court proceedings.

EXHIBIT A

New Texas Rule of Civil Procedure 18c:

Recording and Broadcasting of Court Proceedings

18c.1. Recording and Broadcasting Permitted

A trial court may permit courtroom proceedings to be recorded or broadcast in accordance with this rule and any standards adopted by the Texas Supreme Court. This rule does not apply to an investiture, or other ceremonial proceedings, which may be broadcast or recorded at the trial court's sole discretion, with or without guidance from these rules.

18c.2. Recording and Broadcasting as a Matter of Course

A trial court may record or broadcast courtroom proceedings over which the trial court presides via a court-controlled medium. If a trial court elects to broadcast the proceeding, the trial court must give reasonable notice to the parties. Reasonable notice may include posting on the trial court's official webpage a general notice stating the types of proceedings recorded and broadcasted as a matter of course and the medium of broadcasting. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

18c.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding*. A person wishing to cover a court proceeding by broadcasting, recording, or otherwise disseminating the audio, video, or images of a court proceeding must file with the court clerk a request to do so. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing);
(E) the type and extent of equipment to be used; and
(F) that all parties were notified of the request.

(b) *Response*. Any party may file a response to the request. If a party objects to coverage of a hearing, the objections must not be conclusory and must state the specific and demonstrable injury alleged to result from coverage.

(c) *Hearing*. The requestor or any party may request a hearing on objections to broadcasting or recording a proceeding, which may be granted so long as the hearing will not substantially delay the proceeding or cause undue prejudice to any party or participant.

18c.4. Decision of the Court

In making the decision to record or broadcast court proceedings, the court may consider all relevant factors, including but not limited to:

(1) the importance of maintaining public trust and confidence in the judicial system;
(2) the importance of promoting public access to the judicial system;
(3) whether public access to the proceeding is available absent the broadcast or recording of the proceeding;
(4) the type of case involved;
(5) the importance of, and degree of public interest in, the court proceeding;
(6) whether the coverage would harm any participants;
(7) whether trade secrets or other proprietary information will be unduly disseminated;
(8) whether the coverage would interfere with the fair administration of justice, provision of a fair trial, or the rights of the parties;
(9) whether the coverage would interfere with any law enforcement activity;
(10) the objections of any of the parties, prospective witnesses, victims, or other
(11) participants in the proceeding of which coverage is sought;
(12) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;
(13) the extent to which the coverage would be barred by law in the judicial proceeding;
(14) undue administrative or financial burden to the court or participants; and
(15) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.[1]

18c.5 Official Record

Video or audio reproductions of a proceeding pursuant to these rules shall not be considered as part of the official court record.

18c.6 Violations of Rule

Any person who records, broadcasts, or otherwise disseminates the audio, video, or imagery of a court proceeding without approval in accordance with this rule may be subject to disciplinary action by court, up to and including contempt.

[1] Some subcommittee members would remove the phrase "to which fact the court shall give great weight" because it may cause more confusion than clarity. This phrase comes from the factors the supreme court adopted in Misc. Docket No. 92-0068.

Proposed Revisions to Texas Rules of Appellate Procedure 14:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Recording and Broadcasting as a Matter of Course

An appellate court may record or broadcast courtroom proceedings over which the court presides via a court-controlled medium upon reasonable notice to the parties. Reasonable notice may include posting a general notice on the court's official webpage. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

14.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing); and
(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time*. The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court*. In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

Proposed Revisions to Texas Rules of Appellate Procedure 39:

Rule 39. Oral Argument; Decision Without Argument

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39.8. Remote Argument

An appellate court may hold oral argument with participants physically present in the courtroom or remotely by audio, video, or other technological means. An oral argument held remotely complies with statutory provisions requiring argument be held in a specific location regardless of where the justices and participants are located at the time of argument.

39.9 Clerk's Notice

The clerk must send to the parties—at least 21 days before the date the case is set for argument or submission without argument—a notice telling the parties:

(a) whether the court will allow oral argument or will submit the case without argument;

(b) the date of argument or submission without argument;

(c) if argument is allowed, the time allotted for argument; ~~and~~

(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court; and

(e) if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Proposed Revisions to Texas Rules of Appellate Procedure 59:

Rule 59. Submission and Argument

59.2. Submission With Argument

If the Supreme Court decides that oral argument would aid the Court, the Court will set the case for argument. The clerk will notify all parties of the submission date, location, and, if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information to which Chapter 552, Government Code, is made inapplicable by statute, rule, or other provision of law, other than Section 552.003(1)(B);

(c) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decision, or another provision of law

(d) elected officials other than judges~~.~~; or

(e) recordings of a remote proceeding made pursuant to Rule 18c.

EXHIBIT B

Texas Rules of Civil Procedure 18c provides:

Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

Texas Rules of Appellate Procedure 14 provides:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing); and
(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court.* In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

EXHIBIT C

BACKGROUND AND LEGAL STANDARDS – PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC[1]

On March 13, 2020, the Supreme Court of Texas and Court of Criminal Appeals issued the First Emergency Order Regarding the COVID-19 State of Disaster and authorized all courts in Texas in any case – civil or criminal – without a participant's consent to: 1) conduct any hearing or court proceeding remotely through teleconferencing, videoconferencing, or other means; and 2) conduct proceedings away from the court's usual location *with reasonable notice and access to the participants and the public*.[2] This emergency order's recognition of the public's right to reasonable notice and access to court proceedings, both civil and criminal, is consistent with traditional practice in Texas state courts and with federal and state precedent as discussed below.

The 6th Amendment of the Constitution of the United States affords defendants the right to a public trial, including all phases of criminal cases. Texas extends that right through the 14th Amendment to juvenile justice cases brought under Chapter 54 of the Texas Family Code.[3]

The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts.[4] Although the Supreme Court has never specifically held that the public has a First Amendment right of access to *civil* proceedings,[5] federal and state courts that have considered the issue have overwhelmingly held

[1] The Office of Court Administration wishes to thank District Judge Roy Ferguson (394th) for primary authorship on this document.

[2] The Third Emergency Order Regarding the COVID-19 State of Disaster amended the First Emergency Order to remove the requirement that the court conduct the proceedings in the count of venue.

[3] Texas courts have recognized the juvenile's right to public proceedings in quasi-criminal juvenile justice cases under the 14th Amendment and Section 54.08 of the Texas Family Code. Article 1, Section 13 of the Texas Constitution states that "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." Courts construing this provision interpret it to prohibit the erection of barriers to the redress of grievances in the court system. So, the phrase "open courts" in Section 13 does not appear to mean "public trial."

[4] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing that the 1st Amendment to the United States Constitution guarantees the public a right of access to judicial proceedings).

[5] Although the holding is specific to the criminal case, the constitutional analysis in *Richmond Newspapers* applies similarly to civil cases. As Chief Justice Burger in the majority opinion opined, "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id*. at 576. In his concurrence, Justice Stevens wrote, "[T[he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the judicial branch[.]" Justice Brennan added, "Even more significantly for our present purpose, […] open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[.]'" *Id.* And Justice Stewart specifically addressed the issue of civil cases, saying, "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599.

that there is a public right to access in civil cases under the 1st Amendment.[6] Courts must ensure and accommodate public attendance at court hearings.[7] However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm.[8] Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public.[9] In some instances, improper or unjustified closure of court proceedings constitutes structural error, requiring "automatic reversal and the grant of a new trial."[10]

The Texas Family Code expressly authorizes the limiting of public access by agreement in contested hearings involving SAPCR claims and rights.[11] If supported by appropriate findings made on the record, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.[12] But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in *Waller* regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties' agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.

It is the court's affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access.[13] Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. At this time, the movement of the general public is limited by the executive branch through the governor and various county judges. Shelter-in-place orders and prohibitions on non-essential travel prevent members of the general public from viewing hearings in the courthouse. While hearings in courthouses are no longer mandatory under the First Emergency Order Regarding the COVID-19 State of Disaster, the emergency order requires "reasonable notice and access to the participants and the public." Even if a judge is physically in a courtroom for the virtual hearing, it is the court's burden to ensure public access to each hearing and take reasonable measures to remove barriers thereto. There is no reasonable access to the public for a hearing, whether remote or physically located in a courthouse, when emergency measures are in place that would require the public to commit a jailable criminal offense to attend the hearing in person in a courtroom.[14] For the duration of this crisis and while these emergency orders are in effect, courts must find a practical and effective way to enable public access to virtual court proceedings. Choosing not to provide reasonable and meaningful public access to remote court proceedings at this time may equate to constitutional error and mandate reversal.

[6] *See Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647, 648-50 (S.D. Tex. 1996) (discussing 3rd, 6th and 7th Circuit decisions and concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).
[7] *See Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012).
[8] *See United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).
[9] *See In re A.J.S.*, 442 S.W.3d 562 (Tex. App.—El Paso 2014, no pet.)(discussing open courts in juvenile cases).
[10] Id. (citing *Steadman v. State*, 360 S.W.3d 499, 510 (Tex.Crim.App. 2012)(violation of 6th Amendment right)).
[11] Tex. Fam. Code § 105.003(b).
[12] Tex. Fam. Code. § 105.003.
[13] *See Lilly*, 365 S.W.3d at 331.
[14] *See* Executive Order GA-14 (March 31, 2020) and Tex. Gov't Code § 418.173.

Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. The trial court must consider all reasonable alternatives to closing the proceeding and make findings in open court on the record adequate to support the closure.[15] The court must weigh the totality of the circumstances in making these fact specific findings. For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings.

The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases. Appellate courts have reversed judgments when a single less-restrictive solution existed but was not considered on the record.[16]

Courts should strongly consider employing protective measures short of interrupting or terminating the live stream. Federal courts, including the Fifth Circuit, have held that a partial closure of a proceeding – limiting access rather than excluding the public – does not raise the same constitutional concerns as a complete closure from public access.[17] To employ a less-restrictive measure (for example, temporarily obscuring video but not audio, or not displaying exhibits through screen share,[18] providing a phone number for the public to access the audio of the proceeding only, or providing a link that permits certain members of the public only to view the hearing either through a YouTube private link or a link to the Zoom meeting), the court need only find a "substantial reason" for the limitation and employ a restriction that does not exceed justifiable limits.[19] Terminating or interrupting the livestream without an alternative means for the public to view the hearing – even temporarily – would constitute a complete closure, and the higher burden would apply.

It bears mentioning that this is not a new issue created by video hearings or public livestreaming. Sensitive and embarrassing testimony is entered in every contested family law hearing yet rarely merits closure or clearing of courtrooms. Child protection cases categorically involve evidence that is or may be damaging or embarrassing to the child. Commercial disputes commonly involve protected internal corporate operations. Rarely – if ever – have such trials been closed to the public. Such testimony should not now be evaluated differently simply because more people may exercise their constitutional right to view court proceedings than ever before. Public exercise of a constitutional right does not change the court's evaluation of whether that right should be protected. Nor should courts erect barriers or hurdles to public attendance at hearings to discourage public exercise of that right. On the contrary, courts are required to take whatever steps are reasonably calculated to accommodate public attendance. Closure of courtrooms is constitutionally suspect and risky and should be a last resort.

[15] *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).
[16] *See Cameron v. State*, 535 S.W.3d 574, 578 (Tex.App.—San Antonio 2017, no pet.)
[17] *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Circ. 1995).
[18] The Supreme Court has ruled that the media does not have a First Amendment right to copy exhibits. *Nixon v. Warner Communications*, 435 U.S. 589 (1978).
[19] *A.J.S.*, 442 S.W.3d at 567 (citing *Osborne*, 68 F.3d at 94, and applying the 6th Amendment *Waller* and "substantial reason" standards to 14th Amendment public rights).

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 92-0068

ADOPTION OF RULES FOR RECORDING AND BROADCASTING COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

ORDERED:

At the request of the civil district courts, county courts at law, and probate court of Travis County, the attached rules are adopted governing the recording and broadcasting of civil proceedings in those courts. TEX. R. CIV. P. 18c; TEX. R. APP. P. 21.

This Order shall be effective for each such court when it has recorded the Order in its minutes and complied with Texas Rule of Civil Procedure 3a(4).

SIGNED AND ENTERED this 11th day of March, 1992.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

RULES GOVERNING THE RECORDING AND BROADCASTING OF COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

Pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the following rules govern the recording and broadcasting of court proceedings before the civil district courts, county courts at law, and probate court of Travis County, and their masters and referees.

1. Policy. The policy of these rules is to allow media coverage of public civil court proceedings to facilitate the free flow of information to the public concerning the judicial system, to foster better public understanding about the administration of justice, and to encourage continuing legal education and professionalism by lawyers. These rules are to be construed to provide the greatest access possible while at the same time maintaining the dignity, decorum and impartiality of the court proceeding.

2. Definitions. Certain terms are defined for purposes of these rules as follows.

2.1. "Court" means the particular court, master or referee in which the proceeding will be held.

2.2. "Media coverage" means any visual or audio coverage of court proceedings by a media agency.

2.3. "Media" or "media agency" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news reporting or news gathering agency.

2.4. "Visual coverage" means coverage by equipment which has the capacity to reproduce or telecast an image, and includes still and moving picture photographic equipment and video equipment.

2.5. "Audio coverage" is coverage by equipment which has the capacity to reproduce or broadcast sounds, and includes tape and cassette sound recorders, and radio and video equipment.

3. Media coverage permitted.

3.1. Media coverage is allowed in the courtroom only as permitted by Rule 18c of the Texas Rules of Civil Procedure and these rules.

3.2. If media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c(c) of the Texas Rules of Civil Procedure, permission for, and the manner of such

coverage, are determined solely by the court, with or without guidance from these rules. If media coverage is for other than investiture or ceremonial proceedings, that is, under Rule 18c(a) or (b) of the Texas Rules of Civil Procedure, the provisions of these rules shall govern.

3.3. Media coverage under Rule 18c(a) and (b) of the Texas Rules of Civil Procedure is permitted only on written order of the court. A request for an order shall be made on the form included in these rules. The following procedure shall be followed, except in extraordinary circumstances and only if there is a finding by the court that good cause justifies a different procedure: (i) the request should be filed with the district clerk or county clerk, depending upon the court in which the proceeding is pending, with a copy delivered to the court, court administrator, all counsel of record and, where possible, all parties not represented by attorneys, and (ii) such request shall be made in time to afford the attorneys and parties sufficient time to confer, to contact their witnesses and to be fully heard by the court on the questions of whether media coverage should be allowed and, if so, what conditions, if any, should be imposed on such coverage. Whether or not consent of the parties or witnesses is obtained, the court may in its discretion deny, limit or terminate media coverage. In exercising such discretion the court shall consider all relevant factors, including but not limited to those listed in rule 3.5 below.

3.4. If media coverage is sought with consent as provided in Rule 18c(b) of the Texas Rules of Civil Procedure, consent forms adopted by the court shall be used to evidence the consent of the parties and witnesses. Original signed consent forms of the parties shall be attached to and filed with the request for order. Consent forms of the witnesses shall be obtained in the manner directed by the court. No witness or party shall give consent to media coverage in exchange for payment or other consideration, of any kind or character, either directly or indirectly. No media agency shall pay or offer to pay any consideration in exchange for such consent.

3.5. If media coverage is sought without consent, pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the decision to allow such coverage is discretionary and will be made by the court on a case by case basis. Objections to media coverage should not be conclusory but should state the specific and demonstrable injury alleged to result from media coverage. If the court denies coverage, it shall set forth in its order the findings upon which such denial is based. In determining an application for coverage, the court shall consider all relevant factors, including but not limited to:

(a) the type of case involved;

(b) whether the coverage would cause harm to any participants;

(c) whether the coverage would interfere with the fair administration of justice, advancement of a fair trial, or the rights of the parties;

(d) whether the coverage would interfere with any law enforcement activity;

(e) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;

(f) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;

(g) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought; and

(h) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.

4. Media coverage prohibited

4.1. Media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Audio coverage and closeup video coverage of conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench is prohibited.

4.2. Visual coverage of potential jurors and jurors in the courthouse is prohibited except when in the courtroom the physical layout of the courtroom makes it impossible to conduct visual coverage of the proceeding without including the jury, and the court so finds. In such cases visual coverage is allowed only if the jury is in the background of a picture of some other subject and only if individual jurors are not identifiable.

5. Equipment and personnel. The court may require media personnel to demonstrate that proposed equipment complies with these rules. The court may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceedings. Unless the court in its discretion and for good cause orders otherwise, the following standards apply.

5.1. One television camera and one still photographer, with not more than two cameras and four lenses, are permitted.

5.2. Equipment shall not produce distracting sound or light. Signal lights or devices which show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden lighting changes shall not be used.

5.3. Existing courtroom sound and lighting systems shall be used without modification. An order granting permission to modify existing systems is deemed to require that the modifications be installed, maintained, and removed without public expense. Microphones and wiring shall be unobtrusively located in places approved by the court and shall be operated by one person.

5.4. Operators shall not move equipment or enter or leave the courtroom while the court is in session, or otherwise cause a distraction. All equipment shall be in place in advance of the proceeding or session.

5.5. Identifying marks, call letters, words and symbols shall be concealed on all equipment. Media personnel shall not display any identifying insignia on their clothing.

6. Delay of proceedings. No proceeding or session shall be delayed or continued for the sole purpose of allowing media coverage, whether because of installation of equipment, obtaining witness consents, conduct or hearings related to the media coverage or other media coverage questions. To assist media agencies to prepare in advance for media coverage, and when requested to do so: (i) the court will attempt to make the courtroom available when not in use for the purpose of installing equipment; (ii) counsel (to the extent they deem their client's rights will not be jeopardized) should make available to the media witness lists; (iii) and the court administrator will inform the media agencies of settings or proceedings.

7. Pooling. If more than one media agency of one type wish to cover a proceeding or session, they shall make pool arrangements. If they are unable to agree, the court may deny media coverage by that type of media agency.

8. Official record. Films, videotapes, photographs or audio reproductions made in the proceeding pursuant to these rules shall not be considered as part of the official court record.

September 22, 1992

Ms. Amalia Mendoza
District Clerk
Post Office Box 1748
Austin, Texas 78767

Dear Ms. Mendoza,

Enclosed, please find a **corrected** copy of the order of this Court of March 11, 1992 that approved local rules for recording and broadcasting court proceedings in certain civil courts of Travis County. Please destroy previous versions of this order.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc:
Hon. B. B. Schraub
3rd Admin Judicial Rgn

Hon. Joseph H. Hart
126th District Court

County Clerk

Mr. Ray Judice
Office of Court Admin

State Law Library

Chmn Supreme Ct Adv Committee

JOSEPH H. HART
DISTRICT JUDGE
126TH JUDICIAL DISTRICT COURT

P. O. BOX 1748
AUSTIN, TEXAS 78767

April 17, 1992

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Thank you for forwarding to me a copy of the Order recently issued by the Supreme Court adopting rules for recording and broadcasting court proceedings in civil courts in Travis County. A few omissions and errors have been brought to my attenion that the Court may wish to change.

There is some inconsistency between the first paragraph of the rules and paragraph 2.1. The opening paragraph does not include district court masters and referees, while paragraph 2.1 does. Paragraph 2.1 does not include county courts at law and the probate court of Travis County, while the opening paragraph does. I believe we intended to have all of the courts covered by the rules, and they all should be included in both the opening paragraph and paragraph 2.1.

In paragraph 3.5(c) the conjunction "and" was probably included inadvertently and is not necessary.

The last sentence of paragraph 4.2 reads in part as follows: "In such cases visual coverage is allowed only of the jury is in the background of a picture ...." The "of" should be changed to "if" so that the sentence begins as follows: "In such cases visual coverage is allowed only if the jury is in the background of a picture ...."

Paragraph 5.1 reads in part as follows: "One television camera and one still photographers ..." The word should be "photographer," singular, rather than "photographers," plural.

Thank you, the Court and your staff for working with us on these rules. If there is a problem in making the corrections, please let me know.

Very truly yours,

JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/bjv

Supreme Court of Texas Probate Forms Task Force
P.O. Box 12487 ● Austin, TX 78711-2487 ● Tel: 512-427-1855 ● Fax: 512-427-4160

February 2, 2024

Justice Brett Busby
The Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Report to the Supreme Court of Texas, Misc. Docket No. 16-9003

Dear Justice Busby and Justices of the Supreme Court of Texas:

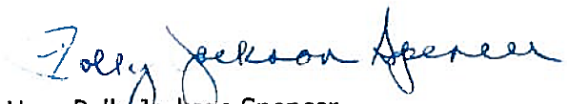
As I believe the Court is aware, the Probate Forms Task Force has finally completed our assigned tasks with the forwarding of the enclosed Transfer on Death Deed (TODD) forms, related forms, and instructions. The Task Force members originally appointed by the Supreme Court on January 21, 2016 are Judge Polly Jackson Spencer as chair, Carlos Aguinaga, Barbara McComas Anderson, Julie Balovich, Craig Hopper, Cathy Horvath, Jerry Frank Jones, Judge Steve M. King, Trish McAllister, Christy Nisbett, and Arielle M. Prangner. Of our original group, Christy Nisbett retired. Julie Balovich and Cathy Horvath took different jobs but remained involved in this phase of our assignment to some degree. Judge King and Jerry Frank Jones were unable to participate in the work on these forms due to other commitments. We were privileged, though, to have Ronald Lipman, an attorney in Houston, working with us. As you know, he expressed a particular interest in working on these forms and has extensive experience in form preparation in general. We continued to meet almost monthly, primarily by Zoom, to work on this project. Our primary contact at the Texas Access to Justice Commission, Trish McAllister, also left to take another position, but she volunteered to continue to work with us. Her involvement was crucial to the completion of this task.

The process has continued to be interesting, challenging, and educational but also much more difficult and time-consuming than any of us anticipated. The Task Force consists of very detail-oriented people from different backgrounds – estate planning attorneys, Legal Aid attorneys, judges, and clerks – all of whom see problems relating to the use of these forms from different perspectives. We tried to accommodate the concerns raised by each member in drafting these forms as we have with our other forms. We believed, though, that our mandate was to write forms in "plain language" for people to complete without the assistance of an attorney.

Related to the point made in the preceding paragraph, I recently had a conversation with an attorney not from San Antonio where I live. She told me that she and her partner had been reviewing the will forms which the Task Force prepared and the Court put out last spring. She raised concerns about the use of these forms by lay people and the possibilities for various misunderstandings and mistakes – problems likely to require the assistance of attorneys, at some cost, to straighten out. She was surprised and chagrined about our conversation when I told her that I had been on the Task Force that prepared the forms. I assured her that those of us on the Task Force shared her concerns, but the task given to us was to prepare forms for lay people to use without requiring the assistance of an attorney. I mention this because it highlights the need for the work recently done by the Working Group on Access to Legal Services on which both Craig Hopper and I were privileged to serve, and the need for implementation of suggestions included in the Group's Report to the Texas Access to Justice Commission delivered on December 15, 2023.

We are pleased to present these forms to the Court as a product into which much time, thought, and effort has gone. We recognize that the forms will be reviewed and likely revised by the Court. We also recognize that no form will be perfect and that they will probably be revised from time to time as the public uses them and provides information about their ease of use and general value. I speak for all of us when I say we would like to discuss any revisions the Court makes. I know I speak for all of us when I say that it has been an honor for us to be asked to be a part of this important work and this task force.

Very truly yours,



Hon. Polly Jackson Spencer
Chair

INSTRUCTIONS AND FAQs
REVOCABLE TRANSFER ON DEATH DEED
FOR AN INDIVIDUAL OWNER

You can use this **Revocable Transfer on Death Deed** ("TODD") form to transfer ownership of real property located in Texas when you die without going to court. To sign a TODD, you must have the legal and mental capacity to sign a contract. The Transfer on Death Deed is authorized under Chapter 114 of the Texas Estates Code.

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You are an owner of real property located in Texas and want to transfer ownership of the property to someone else when you die without a court hearing being required.
- You already filed a TODD in the deed records in the County Clerk's office of the county where the property is located, and you want to create a new TODD to change who will receive the property on your death.

Use the TODD form for Married Owners or Two Co-Owners if:

- You own the property with another co-Owner and you both want to transfer your interest in the property to each other when you die.
- You are married, the real property is community property, and you both want to transfer your interest in the property to each other when you die.

Do not use this form if:

- You do not own an interest in the property. (However, it is okay to use this form if your interest in the property is subject to a mortgage.)

Consult an Attorney if:

- You are married and you do not want to transfer your interest in the property to your spouse. Your spouse may still have homestead rights in the property if you die first.

Helpful Words to Know:

- Community property: Real property is community property if it is acquired during your marriage, except for separate property acquired before or during the marriage.
- Separate property: Real property is separate property if you owned it before your marriage, received it during your marriage by gift or inheritance, or purchased it with separate property money.

The rules of community property and separate property are complicated. If you are not sure whether your property is community or separate property, contact a lawyer for advice.

NOTICE TO PROPERTY OWNERS: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact a lawyer for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your Social Security number or driver's license number on this form. They are not required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. What does a Transfer on Death Deed ("TODD") do?

A TODD transfers ownership of real property, including mineral interests, located in Texas to someone else when you die without going to court. It does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

2. What does this Individual Owner Revocable TODD do?

The Individual Owner Revocable TODD form can be used to transfer ownership of real property to someone else when you die without going to court.

3. Who can I name as a beneficiary or alternate beneficiary in the Individual Owner Revocable TODD form?

You can name anyone you want as a beneficiary or alternate beneficiary, including a family member, a friend or other person, a charity, an educational institution, a trustee of a trust (including the trustee of a revocable or irrevocable trust), a custodian under the Uniform Transfers to Minors Act, etc. You must include the name and address of each person or entity you name as beneficiary or alternate beneficiary, so make sure you have this information when you prepare the form. You do not have to notify any beneficiary that you have named them in the form, but it is recommended that you do.

4. Does a TODD change my ownership of the property or my ownership rights before I die?

No. Even though you must file the TODD in the deed records before you die, you still own your interest in the property and retain your interest in the property rights until you die. This includes the right to use your interest in the property as collateral for a loan, obtain property tax exemptions on your interest, make repairs or other improvements, sell, or transfer your interest in the property as long as the sale or transfer complies with marital property or other co-owner rights, etc.

5. Can I use this Individual Owner Revocable TODD form if I'm married?

It depends.

<u>If you are married and want to name your spouse as the beneficiary</u>, you can use this form if:

- the property is your separate property and your spouse does not have any ownership interest in the property.
- the property is community property, or your spouse has an ownership interest in the property, and you want your interest in the property to transfer to your spouse when you die. If both spouses intend for the property to transfer to the surviving spouse when the first spouse dies, each spouse needs to sign a TODD form naming the other spouse as the beneficiary **or** you can use the TODD form and instructions for Married or Two Co-Owners instead.

If you are married and you want to name someone other than your spouse as the beneficiary, you should consult an attorney, even if the property is your separate property and your spouse has no ownership interest in it. If you create and file a TODD leaving your separate real property to someone other than your spouse, your spouse may still have homestead rights in the property if you die first.

6. What happens when I die?

As long as the TODD is filed in the deed records in the County Clerk's office of each county where the property is located before your death, the property transfers to the beneficiary or beneficiaries named in the TODD (or to their descendants, if this option is chosen) who survive you by at least 120 hours in the shares indicated in the TODD.

If all beneficiaries (and their descendants, if that option is chosen) are deceased or do not survive you by at least 120 hours, then the property transfers to the alternate beneficiaries named in the TODD (or to their descendants, if that option is chosen) in the shares indicated in the TODD.

7. What property can I transfer using a TODD?

A TODD only transfers real property located in Texas. You can only transfer the portion of the real property that you own. A TODD does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

If you are married and you want to name someone other than your spouse as the beneficiary, you should consult an attorney, even if the property is your separate property and your spouse has no ownership interest in it. If you create and file a TODD leaving your separate real property to someone other than your spouse, your spouse may still have homestead rights in the property if you die first.

8. Can I transfer more than one piece of property in this TODD form?

This TODD form is designed to transfer one piece of real property. If you own more than one piece of real property in Texas and you want to transfer additional properties using a TODD form, you should complete and file a separate TODD form for each piece of property.

9. Can I use a TODD to transfer a mobile or manufactured home?

If you want to use a TODD to transfer a mobile or manufactured home, you must:

- Own the real property that the mobile or manufactured home is permanently attached to,
- Have a Statement of Ownership declaring that the mobile or manufactured home is a part of the real property, and
- That Statement of Ownership must have been filed in the deed records in the County Clerk's office of each county where the mobile or manufactured home is located.

For more information, see the Texas Department of Housing and Community Affairs website at https://www.tdhca.state.tx.us/mh/ownership-location.htm and the Application for a Statement of Ownership form at https://www.tdhca.state.tx.us/mh/docs/1037-applysol.pdf.

10. What if I have a Will that leaves the property to someone else?

A properly filed TODD overrules a Will. The property transfers to the beneficiary named in the TODD, not the person named in your Will. This is true even if you make a Will after you have completed and filed the TODD. If you already have a Will or plan to sign one, contact a lawyer for advice about the best method for transferring your real and personal property upon your death.

11. What do I do with the TODD after I fill it out and sign it?

Once you have completed the TODD and signed it in front of a Notary Public, you must file it in the deed records in the County Clerk's office of each county where the property is located. You may need to show the Notary Public a form of identification. You will have to pay a filing fee. Contact the County Clerk for more information. The County Clerk may file the TODD immediately and hand the original back to you, or the Clerk may mail the original TODD to the person you listed in the "After Recording, Return to:" box. Keep the original TODD in a safe place.

12. Does the beneficiary need to do anything to claim the property when I die?

After you die, an "Affidavit of Death" should be filed in the deed records in the County Clerk's office of each county where the TODD was filed. Filing the Affidavit of Death notifies the public that the property has transferred to the new owner or owners. The Affidavit of Death form included with this TODD form can be used at that time.

13. If I change my mind, how can I "undo" a TODD?

If you change your mind, you can revoke (cancel) a TODD at any time before you die either by creating a new TODD or by completing a Cancellation of TODD form. You cannot revoke a TODD by tearing it up once it's been filed. The new TODD or the Cancellation of TODD must be filed in the deed records in each County Clerk's office where you originally filed a TODD. There will be a filing fee.

NOTE: If you cancel your TODD or make a new one, it only affects the portion of the property that you own. It will not affect the ownership rights of any other co-owners.

14. What happens if I get divorced after I have filed this Individual Revocable TODD?

A TODD naming your spouse as beneficiary will remain in effect unless, before you die, a notice of the divorce judgment or a final decree of divorce is filed in the County Clerk's office in each county where the TODD was originally filed. A filed notice of the divorce judgment or final decree of divorce revokes (cancels) your ex-spouse as a beneficiary but does not change the alternate beneficiaries, such as your ex-spouse's children or relatives. A filed Cancellation of TODD or a new TODD will completely revoke the TODD.

You can get a notice of divorce judgment or a final decree of divorce from the clerk of the court where your divorce was finalized. Check with the County Clerk's office where you filed the TODD to see if you need a certified copy of a notice of divorce judgment or a final decree of divorce. If so, you will need to get a certified copy from the clerk of the court where your divorce was finalized, and a fee may be charged.

Because a notice of divorce judgment and a Cancellation of TODD are shorter than a divorce decree, they are significantly less expensive to file. A divorce decree may also include private information, such as the names of children or other private information, so it is best to use a notice of divorce judgment or a Cancellation of TODD.

15. What if I owe debts on the property I want to transfer?

You can sign a TODD to transfer the property even if there is a debt or lien on the property, such as a mortgage. The property transfers to the beneficiary or beneficiaries when you die even if there are debts or liens on the property. A TODD does not protect the property from your creditors. Any mortgages, liens, homeowners' association fees, property taxes, homeowners' insurance, etc., will still need to be paid as required. The property could also be used to pay any other unpaid debts at your death or expenses related to your death. A title company or other party asked to rely on the TODD may request proof that there are no such outstanding debts or expenses, including taxes. If you have questions or concerns about this, consult an attorney.

16. Will a TODD affect my Medicaid benefits?

No. It will not affect your Medicaid benefits because the property does not transfer until you die.

17. What if there is a Medicaid Estate Recovery Program (MERP) claim against my estate after I die?

If the State wants to be repaid after you die for Medicaid benefits you received during your lifetime, property properly transferred under a TODD is not subject to a MERP claim under current law. If you have questions or concerns about this, consult an attorney.

B. COMPLETING THE REVOCABLE TRANSFER ON DEATH DEED FOR INDIVIDUAL OWNER FORM

1. Owner

Enter the owner's full name exactly as it appears on your original property deed. If your name has changed, enter the name as shown on the deed followed by "AKA" (also known as) and your current name.

2. The "Property" is:

Physical Address of the Property: Enter the physical address of the property, including the number, street name, city, county, state, and zip code.

Legal Description of the Property: Print the legal description of the property, which is different from the mailing or physical address. Use the legal description exactly as it appears on your property deed. **It is very important that this information is correct**. If you do not have a copy of your property deed, you may request a copy from the County Clerk's office in the county where the property is located because it should have been filed there when you acquired the property. If you are not able to obtain a copy of your deed or are unsure of the legal description, you may want to consult an attorney.

If you have no other alternative, you can use the property description listed on your property tax statement but be aware that it may not be correct or sufficient to transfer title of the property to the beneficiary or beneficiaries.

3. Beneficiary or Beneficiaries

Print the name of the beneficiary or beneficiaries you want to receive the property when you die. You can name up to four beneficiaries on this form. Use additional pages if you want to name more than four beneficiaries. *See* FAQ 3 for who or what can be listed as a beneficiary. If you name the trustee of a revocable or irrevocable trust, you should use a format similar to the following:

"[Name of trustee], trustee of the [Name of trust] under trust agreement dated [Date]"

You should also enter the address of the trustee and also indicate that the relationship of this beneficiary is either "revocable trust" or "irrevocable trust" (whichever applies). Do not check the box indicating that the share passing to the trust will instead pass to the surviving descendants of the beneficiary, as a trust does not have descendants.

- If more than one beneficiary is listed and there is no indication of how the property should be divided, then the property transfers in equal shares to the beneficiaries who are listed.

- If you name only one beneficiary or one alternate beneficiary, you should enter "100%" in the percentage box for that person. If you name more than one beneficiary or alternate beneficiary, enter the percentage or fraction of the property that you want each beneficiary to receive.

- **It is very important that the shares you list add up to 100% (if you are using percentages) or to 1 (if you are using fractions). If there is a math error and the shares listed for all beneficiaries do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owner.**

  For example:

  If you have five children and you want to transfer the property to them in equal shares when you have died, you would enter the following shares for each child:

  20% + 20% + 20% + 20% + 20% = 100% **-- *or* --** 1/5 + 1/5 + 1/5 + 1/5 + 1/5 = 1

  If you list three beneficiaries and you want all of them to receive an equal share, you should enter 1/3 for each beneficiary named:

  1/3 + 1/3 + 1/3 = 1

  If you have three children and you do not want them to have equal shares, you could give Child A 50% (or 1/2) of the property and give Child B and Child C 25% (or 1/4) each:

  50% + 25% + 25% = 100% **-- *or* –** 1/2 + 1/4 + 1/4 = 1

- Enter the relationship of the beneficiary to you, if applicable (i.e., "child", "brother", "friend," etc.). This information is not required but will be helpful in identifying the beneficiary if necessary.

- A beneficiary you name in the TODD may die before you do. If you want the shares of any named beneficiary who does not survive you to transfer to their surviving descendants, check the box provided for this purpose. If the box is not checked, or if that deceased beneficiary has no surviving descendants, then that deceased beneficiary's share transfers in the same proportion to the surviving beneficiaries. A person's descendants are their children, grandchildren, etc.

4. Alternate Beneficiary or Beneficiaries

Print the name of the alternate beneficiary or alternate beneficiaries you want to receive the property if all beneficiaries identified in Section 3 of the TODD form (and any of their descendants if the box was checked) have died. You can name up to four alternate beneficiaries on this form. Use additional pages if you want to name more than four alternate beneficiaries. *See* FAQ 3 for who or what can be listed as a beneficiary or alternate beneficiary.

Follow the instructions provided in #3 above for calculating shares of the property and completing the rest of this section of the form.

5. No Surviving Beneficiaries

You cannot change this section of the TODD. If all beneficiaries and alternate beneficiaries included in sections 3 and 4 on the form do not survive the Owner by at least 120 hours, the TODD becomes void and the property will pass as a part of the Owner's estate.

6. Error in Property Division

You cannot change this section of the TODD. It is very important that the shares for the beneficiaries or alternate beneficiaries total 100% or 1. If there is a math error and they do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owner. This way, the whole property transfers under the TODD even if there is a math error.

7. Transfer of Property to Descendants

You cannot change this section of the TODD. If the "Share Transfers to Surviving Descendants" box is checked indicating that the property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

If you do not check the "Share Transfers to Surviving Descendants" box for any of the beneficiaries you have named in the form, then that beneficiary's share will be divided among the remaining beneficiaries. It will not go that beneficiary's children, grandchildren, etc.

8. Signatures and Dates

When the TODD form is completely filled out, you will need to sign the TODD in front of a Notary Public. A Notary Public needs to see you sign the form. You may need to show the Notary Public a form of identification. The Notary Public will complete and sign the Notary section. THIS IS VERY IMPORTANT – the TODD cannot be filed unless your signature is notarized.

9. "After recording, return to:" Box

In this box, write the name and address of the person you want the TODD form returned to after the County Clerk has recorded it. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **A person acting as your agent under a Power of Attorney CANNOT sign this TODD for you. The Owner MUST sign it.**
- **DO NOT sign the TODD until you are in front of a Notary Public. The Notary Public MUST see you sign it.**
- **A TODD MUST be recorded in the County Clerk's office in each county where the property is located ("Deed Records") <u>BEFORE</u> you die. If not, the property will not transfer.**
- **The TODD beneficiary(s) MUST survive you by at least 120 hours. If none of the beneficiaries or alternate beneficiaries you name survive you, the TODD will not be effective to transfer the property.**
- **Filing Fees**: The County Clerk will charge a fee to file the TODD. You may want to call the County Clerk's office or check their website to find out how much it costs and what forms of payment they will take before you go.
- **Do Not File the Instructions**: If you file the instructions, it may cause confusion and will also cost you more money.

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: Your social security number or your driver's license number.
Note: This form does not require either a social security number or driver's license number**.**

REVOCABLE TRANSFER ON DEATH DEED
FOR INDIVIDUAL OWNER

1. Owner:

Full Name:
Address:

2. The "Property" is:

Physical Address of the Property:

Address:

Legal Description of the Property:

Insert the full legal description found on the deed (add additional pages if needed at the end):

3. Beneficiary or Beneficiaries:

Upon the death of the Owner, the Property transfers to the following beneficiary or beneficiaries listed below who survive the Owner by at least 120 hours.

If a beneficiary fails to survive the Owner by at least 120 hours and the box below is checked, that deceased beneficiary's share of the Property transfers instead to that beneficiary's surviving descendants (as defined below). If the box is not checked, or if that deceased beneficiary has no surviving descendants, then that deceased beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one beneficiary is listed, and there is no indication of how the Property

should be divided, then the Property transfers in equal shares to the following beneficiaries who are listed below, or to the descendants of a beneficiary if indicated below.

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ____________________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ____________________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ____________________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ____________________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

4. Alternate Beneficiary or Beneficiaries:

If no beneficiary included in Section 3 above survives the Owner, then the Property transfers to the following alternate beneficiaries (or to the descendants of an alternate beneficiary, if indicated below) who survive the Owner by at least 120 hours.

If an alternate beneficiary fails to survive the Owner and the box below is checked, that alternate beneficiary's share of the Property transfers instead to that alternate beneficiary's surviving descendants (as defined below). If the box is not checked, or if that alternate beneficiary has no surviving descendants, then that alternate beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one alternate beneficiary is listed, and there is no indication of how the Property should be divided, then the Property transfers in equal shares to the following alternate beneficiaries who are listed below (or to the descendants of an alternate beneficiary if indicated below).

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ___________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ___________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ___________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

Full Name:	Percentage or fractional share of the Property (see Instructions #3): ___________
Address:	
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owner**

5. No Surviving Beneficiaries:

This Transfer on Death Deed shall have no effect if all beneficiaries and alternate beneficiaries included in sections 3 and 4 above fail to survive the Owner by at least 120 hours.

6. Distributions to a Minor (Optional):

If a beneficiary named in either section 3 or 4 (or a surviving descendant of a deceased beneficiary named in either section 3 or 4) is a minor when the Owner dies, the share passing to the beneficiary shall be held by the following named person as custodian under the Texas Uniform Transfers to Minors Act (UTMA):

Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:

Additional custodians may be added on an attachment to this Transfer of Death Deed.

7. Error in Property Division:

If the percentages or shares indicated in either section 3 or section 4 add up to more or less than all of the Property, then the Property transfers *pro rata* to the surviving beneficiaries or alternate beneficiaries, with each beneficiary receiving a percentage or share equal to that beneficiary's portion of the total listed. [An example of a pro rata distribution: If the box lists 3 beneficiaries each getting a 1/4 share of the Property (which only totals 3/4 of the Property), the Owner's intent will be interpreted to mean that each beneficiary will receive 1/3 share of the Property.]

8. Definition of Surviving Descendants:

If the box is checked indicating that the Property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

9. Revocation Prior to Death:

I understand that I have the right to revoke this Transfer on Death Deed at any time prior to my death.

10. Effect on Existing Transfer on Death Deed:

By signing and properly filing this document, the Owner revokes any prior Revocable Transfer on Death Deed regarding the Owner's interest in this Property.

11. Signature and Date:

_____
Sign full name here

Dated: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by _____.

_____
Notary Public, State of Texas

After recording, return to:

Name:
Address:

INSTRUCTIONS AND FAQs
REVOCABLE TRANSFER ON DEATH DEED
FOR MARRIED OWNERS OR TWO CO-OWNERS

You can use this **Revocable Transfer on Death Deed** ("TODD") form to transfer ownership of your real property located in Texas when you die without going to court. To sign a TODD, you must have the legal and mental capacity to sign a contract. The Transfer on Death Deed is authorized under Chapter 114 of the Texas Estates Code.

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You want to transfer your interest in the property to your spouse or co-owner. This form must be completed and signed by both Owners.
- You already filed a TODD in the deed records in the County Clerk's office of the county where the property is located, and you want to create a new TODD to change who will receive the property on your death.

Use the TODD form for Individual Owners if:

- You want to transfer your interest in the property to someone **other** than your spouse or co-owner.

Do not use this form if:

- You do not own an interest in the property. (However, it is okay to use this form if your interest in the property is subject to a mortgage.)

Helpful Words to Know:

- Community property: Real property is community property if it was acquired during your marriage, except for separate property acquired before or during the marriage.
- Separate property: Real property is separate property if you owned it before your marriage, received it during your marriage by gift or inheritance, or purchased it with separate property money.

The rules of community property and separate property are complicated. If you are not sure whether your property is community or separate property, contact a lawyer for advice.

NOTICE TO PROPERTY OWNERS: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact a lawyer for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your Social Security number or driver's license number on this form. They are not required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. What does a Transfer on Death Deed ("TODD") do?

A TODD transfers ownership of real property, including mineral interests, located in Texas to someone else when you die without going to court. It does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

2. What does this Married Owners or Two Co-Owners Revocable TODD do?

The Married Owners or Two Co-Owners Revocable TODD form can be used by a married couple or two co-owners who want to give real property to the other Owner when the first Owner dies and then have the ownership pass to someone else after both Owners have died.

3. Who can I name as a beneficiary or alternate beneficiary in the Married Owners or Two Co-Owners Revocable TODD form?

This Married Owners or Two Co-Owners Revocable TODD form transfers your interest in the property to your spouse or co-owner when you die. If you want to transfer your interest in the property to someone else, use the TODD form and instructions for an Individual Owner instead.

The Married Owners or Two Co-Owners Revocable TODD form transfers the portion of the property owned by the person who dies first to the Surviving Owner. When the Surviving Owner dies, the property transfers to the beneficiary or alternate beneficiary listed in the TODD.

You can name anyone you want as beneficiary or alternate beneficiary to receive the property after the death of the Surviving Owner, including a family member, a friend or other person, a charity, an educational institution, a trustee of a trust (including the trustee of a revocable or irrevocable trust), a custodian under the Uniform Transfers to Minors Act, etc. You must include the name and address of each person or entity you name as beneficiary or alternate beneficiary, so make sure you have this information when you prepare the form. You do not have to notify any beneficiary that you have named them in the form, but it is recommended that you do.

4. Does a TODD change my ownership of the property or my ownership rights before I die?

No. Even though you must file the TODD in the deed records before you die, you still own your interest in the property and retain your interest in the property rights until you die. This includes the right to use your interest in the property as collateral for a loan, obtain property tax exemptions on your interest, make repairs or other improvements, sell, or transfer your interest in the property as long as the sale or transfer complies with marital property or other co-owner rights, etc.

5. Can my spouse or co-owner change or cancel the TODD after I die?

Yes. If you die first, the Surviving Owner will own your interest in the property and their own interest, and can cancel the TODD, prepare a new TODD, or transfer the property by any other legal means.

6. What happens when both of us die?

As long as the TODD is filed in the deed records in the County Clerk's office of each county where the property is located before your deaths, the property transfers to the beneficiary or beneficiaries named in the TODD (or to their descendants, if this option is chosen) who survive the Surviving Owner by at least 120 hours in the shares indicated in the TODD.

If all beneficiaries (and their descendants, if that option was chosen) are deceased or do not survive the Surviving Owner by at least 120 hours, then the property transfers to the alternate beneficiaries named in the TODD (or to their descendants, if that option was chosen) in the shares indicated in the TODD.

7. What property can I transfer using a TODD?

A TODD only transfers real property located in Texas. You can only transfer the portion of the real property that you own. A TODD does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

This Married Owner or Two Co-Owner Revocable TODD form transfers your interest in the property to your spouse or co-owner when you die. If you want to transfer your interest in the property to someone else, use the TODD form and instructions for an Individual Owner instead.

8. Can I transfer more than one piece of property in this TODD form?

This TODD form is designed to transfer one piece of real property. If you own more than one piece of real property in Texas and you want to transfer additional properties using a TODD form, you should complete and file a separate TODD form for each piece of property.

9. Can I use a TODD to transfer a mobile or manufactured home?

If you want to use a TODD to transfer a mobile or manufactured home, you must:

- Own the real property that the mobile or manufactured home is permanently attached to,
- Have a Statement of Ownership declaring that the mobile or manufactured home is a part of the real property, and
- That Statement of Ownership must have been filed in the deed records in the County Clerk's office of each county where the mobile or manufactured home is located.

For more information, see the Texas Department of Housing and Community Affairs website at https://www.tdhca.state.tx.us/mh/ownership-location.htm and the Application for a Statement of Ownership form at https://www.tdhca.state.tx.us/mh/docs/1037-applysol.pdf.

10. What if I have a Will that leaves the property to someone else?

A properly filed TODD overrules a Will. The property transfers to the Surviving Owner or beneficiary named in the TODD, not the person named in your Will. This is true even if you make a Will after you have completed and filed the TODD. If you already have a Will or plan to sign one, contact a lawyer for advice about the best method for transferring your real and personal property upon your death.

11. What do I do with the TODD after I fill it out and sign it?

Once you and your spouse or co-owner have completed the TODD and signed it in front of a Notary Public, you must file it in the deed records in the County Clerk's office of each county where the property is located. You may need to show the Notary Public a form of identification. You will have to pay a filing fee. Contact the County Clerk for more information. The County Clerk may file the TODD immediately and hand the original back to you, or the Clerk may mail the original TODD to the person you listed in the "After Recording, Return to:" box. Keep the original TODD in a safe place.

12. Does the Surviving Owner or beneficiary need to do anything to claim the property when I die?

After an owner has died, an "Affidavit of Death" should be filed in the deed records in the County Clerk's office of each county where the TODD was filed. Filing the Affidavit of Death notifies the public that the property has transferred to the new owner or owners. The Affidavit of Death form included with this TODD form can be used at that time.

13. If I change my mind, how can I "undo" a TODD?

If you change your mind, you can revoke (cancel) a TODD at any time before you die either by creating a new TODD or by completing a Cancellation of TODD form. You cannot revoke a TODD by tearing it up once it's been filed. The new TODD or the Cancellation of TODD must be filed in the deed records in each County Clerk's office where you originally filed a TODD. There will be a filing fee.

NOTE: If you cancel your TODD or make a new one, it only affects the portion of the property that you own. It will not affect the ownership rights of any other co-owners.

14. What happens if I get divorced after I have filed this Married or Two-Co-Owner Revocable TODD?

A TODD naming your spouse as beneficiary will remain in effect unless, before you die, a notice of the divorce judgment or a final decree of divorce is filed in the County Clerk's office in each county where the TODD was originally filed. A filed notice of the divorce judgment or final decree of divorce revokes (cancels) your ex-spouse as a beneficiary but does not change the alternate beneficiaries, such as your ex-spouse's children or relatives. A filed Cancellation of TODD or a new TODD will completely revoke the TODD.

You can get a notice of divorce judgment or a final decree of divorce from the clerk of the court where your divorce was finalized. Check with the County Clerk's office where you filed the TODD to see if you need a certified copy of a notice of divorce judgment or a final decree of divorce. If so, you will need to get a certified copy from the clerk of the court where your divorce was finalized, and a fee may be charged.

Because a notice of divorce judgment and a Cancellation of TODD are shorter than a divorce decree, they are significantly less expensive to file. A divorce decree may also include private information, such as the names of children or other private information, so it is best to use a notice of divorce judgment or a Cancellation of TODD.

15. What if I owe debts on the property I want to transfer?

You can sign a TODD to transfer the property even if there is a debt or lien on the property, such as a mortgage. The property transfers to the surviving owner or beneficiaries when you die even if there are debts or liens on the property. A TODD does not protect the property from your creditors. Any mortgages, liens, homeowners' association fees, property taxes, homeowners' insurance, etc., will still need to be paid as required. The property could also be used to pay any other unpaid debts at your death or expenses related to your death. A title company or other party asked to rely on the TODD may request proof that there are no such outstanding debts or expenses, including taxes. If you have questions or concerns about this, consult an attorney.

16. Will a TODD affect my Medicaid benefits?

No. It will not affect your Medicaid benefits because the property does not transfer until you die.

17. What if there is a Medicaid Estate Recovery Program (MERP) claim against my estate after I die?

If the State wants to be repaid after you die for Medicaid benefits you received during your lifetime, property properly transferred under a TODD is not subject to a MERP claim under current law. If you have questions or concerns about this, consult an attorney.

B. COMPLETING THE REVOCABLE TRANSFER ON DEATH DEED FOR MARRIED OR TWO CO-OWNER FORM

1. Owners

Enter the full names of both owners exactly as they appear on your original property deed. If either name has changed, enter the name as shown on the deed followed by "AKA" (also known as) and the owner's current name.

2. The "Property" is:

Physical Address of the Property: Enter the physical address of the property, including the number, street name, city, county, state, and zip code.

Legal Description of the Property: Print the legal description of the property, which is different from the mailing or physical address. Use the legal description exactly as it appears on your property deed. **It is very important that this information is correct**. If you do not have a copy of your property deed, you may request a copy from the County Clerk's office in the county where the property is located because it should have been filed there when you acquired the property. If you are not able to obtain a copy of your deed or are unsure of the legal description, you may want to consult an attorney.

If you have no other alternative, you can use the property description listed on your property tax statement but be aware that it may not be correct or sufficient to transfer title of the property to the surviving owner or beneficiary.

3. Death of One Owner

You cannot change this section of the TODD, which states that both Owners intend for the Surviving Owner to receive their interest in the property when the first Owner dies. (If you want to transfer your interest in the

property to someone other than your spouse or co-owner, use the TODD form and instructions for an Individual Owner instead.)

4. Beneficiary or Beneficiaries

Print the name of the beneficiary or beneficiaries you want to receive the property when the Surviving Owner dies. You can name up to four beneficiaries on this form. Use additional pages if you want to name more than four beneficiaries. *See* FAQ 3 for who or what can be listed as a beneficiary. If you name the trustee of a revocable or irrevocable trust, you should use a format similar to the following:

"[Name of trustee], trustee of the [Name of trust] under trust agreement dated [Date]"

You should also enter the address of the trustee and also indicate that the relationship of this beneficiary is either "revocable trust" or "irrevocable trust" (whichever applies). Do not check the box indicating that the share passing to the trust will instead pass to the surviving descendants of the beneficiary, as a trust does not have descendants.

- If more than one beneficiary is listed and there is no indication of how the property should be divided, then the property transfers in equal shares to the beneficiaries who are listed.

- If you name only one beneficiary or one alternate beneficiary, you should enter "100%" in the percentage box for that person. If you name more than one beneficiary or alternate beneficiary, enter the percentage or fraction of the property that you want each beneficiary to receive.

- **It is very important that the shares you list add up to 100% (if you are using percentages) or to 1 (if you are using fractions). If there is a math error and the shares listed for all beneficiaries do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owners.**

  For example:

  If you and the other owner have five children and you want to transfer the property to them in equal shares when you both have died, you would enter the following shares for each child:

  20% + 20% + 20% + 20% + 20% = 100% **-- *or* --** 1/5 + 1/5 + 1/5 + 1/5 + 1/5 = 1

  If you list three beneficiaries and you want all of them to receive an equal share, you should enter 1/3 for each beneficiary named:

  1/3 + 1/3 + 1/3 = 1

  If you and the other owner have three children and you do not want them to have equal shares, you could give child A 50% (or 1/2) of the property and give child B and child C 25% (or 1/4) each:

  50% + 25% + 25% = 100% **-- *or* --** 1/2 + 1/4 + 1/4 = 1

- Enter the relationship of the beneficiary to you, if applicable (i.e., "child", "brother", "friend," etc.). This information is not required but will be helpful in identifying the beneficiary if necessary.

- A beneficiary you name in the TODD may die before you do. If you want the shares of any named beneficiary who does not survive you to transfer to their surviving descendants, check the box provided

for this purpose. If the box is not checked, or if that deceased beneficiary has no surviving descendants, then that deceased beneficiary's share transfers in the same proportion to the surviving beneficiaries. A person's descendants are their children, grandchildren, etc.

5. Alternate Beneficiary or Beneficiaries

Print the name of the alternate beneficiary or alternate beneficiaries you want to receive the property if the Surviving Owner and all beneficiaries identified in Section 4 of the TODD form (and any of their descendants if the box was checked) have died. You can name up to four alternate beneficiaries on this form. Use additional pages if you want to name more than four alternate beneficiaries. *See* FAQ 3 for who or what can be listed as a beneficiary or alternate beneficiary.

Follow the instructions provided in #4 above for calculating shares of the property and completing the rest of this section of the form.

6. No Surviving Beneficiaries

You cannot change this section of the TODD. If all potential beneficiaries and alternate beneficiaries included in sections 4 and 5 on the form do not survive the Owners by at least 120 hours, the property will pass as a part of the Surviving Owner's estate.

7. Error in Property Division

You cannot change this section of the TODD. It is very important that the shares for the beneficiaries or alternate beneficiaries total 100% or 1. If there is a math error and they do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owners. This way, the whole property transfers under the TODD even if there is a math error.

8. Transfer of Property to Descendants

You cannot change this section of the TODD. If the "Share Transfers to Surviving Descendants" box is checked indicating that the property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

If you do not check the "Share Transfers to Surviving Descendants" box for any of the beneficiaries you have named in the form, then that beneficiary's share will be divided among the remaining beneficiaries. It will not go that beneficiary's children, grandchildren, etc.

9. Signatures and Dates

When the TODD form is completely filled out, both you and the other Owner will need to sign the TODD in front of a Notary Public. A Notary Public needs to see you sign the form. You may need to show the Notary Public a form of identification. The Notary Public will complete and sign the Notary section. THIS IS VERY IMPORTANT – the TODD cannot be filed unless your signatures are notarized.

10. "After recording, return to:" Box

In this box, write the name and address of the person you want the TODD form returned to after the County Clerk has recorded it. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **A person acting as your agent under a Power of Attorney CANNOT sign this TODD for you. Both Owners MUST sign it.**
- **DO NOT sign the TODD until you are in front of a Notary Public. The Notary Public MUST see you sign it.**
- **A TODD MUST be recorded in the County Clerk's office in each county where the property is located ("Deed Records") BEFORE you die. If not, the property will not transfer.**
- **The TODD beneficiary(s) MUST survive you by at least 120 hours. If none of the beneficiaries you name survive you, the TODD will not be effective to transfer the property.**
- **Filing Fees**: The County Clerk will charge a fee to file the TODD. You may want to call the County Clerk's office or check their website to find out how much it costs and what forms of payment they will take before you go.
- **Do Not File the Instructions**: If you file the instructions, it may cause confusion and will also cost you more money.

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: Your social security number or your driver's license number.
Note: This form does not require either a social security number or driver's license number**.**

REVOCABLE TRANSFER ON DEATH DEED
FOR MARRIED OWNERS OR TWO CO-OWNERS

1. Owners:

Full Name of Owner A:
Address:

Full Name of Owner B:
Address:

2. The "Property" is:

Physical Address of the Property:

Address:

Legal Description of the Property:

Insert the full legal description found on the deed (add additional pages if needed at the end):

3. Death of An Owner:

When the first of the Owners dies (the "Deceased Owner"), the Deceased Owner's interest in the Property transfers to the other Owner (the "Surviving Owner"). If the Owners die within 120 hours of each other, the Property transfers to the beneficiary or beneficiaries listed below who survive both Owners by at least 120 hours.

4. Beneficiary or Beneficiaries:

When both Owners have died, the Property transfers to the following beneficiaries listed below (or to the descendants of a beneficiary, if indicated below) who survive the Owners by at least 120 hours, in the shares indicated below.

If a beneficiary fails to survive the Owners by at least 120 hours and the box below is checked, that deceased beneficiary's share of the Property transfers instead to that beneficiary's surviving descendants (as defined below). If the box is not checked, or if that beneficiary has no surviving descendants, then that deceased beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one beneficiary is listed and there is no indication of how the Property should be divided, then the Property transfers in equal shares to the following beneficiaries who are listed below (or to the descendants of a beneficiary, if indicated below).

Full Name: Address: 	Percentage or fractional share of the Property (see Instructions #4): _____
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

Full Name: Address: 	Percentage or fractional share of the Property (see Instructions #4): _____
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

Full Name: Address: 	Percentage or fractional share of the Property (see Instructions #4): _____
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

Full Name: Address: 	Percentage or fractional share of the Property (see Instructions #4): _____
Relationship: 	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

5. Alternate Beneficiary or Beneficiaries:

If no beneficiary included in Section 4 survives the Owners, then the Property transfers to the following alternate beneficiaries who are listed below (or to the descendants of an alternate beneficiary, if indicated below) who survive the Owners by at least 120 hours.

If an alternate beneficiary fails to survive the Owners and the box below is checked, that alternate beneficiary's share of the Property transfers instead to that alternate beneficiary's surviving descendants (as defined below). If the box is not checked, or if that alternate beneficiary has no surviving descendants, then that alternate beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one alternate beneficiary is listed, and there is no indication of how the Property should be divided, then the Property transfers in equal shares to the following alternate beneficiaries who are listed below (or to the descendants of an alternate beneficiary, if indicated below).

Full Name: Address: 	Percentage or fractional share of the Property (see Instructions #4): _____
Relationship: 	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

Full Name: Address: 	Percentage or fractional share of the Property (see Instructions #4): _____
Relationship: 	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

Full Name:	Percentage or fractional share of the Property (see Instructions #4):
Address:	_____
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

Full Name:	Percentage or fractional share of the Property (see Instructions #4):
Address:	_____
Relationship:	☐ **Share transfers to surviving descendants if beneficiary fails to survive Owners**

6. No Surviving Beneficiaries

This Transfer on Death Deed shall have no effect if all beneficiaries and alternate beneficiaries included in sections 4 and 5 above fail to survive the Owners by at least 120 hours.

7. Distributions to a Minor (Optional):

If a beneficiary named in either section 4 or 5 (or a surviving descendant of a deceased beneficiary named in either section 4 or 5) is a minor after both Owners have died, then the share passing to the beneficiary shall be held by the following named person as custodian under the Texas Uniform Transfers to Minors Act (UTMA):

Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:

Additional custodians may be added on an attachment to this Transfer of Death Deed.

8. Error in Property Division:

If the percentages or shares indicated in either section 4 or section 5 add up to more or less than all of the Property, then the Property transfers *pro rata* to the surviving beneficiaries or alternate beneficiaries, with each beneficiary receiving a percentage or share equal to that beneficiary's portion of the total listed. [An example of a pro rata distribution: If the box lists 3

beneficiaries each getting a 1/4 share of the Property (which only totals 3/4 of the Property), the Owner's intent will be interpreted to mean that each beneficiary will receive 1/3 share of the Property.]

9. Definition of Surviving Descendants:

If the box is checked indicating that the Property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

10. Right to Revoke Prior to Death:

Either Owner has the right to revoke this Revocable Transfer on Death Deed as to that Owner's interest at any time prior to that Owner's death.

11. Effect on Existing Transfer on Death Deed:

By signing and properly filing this document, an Owner revokes any prior Revocable Transfer on Death Deed regarding that Owner's interest in this Property.

Signatures page follows

11. Signatures and Dates:

_____

First Owner – Sign full name here

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by _____.

_____

Notary Public, State of Texas

****

_____

Second Owner – Sign full name here

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by _____.

_____

Notary Public, State of Texas

After recording, return to:

Name:
Address:

INSTRUCTIONS AND FAQs
CANCELLATION OF REVOCABLE TRANSFER ON DEATH DEED

You can use this Cancellation of Revocable Transfer on Death Deed form to cancel any Transfer on Death Deed (TODD) that has been filed, including the Revocable Transfer on Death Deed for Individual Owner and the Revocable Transfer on Death Deed for Married Owners or Two Co-Owners. The Transfer on Death Deed is authorized under Chapter 114 of the Texas Estates Code.

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You already filed a TODD in the deed records in the County Clerk's office of each county where the property is located, and you want to cancel the TODD without creating a new one.

Do not use this form if:

- You already filed a TODD in the deed records in the County Clerk's office of each county where the property is located, and you want to create a new TODD to change who will receive the property on your death. It is not necessary to file both a Cancellation of TODD and a new TODD. You can simply complete and file a new Revocable Transfer on Death Deed for Individual Owners or the Revocable Transfer on Death Deed for Married Owners or Two Co-Owners.

NOTICE TO PROPERTY OWNERS: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact a lawyer for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your Social Security number or driver's license number, or any other sensitive or private information on this form. They are not required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. If I change my mind, how can I "undo" a TODD?

If you change your mind, you can revoke (cancel) a TODD at any time before you die either by creating a new TODD or by completing a Cancellation of TODD form. You cannot revoke a TODD by tearing it up once it's been filed.

If you want to cancel the TODD and do not want to transfer the property to someone else using a TODD, use the Cancellation of TODD form. If you want to create a new TODD to change who will receive the property on your death, you can simply complete and file a new Revocable Transfer on Death Deed for Individual Owners or the Revocable Transfer on Death Deed for Married or Two Co-Owners. The new TODD or the Cancellation of TODD must be filed in the deed records in each County Clerk's office where you originally filed a TODD. There will be a filing fee.

NOTE: If you cancel your TODD or make a new one, it only affects the portion of the property that you own. It will not affect the ownership rights of any other co-owners. See FAQ 4.

2. **Can I just tear up my TODD to cancel it?**

   No. Tearing up or destroying your TODD will not cancel it.

3. **What happens if I cancel my TODD without making a new one?**

   Your interest in the property can pass to someone else in a variety of ways. The most common ways are through another type of deed to the property, through a Will, or through Texas laws if you die without a Will.

4. **If I used the Revocable Transfer on Death Deed for Married Owners or Two Co-Owner's form and I am the only one who wants to change it, do both of us need to sign the Cancellation of TODD form?**

   No. You can file this Cancellation of TODD form, which will cancel the transfer of your interest in the property.

5. **If I used the Revocable Transfer on Death Deed for Married Owners or Two Co-Owner's form and both of us want to change it, what do we do?**

   If both of you want to cancel the TODD, you should each file a Cancellation of TODD.

6. **Should I cancel my TODD if I get divorced?**

   Maybe. A divorce does not automatically cancel a TODD naming your ex-spouse or the children or relatives of your ex-spouse. The TODD will remain in effect unless a final decree of divorce, a notice of the divorce judgment, a Cancellation of TODD, or a new TODD is filed in the deed records in the County Clerk's office in each county where the TODD was originally filed.

   You can get a final decree of divorce or a notice of divorce judgment from the clerk of the court where your divorce was finalized. Check with the County Clerk's office where you filed the TODD to see if you need a certified copy of the final decree of divorce or the notice of final judgment of divorce. If so, you will need to get a certified copy from the clerk of the court where your divorce was finalized, and a fee may be charged.

   Because a Cancellation of TODD and a notice of divorce judgment are shorter than a divorce decree, they are significantly less expensive to file. A divorce decree may also include private information, such as the names of children or other private information, so it is best to use a Cancellation of TODD or a notice of divorce judgment.

B. COMPLETING THE CANCELLATION OF REVOCABLE TRANSFER ON DEATH DEED FORM

1. **Owner**:

   Enter the owner's full name exactly as it appears on your original property deed. If your name has changed, enter the name as shown on the deed followed by "AKA" (also known as) and your current name.

2. **Physical Address of the Property**:

   Enter the physical address of the property, including the number, street name, city, county, state, and

zip code.

3. **Legal Description of the Property**:

   Print the legal description of the property, which is different from the mailing or physical address. Use the legal description exactly as it appears on your TODD. **It is very important that this information is correct**. If you do not have your TODD, you may request a copy from the County Clerk's office in the county where the TODD was filed, which should be the county where the property is located. Some County Clerks' offices have a copy of your TODD available online. If you are not able to obtain a copy of your TODD or are unsure of the legal description, you may want to consult an attorney.

4. **Cancellation**: This section states you are cancelling your TODD. You cannot make changes to this section.

5. **Signature and Date:**

   When the form is completely filled out, you will need to sign the form in front of a Notary Public. A Notary Public needs to see you sign the form. You may need to show the Notary Public a form of identification. The Notary Public will complete and sign the Notary section. THIS IS VERY IMPORTANT – the Cancellation of TODD cannot be filed unless your signature is notarized.

6. **"After recording, return to:" Box**

   In this box, write the name and address of the person you want the TODD form returned to after the County Clerk has recorded it. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **DO NOT sign the Cancellation of TODD until you are in front of a Notary Public. The Notary Public MUST see you sign it.**

- **A Cancellation of TODD MUST be recorded in the deed records in the County Clerk's office of each county where the property is located <u>BEFORE</u> you die. If not, the existing TODD will not be cancelled.**

- **Filing Fees**: The County Clerk will charge a fee to file the Cancellation of TODD. You may want to call the County Clerk's office or check their website to find out how much it costs and what forms of payment they will take before you go.

- **Do Not File the Instructions**: If you file the instructions, it may cause confusion and will also cost you more money.

CANCELLATION OF REVOCABLE TRANSFER ON DEATH DEED

1. Owner:

Full Name:
Address:

2. The "Property" is:

Physical Address of the Property:

Address:

Legal Description of the Property:

Insert the full legal description found on the deed (add additional pages if needed at the end):

3. Cancellation:

I cancel all of my previous transfers of the Property by transfer on death deed.

4. Signature and Date:

Do not sign or date until you are in front of a notary. *Once the Cancellation of Revocable Transfer on Death Deed is signed and notarized, you **must** file it with the county clerk in the county where the property is located.*

_____

Sign full name here

Dated: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by _____.

_____
Notary Public, State of Texas

After recording, return to:

Name:
Address:

INSTRUCTIONS AND FAQs
AFFIDAVIT OF DEATH

A TODD beneficiary can use this Affidavit of Death to establish that the Owner who signed a Revocable Transfer on Death Deed (TODD) has died. This Affidavit of Death is to be used with the Revocable Transfer on Death Deed forms approved by the Supreme Court of Texas. The Transfer on Death Deed is authorized under Chapter 114 of the Texas Estates Code.

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You are a named beneficiary of a TODD and need to establish that the real property Owner who created the TODD has died.
- You are a Co-Owner named as a Surviving Owner in a TODD and need to establish that the other Co-Owner has died.

Do not use this form if:

- The real property Owner has not died.
- It has been less than the period of survival required in the TODD since the deceased Owner died or if the TODD does not state a period of survival, it has been less than 120 hours.

NOTICE TO SURVIVING BENEFICIARY: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact an attorney for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your or the deceased Owner's Social Security number, driver's license number, or any other sensitive or private information on this form. Do not attach the death certificate. This information is **not** required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. When Should I File an Affidavit of Death?

You should file the Affidavit of Death as soon as possible after the period of survival stated in the TODD or if the TODD does not state a period of survival, after 120 hours has passed.

2. Why Do I Need to File an Affidavit of Death?

An Affidavit of Death lets the public, including title companies, know that the property owner has died and ownership of the property has transferred to the Surviving Owner, beneficiary, or beneficiaries. It is also helpful in other situations, such as when:

- Continuing payments to the current mortgage lender, if one exists;
- Dealing with the County Appraisal District to get a homestead exemption or get or remove

other exemptions, or when assessing the value of the property for property tax purposes;
- Insuring the property;
- Selling the property;
- Borrowing money against the property;
- Applying for FEMA relief if the property is damaged during a disaster; or
- Applying for Medicaid Estate Recovery Programs, Exemption, or Waiver.

3. Who can sign an Affidavit of Death?

Usually, the Surviving Owner or a beneficiary named in the TODD signs the Affidavit, but anyone who is competent, at least 18 years old, and willing to swear that the facts stated in the Affidavit are true may sign it.

4. What Happens if I Don't File an Affidavit of Death?

If you don't file the Affidavit, it can slow down your ability to deal with the property as an owner.

5. Where do I File the Affidavit of Death?

You must file the Affidavit in the deed records in the County Clerk's office of the county where the TODD was filed. If a TODD was filed in more than one county, you must file a separate Affidavit in the deed records in the County Clerk's office in each county.

6. Do I need to bring anything to prove the Owner died when I file the Affidavit of Death?

No. You do not need to bring a death certificate or obituary to file the Affidavit but a title company may require proof of death.

7. What if I don't want the property or I am receiving public benefits?

Contact a lawyer as soon as you can to avoid potential costs and problems, especially if you are receiving public benefits.

B. COMPLETING THE AFFIDAVIT OF DEATH FORM

1. Information of Person Signing Affidavit: Enter your first, middle (if any), and last name.

2. Transfer on Death Deed Filed by Decedent:
   - Enter the name of the person who signed the TODD and has now died exactly as it appeared in the TODD. This person is called the "Decedent" in this Affidavit.
   - Enter in the appropriate blanks the name of the county where the TODD was filed.
   - Enter the instrument or document number the Clerk assigned to the TODD, and the volume and page number if you have it. Some counties may not include volume and page numbers. This information can be found on the filed and recorded TODD. If you don't have a recorded copy of the TODD, you can get a copy at the County Clerk's office in the county where it was filed. Some County Clerks' offices have a copy of the TODD available online.

3. Information of Person Who Signed the Transfer on Death Deed: Enter the date the Decedent died, and the city, county, state, and country where the person died in the box.

4. Signature and Date: This Affidavit must be signed in front of a notary. Do not sign your name or enter the date until a notary can see you sign the document. The Notary Public will complete and sign the Notary section.

5. "After Recording, Return to" Section: After recording, the Clerk will return the Affidavit to the person whose name is in the box. Enter the name and address of that person. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **DO NOT sign the Affidavit of Death until you are in front of a Notary Public. The Notary Public MUST see you sign it.**

- **An Affidavit of Death should be recorded in the deed records in the County Clerk's office of each county where the property is located to show that the Owner who signed a revocable TODD has died.**

- **Filing Fees**: The County Clerk will charge a fee to file the Affidavit of Death. You may want to call the County Clerk's office or check their website to find out how much it costs and what forms of payment they will take before you go.

- **Do Not File the Instructions**: If you file the instructions, it may cause confusion and will also cost you more money.

AFFIDAVIT OF DEATH

STATE OF TEXAS §
§
COUNTY OF _____ §

I swear that the following statements are true:

1. Person Signing Affidavit:

My name is _____ (print Full Name). I am at least eighteen (18) years old and am competent to make this affidavit.

2. Transfer on Death Deed Filed by Decedent:

- *Print the first, middle and last name of the deceased Owner who signed the Transfer on Death Deed for the property exactly as it appeared on the Transfer on Death Deed. This person is now called the "Decedent."*
- *Print the county where the Transfer on Death Deed was filed.*
- *Print the deed's document or instrument number, where the Transfer on Death Deed was recorded. If you have the volume and page number, fill in those blanks. At a minimum, you must fill in the blank for document or instrument number OR the blanks for the volume and page number.*

_____ (Decedent's Full Name) signed a Transfer on Death Deed that was filed in the deed records in the County Clerk's office in _____ County, Texas, and can be found under document or instrument number _____ in Volume _____, Page _____ of the County Clerk's records.

3. Information of Decedent Who Signed the Transfer on Death Deed:

- *Print the date the person died, and the county, state, and country where the person died.*

Date of Death: _____

City, County, State, and Country of Death: _____

4. Signature and Date:

Do not sign or date until you are in front of a notary. *Once the Affidavit of Death is signed and*

*notarized, you **must** file it in the deed records in the County Clerk's office of the county where the Property is located.*

_____
Sign full name here

Dated: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by _____ (Name of Person Signing Affidavit).

_____
Notary Public, State of Texas

After recording, return to:

Name:
Address:

Taskforce for Responsible AI in the Law

Interim Report to the State Bar of Texas Board of Directors

Introduction

In 2023, under the leadership of State Bar President Cindy Tisdale, the Taskforce for Responsible AI in the Law (TRAIL) was formed to address the growing impact of Artificial Intelligence (AI) in the legal profession. The taskforce has worked to identify ways that the emergence of new AI technology might affect the practice of law and how lawyers, judges, and the State Bar should respond. The work of TRAIL focuses on crafting guidelines, navigating challenges, and embracing the potential of AI within the legal profession.

This interim report represents an initial step in understanding the integration of AI within the legal profession. It highlights the taskforce's progress and ongoing efforts, underlining the complexity and scope of the work still required. This document serves as a marker of our current understanding and the groundwork laid, pointing towards a comprehensive and more detailed final report. The emphasis is on continued research, collaboration, and thoughtful development in this rapidly evolving landscape. Regulation and technology will both continue to evolve over the course of this work. None of the preliminary thoughts described below should be taken as any formal recommendation, but rather reflect preliminary concepts being considered by the taskforce.

Executive Summary

The TRAIL Interim Report includes a variety of recommendations being considered across different areas of legal practice, with a focus on the ethical and practical integration of AI. These proposals, while still under review and not finalized, cover:

1) **Cybersecurity**: encouraging awareness among lawyers about possible risks associated with using AI tools, including third party access to sensitive information
2) **Education and Legal Practice**: recommending the inclusion of AI topics in professional education for both lawyers and judges and proposing targeting or increasing attorney's continuing legal education (CLE) hours to include AI and technology issues germane to the practice of law
3) **Legislative, Regulatory, and Legal Considerations**: suggesting the review and monitoring of legislation, regulation, and case law relevant to AI in legal practice, and considering the development of AI-focused legislative proposals
4) **Ethical and Responsible Use Guidelines**: developing recommendations regarding generative AI use that address compliance with attorney ethics and advertising regulations, and offering guidance on the ethical use of AI in legal practice
5) **Access and Equity**: proposing support for legal aid providers in accessing AI technology and potential technologies to enhance individual access to the justice system
6) **Privacy and Data Protection**: examining the implications of privacy laws on AI and proposing best practices for handling personal data in AI applications
7) **AI Summits and Collaborative Efforts**: suggesting the organization of AI summits for knowledge sharing and collaboration among stakeholders

Mission Statement

The Taskforce for Responsible AI in the Law is focused on educating Texas practitioners and judges about the benefits and risks of AI and fostering the ethical integration of AI within the legal

profession. The mission of the taskforce is to explore the uncharted frontiers of AI in the legal profession, approaching this new world with caution and optimism and ensuring that technology serves the legal community and the public without compromising the values central to our profession. The taskforce will investigate how legal practitioners can leverage AI responsibly to enhance equitable delivery of legal representation in Texas while upholding the integrity of the legal system, and the taskforce will make recommendations to the State Bar's Board of Directors consistent with this goal.

Vision Statement

The taskforce envisions a future where the integration of AI in the legal profession is both innovative and principled. Striving to lead the way in Texas and beyond, our focus is on crafting standards and guidelines that enhance legal practice through AI, without sacrificing the core values of justice, fairness, and trust. In this bold new era, we will lead with care and optimism, ensuring that the transformative power of AI serves the legal community and the public with excellence and integrity.

Purpose of the Report

This report serves as an interim report to the Board of Directors concerning the work of the Taskforce for Responsible AI in the Law, its preliminary findings, recommendations that are under consideration, and proposed future activities of the taskforce.

Scope and Limitations

The material outlined in this interim report are preliminary thoughts, many of which will require additional investigation. The potential recommendations listed are currently under review and consideration by the taskforce and are reported here to give the board an opportunity to consider the possible recommendations and provide the taskforce with feedback and direction for its work. The topic of AI has attracted the attention of the media, academia, and government. It is a broad issue with implications for almost every facet of society. The taskforce's attention, however, is limited to consideration of the ramifications of AI for the practice of law.

Subcommittee Insights

The taskforce began its work by identifying issues in the legal profession that may be affected by AI. A subcommittee was assigned to each issue. The initial reports from the subcommittees are included as appendices to this report, and what follows is a summary of the issues identified by each subcommittee and the tentative recommendations that may be proposed at a later date for action by the State Bar of Texas or by other stakeholders in the legal sphere. These tentative recommendations are only proposals at this stage; the Taskforce has not reached a consensus on these proposals and is not asking the State Bar Board to take any action at this time.

Cybersecurity

Overview of the Issues

All lawyers and clients rely on information technology, the Internet, and cloud computing, which means that we all face exposure to cybercrime. Cybercriminals could use AI to be disruptive, spread malware, spread disinformation, and commit fraud and theft, but AI can also be a tool to help lawyers and clients predict or protect against cybercriminals' behavior in the future.

Potential Recommendations

The State Bar should help lawyers become more aware of the risks associated with cybercriminals and in particular the use of AI to hide cybercriminal behavior. The State Bar may wish to consider:

1) including cybersecurity and AI training in CLE events for all lawyers
2) creating an AI toolkit on the State Bar's website
3) publishing articles on cybersecurity threats to lawyers and law firms in the State Bar Journal and section publications

The State Bar should team up with the Chief Information Security Officer (CISO) community to learn more about their perspective on cybercriminals' use of AI.

Cybersecurity Concerns

Here are specific AI cybersecurity concerns that should be addressed:

Malware	Malware is software designed to disrupt, damage, or gain access to a computer system. Often employees unwittingly fall victim to email phishing attacks allowing in disruptive malware. Regular cybersecurity training of employees to prevent them from falling for email phishing attacks is recommended since cybercriminals use AI to fool individuals into opening or responding to fake emails.
Business Email Compromise ("BEC" or "Spearphishing")	When a cybercriminal sends an email or phone call posing as the CEO and requests that the CFO wire monies to a bank is an example of BEC. Cybercriminals are using AI regularly to hide their behavior, including using generative AI tools to replicate the voice of an executive to further their criminal act. Regular cybersecurity awareness training is also recommended.

Privacy

Overview of the Issues

How Does Privacy Law Apply to AI?

Privacy laws apply broadly to protect personal data, and AI is no exception. U.S. state consumer privacy laws and sectoral privacy laws may apply based on the involvement of personal data in any component of AI. International privacy laws applicable to many U.S.-based companies, by nature of the company processing international personal data, could also apply to AI. Notably, proposed legislation to regulate AI has acknowledged the application of privacy laws.

Where Is Personal Data in AI?

Personal data can be found in the data sets used to train AI. Personal data can also be input into an AI tool (e.g., submitting personal data in a prompt to ChatGPT). AI can also be used to make recommendations or inferences that affect privacy.

Potential Recommendations

The AI and Privacy Committee will continue its study of how privacy laws apply to AI and consider any specific implications for Texas lawyers in order to provide pragmatic recommendations to the Texas Bar. Contingent upon the committee's work, the taskforce may consider recommendations regarding the following:

1) how to identify when AI uses personal data
2) best practices for protecting personal data involved in AI

Ethics and Responsible Use

Overview of the Issues

The use of AI in the legal profession raises ethical issues that will need to be addressed by the legal profession.

Ethical Lapses and Misuse of Generative AI

Early instances of lawyers using generative AI in drafting have exposed the potential for ethical lapses due to the misuse of generative AI. Notable instances include:

1) In *Mata v. Avianca Airlines* lawyers submitted a brief with fabricated judicial decisions, leading to sanctions.
2) In *Ex Parte Lee*, a lawyer used a generative AI tool that created nonexistent case citations.
3) A Colorado lawyer was suspended for using fictitious cases from ChatGPT in a legal motion.
4) A Los Angeles law firm was sanctioned for using ChatGPT to draft briefs that included fabricated cases.

Risk of Ineffective Assistance of Counsel

There's a concern about the quality of legal representation, as evidenced by a case in Washington, D.C., where a defendant cited ineffective assistance due to their attorney using generative AI for a closing argument without disclosing financial ties to the AI's developer.

Violation of Ethical and Professional Conduct Rules

Texas lawyers face the risk of violating various disciplinary rules, including:

1) Rule 1.01 on providing competent representation
2) rules related to diligence, candor to the tribunal, supervision of work, and protecting client confidentiality
3) potential violation of Rule 1.05 regarding safeguarding client information, especially when using confidential data in AI prompts in unsecure environments
4) ethical considerations in charging reasonable fees for services enhanced by generative AI tools

Need for Ethical Guidance and Oversight

Ethical guidance and oversight are needed regarding the use of generative AI in legal practices. This includes publishing ethics opinions that address appropriate generative AI use and establish what constitutes reasonable fees and costs in relation to AI use and compliance with ethics and advertising regulations.

Recommendations from Other State Bar Associations

Various bar associations, including those in Florida and California, are proposing guidelines for lawyers using generative AI. These guidelines emphasize the need for lawyers to:

1) protect client confidentiality
2) provide diligent and competent representation
3) supervise both lawyers and nonlawyers in their use of AI
4) communicate adequately with clients about AI use
5) ensure compliance with relevant laws, including intellectual property law

Potential Recommendations

1) Consider having the State Bar of Texas (SBOT) Mandatory Continuing Legal Education (MCLE) Committee promulgate a change to the existing MCLE requirements, making it mandatory that 1.0 hour of an attorney's annual MCLE requirement be in technology.
2) Consider requesting that the Professional Ethics Committee of the State Bar of Texas prepare and issue an ethics opinion providing guidance to Texas practitioners on the ethical dimensions of use of generative AI. This might echo the subjects addressed by the Florida and California ethics proposals discussed in this report. In addition, such an opinion might be along the lines of the Professional Ethics Committee's Ethics Opinion 680 in 2018, which addressed attorneys' use of cloud computing technology, and which addressed multiple ethics concerns.
3) Consider requesting that Texas Bar CLE include that, for at least the next year, one of the subjects at any Texas Bar CLE program be in the area of generative AI use.
4) Consider recommending to the Texas Center for the Judiciary that an educational program on generative AI and its ethical dimensions be added to the center's course offerings for Texas judges. This would provide trial and appellate judges with necessary education on attorney use of generative AI and assist in consideration of potential measures for judicial oversight.
5) Consider recommending to the Supreme Court of Texas Rules Committee that it explore Texas Rules of Civil Procedure 13 on the Effect of Signing Pleadings, Motions, and Other Papers and evaluate whether additional language or guidance is necessary to provide Texas lawyers with additional information regarding AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding same.
6) Consider increasing Texas lawyers' awareness of the benefits and risks of generative AI by increasing the number of CLE offerings and publications regarding this subject. For example, this might include a special issue of the Texas Bar Journal exploring topics related to generative AI.
7) Consider recommending that the State Bar of Texas explore, with one or more AI vendors, a working relationship that would result in a benefit for use by Texas member lawyers. This might, for example, involve discounted access to AI tools, along the lines of the State Bar's previous relationship with Fastcase for legal research.
8) Consider recommending that the State Bar of Texas hold an annual or semi-annual "AI Summit," at which stakeholders from multiple State Bar-affiliated entities could gather to learn about generative AI and share best practices regarding its use. Such an event might also involve

reviewing the work of other state bars and/or other AI taskforces around the country and sharing information regarding the same.

Judiciary

Overview of the Issues

The use of AI in the courts raises ethical and practical issues that should be addressed. These issues include the following.

Standing Orders Prohibiting Litigants from Using GenAI tools Is Not Generally Helpful

Because some attorneys have submitted briefs that contain nonexistent cases, some courts have been entering standing orders that require parties to certify whether any generative AI tool has been used and that all arguments, cited cases and exhibits have been reviewed by a human prior to filing. 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.

Use of Generative AI Tools by Judges, Law Clerks, and Court Staff

The Texas Code of Judicial Conduct is written using broad language. Arguably, a judge relying solely on an AI tool with no subsequent verification would violate Canon 1 of the Texas Code of Judicial Conduct (upholding the integrity and independence of the judiciary).

AI tools may be helpful in drafting rough drafts of any order, but it is advisable that generative AI tools that have been developed for legal use be utilized, rather than generic generative AI tools that may be developed with nonlegal related material and may not be updated regularly with recent cases and statutes.

Confidentiality and Privacy Concerns

If the decision is made to use a nonlegal developed generative AI tool, caution should be exercised to ensure that only public information is entered and that no sealed, personal health information, or sensitive personally identifiable information is inserted into any prompt.

Security Concerns

As with all software or apps that are installed onto court-issued computers, tablets or other devices, it is recommended that any generative AI tools be vetted prior to use. The terms of service of any generative AI tool should be reviewed for industry standard commitments to quality and relevant representations and warranties, including to determine what, if anything, is done with prompts or documents ingested into the tool. How was the tool validated for accuracy and completeness? Are the prompts or documents used to further train the AI tool? Upon the matter's conclusion, how are the prompt histories or documents ingested into the system deleted? What representations are made regarding the AI developer’s cybersecurity measures?

Training

Judges should make law clerks and staff aware of what, if any, acceptable use of generative AI tools the judge authorizes. If the judge allows law clerks and staff to use appropriate legal-based

generative AI tools, judges and court personnel should be trained on how to use the tool (i.e., how to adequately create prompts).

Evidentiary Issues

An immediate evidentiary concern emerges from "deepfakes." Using certain AI platforms, one can alter existing audio or video. Generally, the media is altered to give the appearance that an individual said or did something they did not. The technology has been improving rapidly.

What is more, even in cases that do not involve fake videos, the very existence of deepfakes will complicate the task of authenticating real evidence. The opponent of an authentic video may allege that it is a deepfake in order to try to exclude it from evidence or at least sow doubt in the jury's minds. Eventually, courts may see a "reverse CSI effect" among jurors. In the age of deepfakes, jurors may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake. More broadly, if juries—entrusted with the crucial role of finders of fact—start to doubt that it is possible to know what is real, their skeptic
ism could undermine the justice system as a whole.

Although technology is now being created to detect deepfakes (with varying degrees of accuracy), and government regulation and consumer warnings may help, no doubt if evidence is challenged as a deepfake, significant costs will be expended in proving or disproving the authenticity of the exhibit through expert testimony.

In cases where a party challenges an exhibit as a deepfake or not authentic, judges should consider holding a pretrial hearing to consider the parties' arguments and any expert testimony.

Pro Se Litigants and Generative AI

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.

Potential Recommendations

1) As nonlawyers, pro se litigants are not subject to the Rules of Professional Conduct, but they remain subject to Tex. R. Civ. P. 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.
2) Consider recommending that the State Bar post information for the public on its website about the responsible use of AI by pro se litigants.
3) Consider developing a list of "best practices" for the use of AI in the courts.
4) Consider developing or providing verified tools to guide constructive use of generative AI for pro se litigants.

Governance

Overview

The governance of AI entails rules and standards surrounding the responsible development and use of AI, and the enforcement of such rules. Industry leaders have acknowledged that AI governance or regulation is important and necessary to protect the public. AI governance also includes "soft law" principles that should be used for the development of technology used for the provision of legal services, in courts, or to increase access to justice.

Current State of AI Governance Initiatives

Since 2022, there has been proposed legislation to regulate the use of AI in numerous jurisdictions across the world. Certain trends in the proposed legislation have arisen.

Defining AI

Some of the proposed definitions of AI attempt to focus on generative AI and large language models. There is concern over definitions that are too broad and include common technology like the calculator or that, conversely, are too narrow and could be outdated before the law goes into effect. For example, older types of AI, such as machine learning, can also present risk in legal practice.

High Risk Use of AI

Proposed legislation tends to focus on a risk-based approach where a high-risk use of AI would result in legally significant or similar effects on the provision or denial of (or access to) employment, education, housing, financial or healthcare services, and other significant goods, services, and rights. Variations of the term "legally significant or similar effects" have spread from the E.U. to the U.S. and appear to be a likely standard of measuring the effects of decisions by AI. Whether humans are involved in the decision making also impacts the level of risk. Governance of AI often turns on separating low, medium, and high-risk use cases and applying rules fit to risk level.

Transparency

Proposed legislation in the U.S. and in other countries often seeks to incorporate obligations on deployers and/or developers to make public disclosures of the training data, personal information collected, decision-making process, and impact of the AI output. Competing concerns include intellectual property rights of developers and deployers.

Assessments

Higher risk uses of AI can trigger obligations to conduct and document risk assessments and pre- and post-launch impact testing. In some high-risk cases, red teaming (adversarial testing) of generative AI may become a standard for developers or potentially deployers.

Other Law

Proposed legislation does not purport to override other existing laws like HIPAA, COPPA, consumer privacy, confidentiality, etc.

Issues for Consideration

It is currently unknown what exactly will be required of lawyers and law firms who utilize AI tools. For example, an assessment of high-risk uses of AI and disclosure of AI-based decisions may be required based on proposed legislation.

It is possible that many attorneys and/or law firms could qualify as a deployer of AI, and the use of AI without meeting the prerequisites imposed by statutory obligations such as making appropriate disclosures and conducting a risk assessment could result in a risk of financial and reputational harm.

Potential Recommendations

The AI and Governance Subcommittee will continue studying any proposed AI legislation and other AI governance initiatives to develop pragmatic recommendations to the Texas Bar. The subcommittee will also consider principles and norms that should guide the development of legal AI tools. Contingent upon this committee's work, the taskforce may consider recommendations regarding the following:

1) the tracking and monitoring of legislation and governmental agency regulations for potential publication to Texas attorneys, so that they can use AI in accordance with legal obligations
2) identification of governance trends and the possible consideration of AI-focused legislative proposals in Texas
3) methods for creating and evaluating values and norms for the use of AI in legal technology, including tools to help ensure that results generated by AI tools are valid and unbiased
4) using information gathered in monitoring trends and legislation, provide a sample template allowing attorneys and law firms to evaluate and/or document their use of AI

Employment Law

Overview

Whether you are a Texas lawyer representing Texas employees or Texas employers, or a lawyer litigating on behalf of or against national employers operating in Texas, it is critical to be aware of the many ways in which AI is impacting the modern workplace. Use of AI within law firms for employment or HR purposes can also raise risks and obligations.

Widespread Use of AI in Employment Practices

AI tools are being extensively used by businesses for screening job applicants. AI is also employed in various aspects of human resource management, including recruitment, hiring, training, retention, and evaluating employee performance.

Potential Bias and Discrimination

Despite the potential to eliminate bias, current AI applications might inadvertently perpetuate existing biases, leading to unintentional discrimination. Examples include:

1) AI tools rejecting applicants with resume gaps, potentially discriminating against individuals with disabilities or those who took parental leave
2) overlooking older workers due to smaller digital footprints on social media and professional platforms

Legislative Responses to AI in Employment

There's an increasing trend in city and state legislatures to introduce AI-focused bills. Notable examples include:

1) California's draft AI regulation and legislative proposals to regulate AI's use in employment
2) New York City's Local Law 144 requiring bias audits for automated employment decision tools
3) proposals in other states like Illinois and Vermont focusing on regulating AI in employment decisions and employee monitoring
4) At the federal level, there are proposals like the Artificial Intelligence Research, Innovation, and Accountability Act of 2023 (AIRIA) and the Algorithmic Justice and Online Platform Transparency Act aimed at regulating discriminatory algorithms and allowing government intervention against AI-induced discrimination.

Potential Recommendations

This committee will continue to study what developments may occur in this area. Potential recommendations that the taskforce may later recommend include:

1) advising the Labor and Employment Section to list all legislation and regulations that practitioners in this area should be aware of
2) inasmuch as lawyers are employers as well, recommending that the State Bar publish a listing of legislation and regulations in this area

Family Law

Overview

Texas family law attorneys tend to be early adopters of technology. Family law is a fast-paced field with a high volume of cases, demanding a high level of professional efficiency.

Digital Evidence in Family Law

With over 85% of Americans using smartphones, digital media such as audio recordings, emails, texts, social media posts, and GPS data have become ubiquitous in family law cases. The handling of these extensive and voluminous personal records is a critical aspect of family law practice.

Misuse of Digital Data

Given the emotionally charged nature of family law and the inherent lack of trust between parties, there's a notable issue with the misuse of digital data.

AI's Role in Enhancing Efficiency

AI has the potential to significantly enhance efficiency in family law, similar to past technological advancements like fax machines, scanners, email, and eFiling. However, AI differs in its autonomy, operating without skilled oversight and ethical constraints, and producing sophisticated results.

Use of AI by Self-Represented Litigants

A majority of Texas family law cases involve litigants without legal counsel. Many of these self-represented litigants turn to free online AI solutions to compensate for their lack of legal knowledge.

Legal Aid and AI

Legal aid associations are developing AI avatars to assist clients with inquiries and court preparation.

AI's Potential for Family Law Cases

Family law attorneys should consider utilizing AI to streamline document management, increase efficiency, and enhance communication with clients, while safeguarding courts against potential misuse and avoiding ethical entanglements.

There are many potential benefits of incorporation of AI systems for family law attorneys:

1) **Discovery**: AI document management systems can be used to streamline discovery by proposing and narrowing relevant discovery requests and objections. Voluminous documents can be sorted and scanned to identify responsive records and flag privileged communications that might otherwise escape detection. These systems can eliminate duplication, identify frivolous, repetitious, and bad faith responses, objections, and nonanswers, and then draft requests for sanctions or to compel.
2) **Document Management**: AI systems can independently evaluate records, categorizing them and organizing them by content. These systems can summarize the records as a whole or by category, no matter how voluminous, and then retrieve certain records based on natural language descriptors. Rule of Evidence 1006 summaries can be easily generated and readied for submission in court in lieu of offering separate and numerous exhibits.
3) **Contracts**: AI systems can draft, review, compare, and summarize contracts and drafts, to facilitate the creation of pre- and post-nuptial agreements, AID's, and other settlement agreements.
4) **Improved Communications**: Client hand-holding consumes a significant amount of time for lawyers and staff, particularly in solo and small firms. Online chatbots and virtual assistants can provide simple answers to common client questions, easing the administrative burden on staff, increasing efficiency, and eliminating wasted billable hours. Witness prep for depositions and trial can be bolstered or even replaced with AI training. This is particularly useful for self-represented litigants who have no other source of guidance. Legal Aid services are already implementing online training bots for clients and low income nonclients alike which may soon be made freely available to the general public.
5) **Trial Preparation**: By analyzing strengths and weaknesses of claims, AI systems can identify evidentiary gaps and recommend additional discovery requests, responses, and necessary witnesses. These systems can recommend and create demonstrative exhibits that appeal to certain judges or jurors. Trial briefs can be generated during contested hearings for submission during closing argument. Postjudgment motions can be generated from analysis of transcripts, for use as motions for new trial and polished appellate briefs.
6) **Tracing**: Successful tracing of separate property requires meticulous record keeping and clear presentation of complex concepts. AI can apply and compare various tracing methods and identify potential gaps that could be fatal to a tracing analysis. It can prepare timelines and summaries to bolster the presentation, possibly eliminating the need for expert testimony in some tracing cases.
7) **Social Media**: There is rarely a family law hearing that does not involve social media evidence. Unfortunately, there are many social media platforms, and search features are generally inadequate for sweeping and thorough inspection. AI can continually scan and monitor social

media for useful information about parties or witnesses, or posts indicating bias of potential jurors. This would be of great value in presenting motions to transfer venue under TRCP 257.

Potential Risks

While the potential benefits are numerous, so too are the risks of misuse and abuse. Family law lawyers must be able to anticipate, identify, and respond to these situations.

1) **Falsified Records**: Free AI websites can easily create fake, manipulated, forged, and pseudo documents and records that frequently escape detection. Government records (passports, driver's licenses, search warrants, protective orders, deportation orders) and personal records (medical, drug tests, utility bills, real estate documents, bank statements) can be obtained in seconds, for a minimal cost. Fake emails, texts, audio recordings, and social media posts may be indistinguishable to a nonexpert without application of AI detecting software.
2) **Medical Lay Opinions**: Parental observation and opinion of their child's medical, mental and emotional condition is commonly admitted in family law hearings. The basis for these opinions is explored on voir dire or during cross examination to test the credibility of the parent's testimony. Parents often report relying on input from the children's treating physicians. However, as AI chatbots replace personal interactions with medical professionals, opinions based on doctor's recommendations may be deemed unreliable. This is exacerbated by the recent trend of AI systems being quietly trained by unsophisticated workers to anthropomorphize communications—emoting to show seemingly real empathy and thus soothe frightened patients. Mimicry of empathy and humanity by AI can manipulate human emotion and sway outcomes in imperceptible ways.
3) **Editing of Digital Media**: "Deep fakes" are fictitious digital images and videos. They are created with simple, free apps currently available on both Apple and Android smart phones. With a few clicks or taps, AI can manipulate digital media and create seemingly authentic photos and videos that easily fool unwary recipients. AI detectors flag suspicious files, but they are not foolproof. Attorneys should routinely run all digital photos through AI detectors.
4) **Caller ID spoofing**: Spoofing is the falsification of information transmitted to a recipient phone's display that disguises the identity of the caller. The technique enables the user to impersonate others by changing the incoming phone number shown on the receiving phone. In this way, someone can fabricate abusive, repeated, or harassing calls and texts seemingly originating from one spouse, parent, paramour, child, law enforcement or CPS. The perpetrator can create a mountain of false evidence while hiding behind AI anonymity. AI systems can be instructed to inundate a recipient with nonstop harassing messages or calls, without leaving any digital footprint on the perpetrator's phone or computer. By evaluating years of messages and emails, the AI system can mimic the victim's speech and emoji patterns—a key element of admissibility. Further, AI spoofers can be used to fraudulently obtain or circumvent liability for life-long protective orders under Tex. Code Crim. Pro. 7b for stalking by digital harassment. And because these systems do not work through the service provider, third-party discovery from the phone company will appear to confirm that the calls or messages originated from the spoofed number, lending an air of credibility to the ruse.
5) **Voice Cloning**: Voice cloning apps and websites allow someone to convincingly spoof the voice of any other person with only a single audio sample of the target. Someone with dozens of voicemails and recorded conversations from years of marriage, or even a recorded deposition, can use these systems to create audio files that require an AI detector or forensic expert to detect.

6) **Data Analysis Manipulation**: AI systems can be used to subtly modify large data sets, corrupt legitimate data analysis, and generate false conclusions that appear legitimate and are only detectable by competing expert review. They can fabricate peer review and approval, circumventing the rigorous gatekeeping process that would otherwise be required for admissibility. This allows lay witnesses to present false opinions as verified scientific fact, or as the basis for a law-expert opinion.
7) **Dissemination of Misinformation**: As described above, AI can monitor and find useful social media evidence. However, it can also wield the power of social media to maliciously generate false information and evidence. AI can be unleashed to wage a social media disinformation campaign. It can flood various platforms in a reputation manipulation campaign targeting the judge, opposing counsel, parties, or witnesses. It can untraceably tamper with or poison a jury pool, spreading lies or false legal positions and authority. It can significantly damage the reputation of court participants, enabling the other side to provide negative reputation testimony to undermine the credibility of opposing witnesses. And these efforts could create sufficient taint to legitimately support a motion to recuse or venue transfer motion under TRCP 257.
8) **Facilitated Hacking**: Hackers use AI systems to breach secure cloud databases and obtain unauthorized access to sensitive personal information. Client's financial, medical, or personal communications, including attorney-client privileged emails, could be surreptitiously obtained. Moreover, hackers can target law firms seeking to break into their secure servers, obtaining access to all privileged records and client files. Lawyers should question the source of such information, so as not to run afoul of criminal prohibitions on use of stolen digital data, such as the Texas Penal Code 16.04. Additionally, these systems can hack dating apps and target unwary spouses for romantic entrapment using AI chatbot baiting.
9) **Voluminous Records**: One of the great benefits of AI is the handling of voluminous records: thousands of documents, millions of emails, or decades of bank statements and canceled checks. Through AI analysis, there is the possibility that all could be categorized and summarized, potentially one day without human oversight. However, there remain important questions about the validation of such tools and the ongoing role of human oversight. The committee will explore how to address risks presented by greater use of this technology.
10) **Local Rules and Court Practices**: AI systems can analyze a court participant's public life and social media presence, seeking leverage for inappropriate strong-arming and manipulation. In a similar way, the systems can be unleashed on a judge's personal and professional history, determining personal predilections, biases, and likely outcomes. The old saying, "A good lawyer knows the law. A great lawyer knows the judge," takes on new meaning when the knowledge includes a detailed and thorough psychological and historical evaluation of the judge.

Potential Recommendations

1) Increase Texas lawyers' awareness of the benefits and risks of AI by expanding the number of CLEs and articles regarding same.
2) Consider 1 hour of MCLE per year requirement to meet the technical competency and proficiency requirements of Texas Disciplinary Rules of Professional Conduct, Rule 1.01 Comment 8.
3) Examine and review TRCP 13 Effect of Signing Pleadings, Motions, and Other Papers: Sanctions to ensure that trial and appellate courts have adequate remedies regarding AI- generated misinformation or hallucinations.
4) Increase and support AI integration for low-income and pro bono legal service providers.

5) Annually review AI and its utilization and risk for Texas lawyers.
6) Continually review other State Bar and national legal organizations' reviews and recommendations regarding AI and the legal profession.
7) Periodically review state and federal laws regarding AI and advise Texas lawyers of any changes that would or could affect the practice of law.
8) Ensure that Texas judges are routinely provided with current information regarding the benefits and risks of AI.
9) Begin exploring with AI vendors a working relationship for potential use by Texas lawyers, similar to the State Bar's access to Fastcase.
10) Update predicate manuals to have enhanced materials and examples for offering or challenging digital evidence.

Healthcare

Overview

Complex Regulation of Medical AI

The U.S. Food and Drug Administration (FDA), U.S. Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), state medical boards and others have overlapping and complementary jurisdiction over AI in healthcare and life sciences. The use of AI in healthcare raises important opportunities for new treatments, improved medical decision making, and access to care and defragmentation of the healthcare system. At the same time, AI in healthcare poses unique risks and challenges to existing regulatory and legal rules such as the learned intermediary and the distinction between devices and practicing medicine. Lawyers in this space will face uncharted territory as the technology evolves.

Dependence on IT, the Internet, and Cloud Computing

Healthcare providers heavily rely on information technology, the Internet, and cloud computing, necessitating the protection of patient data privacy, especially when AI is involved.

HIPAA Compliance and Patient Data Protection

Healthcare providers are bound by the Health Insurance Portability and Accountability Act (HIPAA) to protect patient health information (PHI). They use Electronic Health Record (EHR) systems, such as EPIC and Cerner, where AI is likely utilized to assist healthcare providers and business associates.

Third-Party Software and AI Risks

Given the reliance on cloud computing, it's probable that third-party Software-as-a-Service (SaaS) providers use AI. Large cloud computing providers like Amazon offer AI-as-a-Service (AIaaS) to manage vast data volumes, which healthcare providers and business associates may use. However, the usage of AI by SaaS can pose risks to PHI if healthcare providers do not thoroughly review and negotiate online terms of service, click agreements, and privacy policies.

Complexity of AI in Healthcare

AI is involved in various healthcare aspects, including record keeping, diagnostic imaging, triage, prescription dispensing, billing, staffing, and patient satisfaction evaluation. The integration of AI in healthcare legal departments combines the complexities of healthcare, AI, and the law, necessitating tailored guidance.

Potential Recommendations

1) **Engagement with Healthcare IT Professionals**: The State Bar should interact with Chief Legal Officers (CLOs), Chief Information Officers (CIOs), Chief Privacy Officers (CPOs), Chief Information Security Officers (CISOs), and risk management professionals to understand their perspective on AI use in healthcare.
2) **Public Information and Awareness**: Provide accessible information to lawyers and the public about AI's current use in healthcare, its impact on patient care, and patient rights.
3) **Continuing Legal Education Programs**: Offer CLE programs for lawyers and judges to understand how healthcare providers, device manufacturers, covered entities, business associates, and subcontractors use AI. This understanding is crucial for the protection of safety and efficacy, patient care and rights, physical judgement, and PHI and to assist these entities effectively.

Legal Education

Overview

Importance of Understanding AI in Legal Education

Recognizing the significant influence that AI has on the ethical practice of law and case management in courts, it's essential for law school education to address how AI affects these areas. This understanding is crucial for preparing law students for their future roles as lawyers and judges.

AI as an Educational Tool

AI can be beneficial for law students to better comprehend the practice of law, which would ultimately benefit all lawyers and judges. However, there's a concern that an overreliance on AI could lead to a deficiency in the essential skills and knowledge required for legal and judicial careers.

Experiences with Generative AI in Law Schools

Early experiences with generative AI reflect some of the persistent concerns over its use by law students.

1) The University of Michigan Law School prohibited the use of ChatGPT on student application essays.
2) The University of California Berkeley School of Law adopted a formal policy on the use of AI by students but did not pass an outright ban.
3) In a study analyzing ChatGPT's performance on the bar exam, Chicago-Kent College of Law professor Daniel Katz and Michigan State College of Law professor Michael Bommarito found that the AI got answers of the Multistate Bar Exam correct half of the time, compared to 68% for human test takers.
4) Law professors at the University of Minnesota Law School conducted a study which showed ChatGPT performing on average at the level of a C+ student, earning a low but passing grade in four courses. The same researchers authored a follow-up study, Lawyering in the Age of Artificial Intelligence, in November 2023. It found that while use of AI led to consistent and significant improvements in the speed of law students' work on common legal tasks (enhancing it by as much as 32%), AI did not really improve the quality of the work.
5) Legal writing professors interviewed by the ABA Journal who used ChatGPT in writing classes concluded that the AI tool can model good sentence structure and paragraph structure and aid in summarizing facts.

The use of AI in law schools can present the opportunity for certain efficiencies and familiarize students with technology used in practice, but AI is no substitute for a student's own analysis.

Potential Recommendations

1) **Balancing AI Use with Traditional Learning**: A practical solution suggested is to modify legal education to encourage AI use among law students. At the same time, it is recommended that students be required to orally explain their research papers to ensure they retain critical thinking and understanding skills.
2) **Collaboration with Legal Education Institutions**: The State Bar should collaborate with law school deans and law professors to focus on using AI in practical law courses, thereby enhancing the practical aspects of legal education with AI technology.
3) **Mandatory Continuing Legal Education (MCLE) on AI**: The recommendation includes the State Bar mandating MCLE courses about the ethical and practical uses of AI for young lawyers, particularly in the first five years following their passing of the bar exam.
4) **AI Summit**: Consider recommending that the State Bar of Texas hold an "AI Summit," to which deans of the ten Texas law schools will be invited and encouraged to bolster technology law offerings to students, including but not limited to generative AI.
5) **Mandatory Court on AI for Recent Graduates**: Consider a requirement for recent law school graduates, along the lines of the mandatory Introduction to practice course currently in place, to complete a CLE course on the benefits and risks of generative AI.
6) **Ongoing Study**: Consider ongoing review and study of AI-related issues by the State Bar due to its rapid evolution and the advanced rate of adoption within the legal profession. Such ongoing study could include outreach to Texas law schools and providing guest speakers on the subject of generative AI.

The State Bar should encourage law schools to address AI topics in these Law School Courses:

TOPICS	LEGAL EDUCATION POINTS
1L Courses Which Should Include AI	Legal Research Writing Communication & Legal reasoning Foundation of the Legal profession Civil Procedure Legal Analysis & Persuasion
2L & 3L Courses Which Should Include AI	Administrative Law Basic Federal Income Taxation Business Associations Civil Procedure II Comparative Law Constitutional Criminal Procedure Conflict of Laws Estates and Trusts Evidence International Law Law Office Management Professional Responsibility Remedies

	Secured Transactions

Practical Uses

The legal community in Texas would benefit from a consideration of the possible practical uses of artificial intelligence.

Potential Recommendations

1) **Educational Outreach**: We recommend the development of a self-service presentation (slide deck) covering practical use cases and examples of responsible uses of AI. Bar members can review the presentation themselves, and we also recommend that it be presented at each bar section meeting at least once in 2024. To incentivize participation, we suggest offering CLE credits to attendees.
2) **Bar Magazine Articles**: To ensure that information reaches every member of the bar community, we propose the creation of concise one- or two-page articles that cover similar content to the presentation. These can be disseminated through the bar association's email newsletters or magazines, specifically tailored to cater to a less technical audience. The aim is to provide accessible and digestible insights into the world of AI and its relevance to legal practice.
3) **Paralegal Empowerment**: Recognizing the vital role paralegals play in the legal ecosystem, we recommend dedicating a one-page article in the Texas Bar Journal and Texas Paralegal Journal. This content should be tailored to address the unique perspectives and responsibilities of paralegals, making the integration of AI concepts relevant to their daily tasks.
4) **Community Building**: Fostering a sense of community and shared learning is crucial. We are considering recommending the creation of an AI affinity group that meets quarterly. This group would serve as a platform for members to share success stories, exchange insights, and collectively navigate the challenges posed by AI in the legal profession.
5) **Business Mentor Program**: To bridge the gap between tech-forward lawyers and those seeking guidance, we would like to explore designing a business mentor program for bar members. Experienced lawyers well-versed in technology can mentor another bar member, sharing ideas on how to incorporate tech into their practice. This could be designed in coordination with supporting retiring lawyers who want to transition their practice to the next generation of attorneys.
6) **Scholarship Fund for Upskilling**: Acknowledging the financial considerations of adopting AI tools, we propose the establishment of a scholarship fund. Bar members can apply for funds to purchase AI tools or reduce the cost of upskilling during this period of technology transition for the profession. Additionally, exploring potential bar discounts on AI tools would further support this initiative.
7) **List of Social Media Resources**: We recommend compiling a list of reputable groups and associated social media accounts on LinkedIn and Facebook so that bar members can continue to learn about AI in bite-size amounts over the course of the next few years.

Justice Gap

Overview

The “Justice Gap” refers to the tremendous unmet need for legal services among low-income persons. The Legal Services Corporation (LSC) 2022 Justice Gap Study revealed that 92% of the civil legal

problems of low-income Americans did not receive any or enough legal help. Nearly three-quarters (74%) of low-income households experienced at least one civil legal problem in the previous year. A third (33%) of low-income Americans had at least one problem they attributed to the COVID-19 Pandemic. (https://www.lsc.gov/initiatives/justice-gap-research)

How Might Legal AI Help?

Legal AI technology will impact the justice gap on two fronts. First, by making lawyers more productive and thus allowing them to serve more clients, more quickly. Second, via self-help legal tools, in the form of chatbots, designed to be used directly by consumers. (https://www.lawnext.com/2023/09/thoughts-on-promises-and-challenges-of-ai-in-legal-after-yesterdays-ai-summit-at-harvard-law-school.html)

What Are the Potential Challenges or Pitfalls?

Particularly with respect to consumer self-help legal tools, there will be huge challenges in ensuring that data used in legal AI systems is valid and that legal answers consumers receive can be trusted. The subcommittee will survey Texas legal aid providers regarding how they plan to use AI tools in the provision of client services and also directly to clients in form of chatbots (Texas Legal Services Center is beginning to test chatbot technology as a component of its virtual court kiosks, only for the purpose of helping people use the kiosks (https://www.tlsc.org/kiosks)).

Potential Recommendations

The Subcommittee may study and make recommendations regarding the following:

1) strategies for ensuring that direct-to-consumer legal AI tools provide valid information that is usable and effective in helping solve legal problems
2) how to ensure self-help legal AI tools are accessible to people who may have limited internet access or low proficiency in using computers and mobile devices, or who are non-English speakers
3) ideas for supporting Texas legal aid providers as they build out their own legal AI tools
4) how to address the potential for unequal access to AI technology; that is, that legal aid providers will be shut out of access to expensive AI tools which may be accessible only by big firms and corporations; encourage legal technology vendors to provide low-cost access to such tools
5) the potential for AI technology to help with dispute resolution and dispute avoidance
6) ideas for innovative legal services platforms based on AI

Areas for Additional Research

The taskforce identified areas where additional research would be helpful.

1) **The Use of AI by Texas Lawyers**: The taskforce proposes to poll members of the Texas Bar to gain insight into how quickly the use of AI is spreading in the legal profession, and what AI tools are being used.
2) **The Use of AI by the Judiciary**: The taskforce proposed to poll members of the judiciary to gain insight into how AI is being used by and in the courts.
3) **Practical Application of AI**: The taskforce proposes identifying examples of Texas lawyers and judges applying AI to their work.

4) **Responses to AI in Other States**: Taskforces or committees in several states are studying the implications of AI in the practice of law. The taskforce is monitoring these efforts and will consider the findings and recommendations that result from them.

Collaboration

As the taskforce identified issues that span the legal profession, it became apparent that these issues impact other interest groups such as the courts, law schools, and legal regulators, to name a few. The taskforce is planning to invite other stakeholders to an AI Summit in the spring of 2024 to continue the discussion on the impact of AI on the legal profession.

Conclusion

In conclusion, the Taskforce for Responsible AI in the Law has begun to navigate the complex intersection of AI and legal practice. This interim report marks an initial step in our journey, outlining key areas of focus and preliminary recommendations. As we proceed, our work remains grounded in a commitment to thorough investigation and careful consideration of AI's implications for the legal profession. Our ongoing efforts aim to responsibly integrate AI, balancing innovation with the profession's foundational values and ethical standards. The taskforce will continue to diligently explore these emerging challenges, ensuring our final recommendations are informed, measured, and aligned with the evolving needs of the legal community.

Appendix A

Glossary of Useful Terms

The following definitions and key terms are helpful in understanding the report of the taskforce:

1) **Algorithm**: a step-by-step procedure or set of rules designed to perform a specific task or solve a specific problem
2) **Artificial Intelligence** (AI): the simulation of human intelligence in machines, programmed to think and learn like humans
3) **Bias in AI**: the tendency of an AI model to make decisions that are systematically prejudiced due to underlying assumptions in the algorithm or biases in the training data
4) **Chatbot**: a computer program that simulates human conversation through text or voice interactions, often powered by AI
5) **ChatGPT**: a specific type of generative large language model developed by OpenAI, designed to create human-like text based on the input it receives that utilizes deep learning and has been applied in various fields including natural language understanding, content creation, and conversation simulation
6) **Data Training**: the process of feeding data into an AI model to teach it specific behaviors and patterns, allowing it to learn and make predictions or decisions
7) **Deep Learning**: a subset of machine learning that uses neural networks with three or more layers, allowing for more complex and abstract pattern recognition
8) **Ethical AI**: refers to the practice of using AI in a manner that aligns with accepted moral principles and values, especially in terms of fairness, transparency, and accountability
9) **Generative AI**: AI models that create new, original content such as text, images, or music, based on the data they have been trained on
10) **Large Language Model (LLM)**: a type of machine learning model designed to understand and generate human-like text, used in various applications including content creation and natural language understanding
11) **Machine Learning (ML)**: a subset of AI, where algorithms allow computers to learn and make decisions from data without being explicitly programmed
12) **Natural Language Processing (NLP)**: a branch of AI focused on the interaction between computers and humans using natural language, enabling machines to read, interpret, and respond to human language
13) **Neural Network**: a computational model inspired by the way human brain cells work, used in machine learning to process complex patterns and relationships in data
14) **OpenAI**: an artificial intelligence research lab consisting of the for-profit OpenAI LP and its parent company, the non-profit OpenAI Inc. OpenAI is dedicated to advancing digital intelligence and conducts research on various AI topics including machine learning, deep learning, and natural language processing
15) **Reinforcement Learning**: a type of machine learning where agents learn to make decisions by receiving rewards or penalties based on the actions they take
16) **Supervised Learning**: a type of machine learning where algorithms are trained on a labeled dataset, which means the algorithm has access to an answer key while learning
17) **Unsupervised Learning**: a type of machine learning where algorithms are trained without any labeled response data, learning to identify patterns and structures within the input data

Taskforce for Responsible AI in the Law

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Taskforce for Responsible AI in the Law

Report on the 2024 Texas AI and Law Summit

February 26, 2024, Texas Law Center, Austin, Texas

Moderators:

John Browning, Chair TRAIL
Hon. Xavier Rodriguez*
Hon. Roy Ferguson *
Lisa Angelo*
Reginald Hirsch*
Peter Vogel*
Joshua Weaver*

Attendees:

Senior Justice Debra Lehrmann
SBOT President Cindy Tisdale
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* Indicates a member of the Taskforce for Responsible AI in the Law

Recommendations

The Artificial Intelligence ("AI") Summit Attendees' discussion resulted in the following recommendations:

- TRAIL should request a formal ethics opinion on the use of AI and generative AI by lawyers, including when it can be used and how to bill for its use. As a result of the discussion during the Summit, TRAIL Chair John Browning sent a request to the Professional Ethics Committee requesting an ethics opinion and has received a letter confirming that the PEC is working on preparing an ethics opinion in response to the request
- For attorneys using AI, Texas Rule of Civil Procedure 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the Texas Civil Practice & Remedies Code ("CPRC") require reasonable diligence from the filer. The Supreme Court's Rules Committee should clarify the rules without being specific to AI and generative AI.
- The State Bar should educate lawyers and judges about the responsible use of AI and generative AI. This should include educational materials for judges, training on metadata, CLEs on prompting, data privacy, and responsible document sharing. Short-take CLE products and AI topics tailored to specific practice areas could also be effective. Education efforts could involve the Texas Access to Justice Commission ("ATJ"), the State Bar, pro bono groups, and other organizations, with resources provided on the State Bar website.
- A toolkit should be created, focusing on AI and cybersecurity more broadly, written in plain language, and maintained by the State Bar.

Executive Summary

The Taskforce for Responsible AI in the Law held an AI Summit in Austin at the Law Center on February 26, 2024. Members of the Taskforce moderated sessions on several issues identified by the Taskforce as important to lawyers in addressing the risks and opportunities presented by AI and generative AI. Topics included ethical use of AI, addressing AI through legal education, cybersecurity and privacy concerns, use of AI in the courtroom, and AI and access to justice. The Taskforce invited stakeholders from across the legal community to attend the discussion. The group of approximately 40 attendees included Supreme Court Senior Justice Lehrmann, Rules Attorney Nina Hsu, representatives from several Texas Law Schools, a representative from Texas Health Resources, and representatives from State Bar Committees including the CLE Committee, the Court Rules Committee, and the Law Practice Management Committee.

Ethical and Privacy Concerns

The AI Summit discussion focused on how the existing ethics rules apply to AI, and whether the existing rules are adequate in providing guidance to attorneys on how to use AI ethically. The group also considered whether additional ethics rules are necessary to provide attorneys with guidance and to protect clients.

The AI Summit attendees discussed AI broadly instead of focusing only on Generative AI. The AI Summit attendees noted that AI has become so pervasive in most technology applications that it is not feasible for attorneys to eliminate the use of AI, even if that were desirable. It would therefore

not be feasible for an attorney to effectively represent a client without in some way making use of AI.

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.

2018 Ethics Opinion 680 requires lawyers to understand the technology they use, including cloud services. TRAIL's Interim Report proposed requesting a formal ethics opinion on the use of AI by lawyers, including when it can be used and how to bill for its use. The discussion at the Summit supported this recommendation.

An ethics committee should define due diligence for electronic services, as the level of risk varies among AI applications.

Transparency in AI is expected to improve, and lawyers need to review privacy notices and terms of service. Debate exists on whether increasing the technology CLE requirement is necessary, as market forces may address the issue and lawyers learn about AI risks quickly.

While the AI Summit discussion did not propose drafting additional ethics rules specifically addressing AI, the group did note that any new rules should be AI-agnostic, emphasizing the lawyer's responsibility for the contents of signed documents.

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.

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.

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 involve the ATJ, State Bar, Pro Bono Law Group, and other organizations, with resources provided on the State Bar website.

AI in Legal Education

Law schools should be encouraged to address the challenges and benefits of technology and AI in their curricula. AI education could be embedded in legal writing courses or offered through short CLE presentations. The State Bar can support law schools by clarifying what "professional competence" means concerning AI and offering nuts-and-bolts education for new lawyers.

Law students need to understand the terms of use of AI services, data privacy, and the complexity of de-identification.

CLEs on prompting, data privacy, and responsible document sharing could be helpful. Short-take CLE products and AI topics tailored to specific practice areas could also be effective.

Real-time, AI-driven spoken communication might transform how people learn about AI.

AI and Cybersecurity

AI is being used to create more effective phishing emails and malware, with threat actors patiently collecting information before attacking.

Continuous training is crucial for all staff members, not just attorneys. Cybersecurity issues need to be translated into plain language for better understanding. Solo and small firm attorneys need resources and toolkits, particularly regarding cyber insurance.

The State Bar could remind attorneys about the availability of cybersecurity insurance and resources. Cyber insurance requires affirmative steps to protect data and may not cover all potential problems.

Lawyers should understand where their data resides and take advantage of free resources for training and risk assessments.

A toolkit should be created, focusing on AI and cybersecurity more broadly, written in plain language, and maintained by the State Bar.

AI and Access to Justice

The AI Summit attendees discussed the potential benefits of AI and generative AI for increasing access to justice. However, many attendees also expressed concern that AI and generative AI is not an adequate substitute for qualified legal assistance. Concerns were raised about over-reliance on AI and generative AI as a method of providing low-cost legal services. Some members of the group

proposed considering safe harbors or coverage for attorneys doing pro bono work with AI, while some members opposed this proposal.

Other proposals included increasing support and funding for legal aid to serve as a testing ground for AI adoption and exploring the use of AI, including AI and generative AI videos, to create more educational and empathetic resources for pro se litigants.

TEXAS CIVIL JUSTICE LEAGUE
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May 20, 2024

The Honorable Nathan Hecht
Chief Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78701

Dear Chief Justice Hecht:

On November 8, 2022, the Texas Civil Justice League respectfully requested you refer the issue of third-party litigation funding (TPLF) to the Supreme Court Advisory Committee for promulgation of an amendment to the Texas Rules of Civil Procedure establishing a framework for discovery and disclosure of TPLF agreements under appropriate circumstances. Our correspondence today serves as an addendum to that request and is intended to provide the committee with the history of action (or inaction) in the Texas Legislature on this topic.

We believe the notion of "lawsuit lending" (at various times also known as "lawsuit loan," "consumer lawsuit lending," "alternative litigation financing," "lawsuit advance funding" and "third party litigation funding") was first brought to the Texas Legislature's attention in 2005. At the time, the focus was on small dollar loans made to individual consumers using the proceeds of the lawsuit or settlement as collateral. The practice was akin to a plaintiff's counsel fronting his client small dollar loans to pay for living expenses prior to a resolution of a lawsuit or settlement.

In 2005 (79th Legislative Session), HB 2987 was filed by Representative Joe Nixon (R-Houston) which prohibited usurious interest rates on lawsuit loans. The bill passed the House, was picked up by Senator Ken Armbrister (D-Victoria), passed the Senate Business & Commerce Committee, but was never recognized on the Senate floor for debate. The bill language and history can be found at: https://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=HB2987. The House Research Organization report can be found at: https://hro.house.texas.gov/pdf/ba79R/HB2987.PDF

We are unaware of any legislative activity on this topic between the 79th and 82nd Legislative Sessions (2005-2011).

The issue reappeared in 2012, during the 82nd legislative interim, when the House Judiciary and Civil Jurisprudence Committee was given the following interim charge (#5) regarding Alternative Litigation Financing:

Study the public policy implications of lawsuit lending and its effects on the civil justice system.

Chairman Tryon Lewis (R-Odessa) held a hearing on the topic on April 18, 2012. A primer on the topic was prepared by the Texas Civil Justice League and the Texas Association of Defense Counsel (TADC) testified. For your convenience, we are attaching both the primer and the testimony. The committee made the following conclusion in its report:

This committee affirms that "consumer lending" serves a legitimate need in the Texas economy. While the committee believes that reasonable regulations may be appropriate, it makes no specific recommendation regarding the regulation of consumer lending and believes that no compelling reason to prohibit the practice has been offered. Regarding "Lawsuit Finance," it is the committee's opinion that companies engaged in lawsuit finance should have to disclose their financial arrangements with attorneys, and their financial interest in lawsuits. There should be limits on this discovery; for instance, attorneys should not be able to determine opposing counsel's legal strategy through discovery. This should still fall under the attorney/client privilege. But, because of the unique circumstances behind these types of cases, there should be exceptions to the attorney/client privilege when these types of investors become involved in a lawsuit. Plaintiffs deserve to know when a third party has an interest in their lawsuit and what that interest is, as does the defendant and opposing counsel.

The full report can be found at (beginning on page 23):
https://house.texas.gov/_media/pdf/committees/reports/82interim/House-Committee-on-Judiciary-and-Civil-Jurisprudence-Interim-Report-2012.pdf

During the 83rd Regular Session (2013), Representative Doug Miller (R-New Braunfels) and Senator Joan Huffman (R-Houston) filed HB 1595 and SB 927, respectively. The house bill was heard in the House Judiciary and Civil Jurisprudence Committee on March 18, 2013, and a committee substitute was voted out on May 5, 2013, but never voted out of the House Calendars Committee. This bill required full licensure of litigation funding entities and was prescriptive in terms of the provisions of financing agreements. The bill language can be found at:
https://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/HB01595H.pdf#navpanes=0

In 2015, 84th Legislative Session, Senator Kevin Eltife (R-Tyler) and Representative Tan Parker (R-Flower Mound) filed SB 1282 and HB 3094, respectively, an omnibus bill relating to the regulation of consumer credit transactions and the regulation of the Office of the Consumer Credit Commissioner.
https://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/SB01282H.pdf#navpanes=0

SB 1282 passed the Senate and was referred to the House Investments & Financial Institutions Committee. Then-Representative (now-State Senator) Phil King (R-Weatherford) added an amendment in committee that proposed to authorize the Office of Consumer Credit Commissioner to regulate the industry and impose an annual cap on the industry's interest rate to

36% (the industry was pushing a measure that would have capped their interest rate at 100%). The bill was ultimately killed in the House in the final days of the 84th legislative session.

No legislative action was pursued in the 85th Legislative Session (2017).

Beginning in 2017, the use of what we now refer to as "third party litigation funding" emerged in full force. Instead of small dollar "loans" to consumers, the funding shifted to private investment in civil litigation in exchange for a portion of a settlement, judgment or some agreed value above the amount loaned to the claimant. By its very nature, TPLF injects unknown third parties into matters whose only interest is increasing the return on their investment. These third-party funders are sophisticated investors like venture capital firms or hedge funds, both in the United States, and abroad. The federal General Accounting Office (GAO) reports $3.2 billion in assets were under litigation funding in 2022 alone.

In 2019, during the 86th Legislative session, Senator Pat Fallon (R-Frisco) and Representative Matt Krause (R-Haslet) filed SB 1567 and HB 2096, respectively. These bills did require disclosure of a litigation financing agreement but did not regulate interest rates or any aspects of the practice of litigation funding. After significant pushback from politically conservative public-interest groups and law firms who use third-party financing in issue-oriented lawsuits, the bill authors declined to pursue the legislation.

No legislative action was pursued in the 87th Legislative Session (2021).

As mentioned before, in November of 2022, the Texas Civil Justice League requested this issue be referred to the Supreme Court Advisory Committee for rulemaking. For reference, that letter is attached.

No legislative action was pursued in the 88th Legislative Session (2023).

Recently, the existence of third-party intervention in lawsuits has also gotten the attention of the plaintiff's bar. First and foremost, these funders are not attorneys and arguably fall under the auspice of the unauthorized practice of law. While they may not be arguing in the courtroom, they are clearly influencing litigation decisions including when to settle and for what amount. As one lawsuit lender admitted, "We make it harder and more expensive to settle cases." (J, Gershman, "Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight," *Wall Street Journal*, March 21, 2018, at wsj.com (quoting Allison Chock with Bentham IMF).

Moreover, third party lawsuit lending is impacting the amounts ultimately received by the injured party. As most representation of litigation on the plaintiff's side is supported by contingency fee arrangements, the coupling of another percentage fee arrangement on top of the lawyer's clearly reduces the amount ultimately recovered by the plaintiff. In some instances, the injured party ends up receiving less than the funder. A study conducted by Swiss Re Institute found civil cases involving third-party funders took 15 months longer to settle than cases where none was present. And, while longer cases might sometimes lead to greater rewards, these rewards are rarely passed on to the claimant, as cases involving third-party funders leave

claimants with 12 percent less in take-home settlement funds. This inequity seems contrary to public policy.

Finally, the possibility of foreign adversaries using TPLF may threaten U.S. national and economic security. A 2022 letter from Sen. John Kennedy (R.-La.) to Chief Justice of the United States John Roberts and U.S. Attorney General Merrick Garland highlights this very concern, recognizing that "few safeguards exist in any form of law, rule, or regulation to prevent foreign adversaries from participating in civil litigation as an undisclosed third-party in our country's federal courtrooms." *(https://www.kennedy.senate.gov/public/pressreleases?ID=1FBC312C-94B8-409B-B0A3-859A9F35B9F5).* Sen. Kennedy warns that "[m]erely by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country." (*see id*). Examples include prolonged litigation affecting U.S. competition or the economy or access to confidential trade secret information for state purposes. Judges and parties have a right to know whether non-related interests are driving the litigation, and a mandatory disclosure rule would effectuate that right.

In conclusion, we hope you find this legislative history useful as the Supreme Court Advisory Committee deliberates on this topic. If we can be of further assistance, please do not hesitate to ask.

Sincerely,

Lisa Kaufman

Lisa Kaufman
General Counsel

TEXAS CIVIL JUSTICE LEAGUE

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November 8, 2022

The Honorable Nathan Hecht
Chief Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Hecht:

In the last 20 years, the growing prevalence of third-party litigation funding (TPLF) has sparked a national debate over the extent to which TPLF agreements should be disclosed, discoverable, or otherwise regulated by the state. In view of the rapid growth of the TPLF industry, it seems likely that the debate will only intensify. On one hand, proponents seek legislative or judicial action either legitimizing their business or keeping other people's noses out of it. On the other, opponents seek with equal conviction to heavily regulate the industry or at minimum mandate disclosure of TPLF agreements to all parties in the litigation.

To date, two states, Wisconsin and West Virginia, have enacted mandatory disclosure statutes. Some federal district courts have adopted rules requiring disclosure of TPLF agreements to the court, including the Districts of Delaware and New Jersey, and the Northern District of California. More limited disclosure requirements have been adopted in at least two federal MDL cases, while more generally a number of other federal district and appellate courts have local rules that require disclosure of entities with a financial interest in the outcome of the litigation. Case law in the federal system is somewhat split, with some courts requiring disclosure when specific conditions are met and others denying discovery of TPLF agreements as either irrelevant or protected by attorney work product privilege.[1] Numerous state legal ethics opinions have weighed in on the relation between TPLF and various ethical rules, and the American Bar Association House of Delegates has recently issued "best practices" guidelines to assist attorneys and third-party funders in navigating the potential legal and ethical pitfalls of TPLF agreements.[2] No uniform standards exist to guide federal and state courts in determining if, when, to whom, and to what extent TPLF agreements should be disclosed.

This debate has come to the Texas Legislature as well, most recently in the form of H.B. 2096 and S.B. 1567, which were filed during the 2019 legislative session.

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[1] See Mark Behrens, Katie Jackson, and Cary Silverman, "Third-Party Litigation Funding: State and Federal Disclosure Rules and Case Law," May 11, 2022. https://shb.com, last visited July 31, 2022.

[2] See "ABA Outlines Best Practices for Third-Party Litigation Funding." https://www.americanbar.org/groups.business_law/publications/committee_newsletters/consumer/2020/202011/thid-party, last visited August 31, 2022.

This proposal directed the Supreme Court to adopt a rule mandating disclosure of TPLF agreements to all parties in a civil action. Although the legislation did not progress beyond the committee stage, we anticipate that something like it may again be introduced in the future as more states take or consider similar action.

That is why, on behalf of the members of the Texas Civil Justice League, we are asking you to refer the issue to the Supreme Court Advisory Committee for promulgation of an amendment to the Texas Rules of Civil Procedure establishing a framework for disclosure and discovery of TPLF agreements under appropriate circumstances. We understand and appreciate that sharp disagreement exists among members of the civil trial bar, the business community, the TPLF industry, and other stakeholders regarding both the threshold question of whether the existence of such agreements should be disclosed at all and, if so, just how much information should be provided. The SCAC, with its broad representation of the civil trial plaintiff's and defense bar, the judiciary, and in-house counsel, is the ideal forum for making policy in this area.

As for TCJL, we support mandatory disclosure of the existence of third-party funding agreements for both consumer and commercial litigation to all parties in the litigation. In our view, a disclosure statement should include: (1) the name, address, and place of formation of the third-party funder; (2) whether any third-party funder's approval is necessary for litigation or settlement decisions in the action, and, if the answer is yes, the nature of the terms and conditions of such approval; and (3) a brief description of the type of funding provided and whether any attorney's fees that may be awarded in the matter will be subject to assignment to the third-party funder.[3] A disclosure statement of this nature would put the court and parties on notice a funding company's interest in the outcome of the case without intruding into the realm of attorney work product, litigation strategy, or the specific amount of funding involved. It would also help illuminate whether certain third-party funding arrangements violate Rule 5.04 of the Texas Disciplinary Rules or Professional Conduct.

If it is the case that a TPLF agreement confers authority on the provider to make or participate in litigation or settlement decisions or to receive an assigned share of attorney's fees, a party could make a discovery request for more information, including the agreement itself, provided that such request meets the relevancy and other requirements of the existing rules. This may well be a rare case, given that to our knowledge most TPLF providers disclaim any involvement in managing or influencing litigation or settlement strategy (although we are not sure of the extent to which fee-splitting between lawyers and non-lawyers may be occurring).

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[3] This proposal closely tracks the Standing Order Regarding Third-Party Litigation Funding Arrangements issued by the Chief Judge of the United States District Court for Delaware. https://ded.uscourts.gov/sites/ded/files/Standing%20Regarding%20RegardingThird-Party%20Litigation%20Funding.pdf, last visited July 31, 2022.

But if such influence does exist, the court and other parties should have the tools to assess whether further disclosure should be compelled if it is relevant to identifying potential conflicts-of-interest and protecting the court's and attorneys' respective duties to the judicial system and the litigants they serve.

Thank you for your continued commitment to maintaining a fair, efficient, and transparent civil justice system. We deeply appreciate all you have done on behalf of the citizens of our state.

Sincerely,

George Christian
Senior Counsel

THE LEAGUE
TEXAS CIVIL JUSTICE

Alternative Litigation Financing

Testimony to the Texas House Committee on Judiciary & Civil Jurisprudence

TEXAS CIVIL JUSTICE LEAGUE *APRIL 18, 2012*

Background: What is ALF?

In his interim charges to House committees, Speaker Joe Straus has asked the Committee on Judiciary & Civil Jurisprudence to "study the public policy implications of lawsuit lending and its effects on the civil justice system." This charge responds to a growing national debate in the legal community regarding ethical questions raised by alternative litigation financing ("ALF"). ALF, also referred to as third-party litigation financing, is a practice in which investors provide funding to a litigant, usually in the form of a non-recourse loan, in return for a monetary interest in the outcome of the litigation. Currently, most ALF arrangements involve claimants, but nothing precludes defense financing as well. Its use in the United States thus far, however, appears limited primarily to litigation involving unsophisticated claimants in the mass tort arena, where settlements of bundled claims can produce significant returns to investors. It does not appear that any publicly-held entities have yet engaged in ALF in the US, though the changing economics of legal practice have sparked interest in equity investments in law firms (a more indirect form of ALF). One may reasonably expect that if ALF becomes the norm in large-scale litigation, publicly-held entities, pension funds, mutual funds, venture capital firms, and other entities may well participate.

ALF originated in the United Kingdom and has spread to other common law jurisdictions, primarily Australia, New Zealand, and, more recently, the United States. Limitations on contingency fees and bar rules that permit fee sharing between attorneys and non-attorneys helped spur the creation of the ALF industry in the UK, where both publicly-held and private investment companies regularly invest in commercial and other litigation. According to the American Bar Association, ALF has become a feature of complex disputes between experienced parties with substantial, ongoing litigation in UK courts and supports both offensive and defensive claims.

Alarmed by the trend toward increased use of ALF, late last year the American Bar Association Commission on Ethics 20/20 formed a working group to solicit comments from interested parties respecting the ethical implications of "investor-owned" litigation and the status of so-called ALF suppliers, the individuals or entities that buy shares in lawsuits. The ABA Commission's request for comments included an extensive memorandum discussing the relevant common law and disciplinary rules. Our analysis also includes the specific Texas statutory provisions, disciplinary rules, and case law that are pertinent to ALF arrangements.

The Common Law Background

For centuries the common law has developed specific legal doctrines designed to protect litigants from third-party financial interests gaining control of their claims and defenses. These doctrines include:

- Maintenance—malicious or officious intermeddling with a suit that does not belong to one, by assisting either party with money or otherwise to prosecute or defend; something done which tends to obstruct a court of justice or is against good policy in tending to promote unnecessary litigation and is performed under a bad motive.
- Champerty—a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.
- Barratry—the practice of exciting groundless legal proceedings (also referred to as "common barratry").

The Texas Supreme Court has held that Texas does not recognize the English common law doctrine of maintenance, champerty, and common barratry. In Harriet W. Bentinck v. Joseph Franklin and Galveston City Company, 38 Tex. 458 (1873), the court ruled:

> *Whether the English statutes prohibiting common barratry, maintenance and champerty have ever come to be regarded as a part of the common law of*

England, even in that country, we think, is somewhat doubtful. They have certainly not been so considered by the courts of this country, unless in the State of New York, which would be regarded as an exception to the rule. The English statutes, if not in terms, have been in principle adopted by the Legislatures of some of the States; but neither of the statutes passed in the reign of Edward I. nor Edward III., nor has that of 8 Elizabeth, c. 2; 12 George I., c. 29; nor 32 Henry VIII., c. 9, ever been adopted by the Legislature of Texas.

If, then, they have not become a part of the common law of England, they form no part of our system.

It is more than probable that the political power of our State has never regarded the principle contained in the English statutes as necessary or applicable to the condition of our people. A law which would prevent the officious intermeddling in the suits of others, in no way concerning parties so interfering, might be a salutary law in any State or community; but it cannot be denied that cases often present themselves to the profession in which a good man may do a service to humanity by espousing the cause of the weak against the strong.

The offense of common barratry is a species of immorality against which no law is necessary to warn the American profession.

The reasons which led to the enactment of 32 Henry VIII. do not exist in this country. In a country where all the lands embraced in what was once three kingdoms are owned by about eleven thousand persons, who form a strong landed aristocracy, such a statute as that of 32 Henry VIII. might serve to keep the land titles within these aristocratic limits; but in this country we have land for the millions; and if a lawyer helps his client to recover lands from the possession of another, and even takes a part of the land for his fee, if the right of his client is clear to the land, we are unable to see any immorality or breach of professioal ethics in the transaction. Yet it would certainly be very wrong for attorneys to become mere jobbers and speculators, to hunt up rotten titles and ferment litigation.

As indicated in the Bentinck opinion, the usual context for the common law defense of maintenance, champerty, and common barratry was in a dispute between an attorney and client over a fee agreement in which the attorney received a portion of the client's land in an action for the recovery of the client's real property. The origins of the defense lay in the preservation of feudal tenures, hence the court's holding that Texas' adoption of the common law of England did not include those parts of the common law inapplicable to the republic.

The Statutory Background: Barratry

Texas has long recognized the criminal offense of barratry. The offense existed at common law, and the Legislature codified it in the 1879 Revised Penal Code. The Legislature has included barratry in each revision of the Penal Code since 1879, and the current statute (last amended in 2009) is §38.12, Penal Code. The statutory offense of barratry is more narrowly circumscribed than the common law doctrine. A person commits barratry if, with intent to obtain an economic benefit the person:

(1) knowingly institutes a suit or claim that the person has not been authorized to pursue;

(2) solicits employment, either in person or by telephone, for himself or for another;

(3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client;

(4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;

(5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or

(6) accepts or agrees to accept money or anything of value to solicit employment.

The statute further prohibits a person from knowingly financing the commission of barratry, investing funds the person knows or believes are intended to further barratry, or knowingly accepting employment as a professional from an illegal solicitation of employment.

Barratry is a third degree felony in Texas. The statute does not apply to conduct authorized by the Texas Disciplinary Rules of Professional Conduct or a court rule. The statute also creates a separate offense of solicitation of professional employment, applying broadly to attorneys and health care providers, but classifies the offense as a Class A misdemeanor (unless it involves a repeat offender, in which case the offense is likewise a third degree felony).

Sec. 82.065, Government Code, governs contingent fee contracts and civil remedies for violations of state law and the Disciplinary Rules related to barratry. It requires a contingent fee contract for legal services to be in writing and signed by the attorney and client. It further allows the client to void the contract if it was procured as a result of conduct violating the laws of this state or the Texas Disciplinary Rules of Conduct regarding barratry by attorneys or other persons (see discussion below). During the 2011 session, the Legislature amended §82.065 to allow an attorney who was paid or owed fees or expenses under a contract voided under this section to recover fees and expenses based on a quantum meruit theory, if the client does not prove that the attorney committed barratry or had actual knowledge, before undertaking the representation, that the contract was procured as a result of barratry by another person. To recover the attorney must have reported the misconduct

as required by the Disciplinary Rules, unless another person already reported the conduct or the attorney reasonably believes that reporting would substantially prejudice the client's interest.

The 2011 Legislature also added a new civil cause of action for barratry. A client who brings a civil action to void a contract for legal services procured as a result of barratry may recover all fees and expenses paid under the contract, fees and expenses paid to any other person under the contract (less fees and expenses based on quantum meruit), actual damages, and attorney's fees. A person improperly solicited for a contract for legal services may also file a civil action, even though the person did not enter into the contract that violates the law or disciplinary rules. If successful, the person may recover a penalty of $10,000, actual damages, and attorney's fees.

The Ethical Background: Barratry, Conflict of Interest, Client Confidentiality, Fee Arrangements, Independent Judgment

(1) Barratry. There are a number of ethical rules that may apply to ALF arrangements under certain circumstances. Rule 7.03, Texas Disciplinary Rules of Professional Conduct, broadly parallel the criminal and civil statutes proscribing barratry. It reads as follows:

> (a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:
>
> (1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
>
> (2) the communication contains information prohibited by Rule 7.02(a) ; or
>
> (3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.
>
> (b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(2) Champerty and Maintenance. The old common law doctrines of champerty and maintenance, though not recognized by judicial decision, are carried forward in part in the Texas Disciplinary Rules of Professional Conduct as well. Rule 1.08 prohibits certain transactions that may compromise the lawyer's duty of fidelity to the client. It includes a provision barring a lawyer from accepting compensation for representing a client from a person other than the client unless:

> (1) the client consents;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.05.

The rule states further that a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
>
> (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

As stated by the comment to the rule:

> *This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions*
>
> *developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.*

More generally, Rule 1.06 bars a lawyer from representing a person if the representation "reasonably appears to be

or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests." A lawyer may, however, proceed with the representation if the lawyer reasonably believes the client's representation will not be materially affected and each affected client consents to the representation after full disclosure.

(3) Fees; Client Confidentiality; Professional Independence. The terms of a particular ALF arrangement may also raise ethical issues with respect to the fees charged by the lawyer, the confidentiality of client information, and the professional independence of the lawyer.

- A lawyer must charge a "reasonable" fee. Specifically, a lawyer may not "enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."

- A lawyer may not disclose confidential client information to a third party or use client confidential information to the disadvantage of the client, except under extreme circumstances or if the client consents to the disclosure.

- A lawyer may not allow a person who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment on behalf of the client. Moreover, a lawyer shall not practice with or in any form of business that is authorized to practice law for a profit if a nonlawyer owns any interest in the business or has the right to direct or control the professional judgment of the lawyer.

Potential Legal and Ethical Issues with ALF

Within this framework of statutes and disciplinary rules, ALF raises a complex and interlocking set of legal and ethical issues. As identified by the ABA Commission on Ethics 20/20, these issues may be summarized as follows:

- Confidentiality and Privilege. In order to evaluate a case for possible investment, an ALF supplier may ask an attorney for information protected by attorney-client or work product privilege. As discussed above, Rule 1.05 broadly prohibits the disclosure of any confidential or privileged client communication without the express consent of the client. Such information may include, for example, the lawyer's assessment of the client's case and the likelihood of the client prevailing. Moreover, even if the client consents to the disclosure of confidential information to an ALF supplier and therefore waives privilege (if the communication is indeed privileged), the privilege may not be reasserted against any other party to or interest in the suit. In that event, the lawyer might likewise run afoul of Rule 1.05(b)(2), which bars the lawyer from using the client's confidential information to the client's disadvantage without consultation with and consent of the client. Thus, it would appear that if a lawyer wishes to seek an ALF arrangement with respect to a client, the lawyer must obtain the client's consent for both the disclosure of information necessary to secure the ALF contract and the possible consequences of the disclosure of the information in the litigation itself. This may not be completely known at an early stage in the lawsuit, however, creating a potentially difficult ethical issue that could materially affect the client's prospects for a successful outcome.

- Professional Independence. As we have seen, an attorney owes an ethical duty to his or her client to represent zealously the client's interests and to exercise independent professional judgment on behalf of the client. The presence of a third party with a potentially significant interest in the outcome of the lawsuit raises the possibility of conflicts between the client's desires, the attorney's evaluation of the client's best interests, and the financial interest of the ALF supplier. It is conceivable that the ALF supplier may even attempt to influence, directly or indirectly, the lawyer's handling of the case. Moreover, an attorney who both represents the client and invests in an ALF supplier that finances the suit faces the potential for conflicts between the client's interest and the attorney's financial interest. Consequently, a Texas lawyer seeking an ALF arrangement will have to consider Rules 1.06 (conflict between the lawyer's and client's interest), 1.08 (the lawyer's acceptance of payment for legal services by a person other than the client, and 5.04 (professional independence of the lawyer).

- Conflicts of Interest. A client may seek his or her attorney's advice when deciding whether to pursue or accept ALF for a particular claim. If the attorney advises the client to agree to an ALF supplier acquiring an interest in the litigation and the client subsequently enters into a contract with a supplier, the attorney may then have a duty to inform the ALF supplier (in addition to the client) of material adverse developments in the litigation. A question therefore arises as to whether the client should seek an independent opinion regarding the advisability of ALF in this particular instance. Texas Disciplinary Rules 1.05 and 1.06 may be pertinent here, since a conflict may be created by both the terms of the ALF contract itself and the lawyer's personal financial interest in securing ALF for the claim. Rule 1.08 may also come into play, since an ALF agreement could be construed as a business transaction with the client. In that event, the lawyer must fully disclose the details of the arrangement, allow the client to seek independent legal counsel, and obtain the client's written consent to the ALF agreement.

- Fees. Most ALF agreements are structured as non-recourse loans that are repaid solely from the eventual settlement or judgment in the litigation. But other types of fees or payments may be contractually arranged, including finder's fees for attorneys who refer clients to an ALF supplier or non-contingent legal fees. The ethical issues here involve whether the payment of substantial finder's fees by ALF suppliers may constitute barratry and whether and under what circumstances the attorney must disclose to the client fees paid by the ALF supplier. These circumstances might invoke Texas Disciplinary Rules 1.08 (prohibited transactions) and 7.03 (prohibited solicitations and payments), as well as the criminal and civil liabilities discussed above. Moreover, the high interest rates common to ALF arrangements may rise to the level of an unconscionable fee under Texas Disciplinary Rule 1.04, as well as create the po-

tential for usurious interest charges in the event the claimant prevails in the suit and the loan is repaid from the proceeds (if, as discussed below, the ALF agreement may be construed as a loan subject to interest rate limitations).

- Withdrawal. ALF contracts may limit the ability of the client to terminate the attorney's representation or of the attorney to withdraw from the litigation. If the ALF supplier has the power to approve or veto termination or withdrawal or the hiring of substitute counsel, both the client's right to discharge the lawyer and the lawyer's ethical duty to withdraw from or terminate the representation under certain circumstances may be compromised.

Numerous lawyers, firms, ALF suppliers, and national legal interest groups, including the American Tort Reform Association, the Institute for Legal Reform of the U.S. Chamber of Commerce, and the American Insurance Association, filed comments with the working group. While much of the content of these responses is repetitive, the primary arguments in favor of and opposed to ALF can briefly be characterized as follows:

ARGUMENTS IN SUPPORT OF ALF

(1) the availability of litigation financing for trial attorneys and their clients allows greater access to the judicial system while safeguarding both the attorney's ethical obligations and the client's interests;

(2) a significant amount of litigation is already funded by third parties, such as financial institutions that lend money to lawyers to finance their practices, insurers through subrogation, and contingency fee arrangements in a growing variety of contexts—ALF is no different;

(3) the ethical questions raised by ALF do not vary in kind from those arising under other financing arrangements and that the ABA Model Rules and most states' rules of professional conduct adequately address conflicts of interest, attorney-client and work product privilege, and other issues.

ARGUMENTS IN OPPOSITION TO ALF

(1) the expansion of ALF will encourage the proliferation of litigation with no offsetting public policy benefits;

(2) ALF causes irreparable harm to the U.S. system of justice by turning litigation into a marketable commodity and courts into investment instruments;

(3) by its very nature ALF introduces third party financial interests into the attorney-client relationship, producing insoluble conflicts of interest and threatening the lawyer's duty of confidentiality and loyalty to the client.

Buyer Beware: Is ALF "Legal Loan-Sharking"?

According to a January 17, 2011 article published in The New York Times, loans to consumers from ALF suppliers can resemble the kind of high-interest loans usually associated with unregulated lenders. In fact, the Attorney General of the State of Colorado has filed suit against two ALF suppliers for violations of Colorado lending laws. In an effort to avoid regulation, ALF suppliers have banded together to persuade state legislatures to pass model legislation sanctioning alternative litigation finance. Thus far, Maine, Ohio, and Nebraska have enacted such legislation, and it has been introduced in several more, including New York, Illinois, and Maryland.

Even some plaintiff's lawyers, however, worry that ALF suppliers take advantage of vulnerable consumers. "It takes advantage of the meek, the weak and the ignorant," according to New York plaintiff's attorney Robert Genis. "It is legal loan-sharking." Mr. Genis is referring to cases like Ernesto Kho's. Injured in a 2004 auto accident, Kho borrowed $10,500 from ALF supplier Cambridge Management Group. When Kho's lawsuit settled for $75,000, Cambridge dipped into the proceeds for $35,939, more than three times the principal amount of the loan. In another case, a Brooklyn man injured by police borrowed $4,000 from LawBuck$ to pursue a civil rights claim against the city. When a jury awarded him $350,000, LawBuck$ claimed that the claimant owed them $116,000. A Brooklyn trial judge considering whether to enforce the litigation finance agreement is quoted as saying, "This is usurious, and if not usurious, it's unconscionable."

Although ALF suppliers say the risk of losing money on these loans is far more significant than in the standard credit market, the facts appear otherwise. According to The New York Times, ALF suppliers look for mass litigation, such as the Vioxx cases, with fairly predictable payouts. They further prescreen potential clients to cherry pick only the best claims and limit their liability to 10-20% of the amount they project the claimant will collect. In the absence of any disclosure or transparency, it is impossible to judge whether ALF suppliers' claims that they lose money on a substantial number of loans are justified. In fact, courts in Michigan, New York, and North Carolina have determined that plaintiffs may not be obligated to repay litigation loans that carry usurious rates of interest. One ALF supplier told the Times that "[W]e don't want judges to shine a light on us," so it only invests in claims expected to settle before trial.

In 2005 the Texas Legislature considered subjecting ALF contracts to the state's usury laws. H.B. 2987 prohibited lenders from charging usurious rates of interest in violation of §302.001, Finance Code, which limits the annual rate of interest a lender may charge. If an ALF agreement resulted in an interest rate exceeding the limitation, it would be subject to the financial and other penalties prescribed by Chapter 305, Finance Code. The bill did not apply to contracts entered into between a lawyer and a client for purposes of compensating the lawyer for providing legal services. The bill passed the House and cleared Senate committee, but was not considered by the Senate.

Another ALF Model: Financing the attorneys not the clients

Founded in 1998, Augusta Capital is the leading provider of customized capital solutions to the nation's elite law firms. Augusta accommodates a wide variety of law firm models, ranging from full service firms to litigation boutiques. Our extensive industry experience makes Augusta a valuable capital partner for firms seeking to manage their contingency fee practices more effectively.

Augusta specializes in providing nonrecourse financing for complex contingency fee cases—an ideal tool for the financial management of contingency fee practices. Augusta's financial solutions provide firms with a prudent hedge to manage individual case concentrations, which often occur in the firm's best cases, as well as a source of liquidity with repayment obligations that coincide with the firm's recoveries. Tailored to the unique demands of each firm's practice, Augusta's solutions give our clients valuable advantages in today's competitive marketplace.

Headquartered in Nashville, Tennessee, Augusta Capital, L.L.C. provides financing directly to attorneys and law firms specializing in complex contingent-fee litigation. According to Augusta Capital's comments to the ABA Commission on Ethics 20/20, a typical financing agreement works as follows:

- Pursuant to Augusta Capital's funding model, Augusta Capital agrees to provide litigation funding typically on an ongoing basis to the lawyer in an amount that equals a set percentage of normal litigation expenses (e.g., expert fees, deposition costs, counsel's travel expenses) incurred by that lawyer in pursuing the case. As an example, if the lawyer incurs in a given month $50,000 in normal litigation expenses for a case that qualifies for funding under Augusta Capital's contract and the contract calls for Augusta Capital to fund 50% of normal litigation expenses, then Augusta Capital will provide funding to the lawyer serving to reimburse the lawyer for 50% of that amount, or $25,000.

- The funding that Augusta Capital provides is entirely contingent—the lawyer is not obligated to repay any portion of the funding provided by Augusta Capital—nor to pay any fee to Augusta for the funding—for a particular case unless and until a recovery is made in that particular case. If, as to a particular case, no recovery is obtained, then the lawyer is not obligated to repay any portion of the funding provided by Augusta Capital for that particular case or any fee to Augusta. If a recovery is made in a case, the lawyer must repay the funding Augusta Capital provided in that particular case, plus a fee to Augusta Capital in an amount provided for under the terms of the funding agreement. Augusta's fee in a case where a recovery has been obtained is strictly a function of the amount of funding provided and usually, although not always, of the amount of time required to resolve the case. Typically, in a case involving complex litigation that resolves successfully three years after Augusta began providing funding, Augusta's fee equals approximately $1 for every $1 of funding to be repaid to Augusta Capital.

Augusta Capital's agreements purport to shield the attorney-client relationship from outside interference. They:

- require the attorney to maintain independent judgment;
- prohibit Augusta from exercising any control or influence over the attorney's decisions in the litigation;
- provide Augusta no recourse against the client if, in the event of recovery, the attorney does not repay the loan;
- prohibit the attorney from passing financing costs through to the client either directly or through a higher attorney's fee;
- provides that the attorney's obligation to repay the loan is not contingent on the attorney receiving any payment of attorney's fees out of the recovery;
- requires the attorney to obtain the written consent of the client to the attorney's funding agreement with Augusta; and
- requires the attorney to obtain the written consent of the client prior to communicating any confidential client information to Augusta and requires Augusta to enter into a confidentiality and non-disclosure agreement with the attorney with respect to any such communications.

Augusta asserts that its ALF arrangement with litigation counsel avoids the ethical pitfalls associated with direct financing of the client, particularly with respect to waiver of the attorney-client privilege and the protection of the lawyer's work product. They point to federal court decisions that protect the lawyer's work product even if it is disclosed to a third party, if the disclosure does not substantially increase the opportunity for potential adversaries to gain access to the information. Thus, courts have generally held that disclosure to non-adversarial parties does not waive work product protection.

Still, although the Augusta Capital financing agreements attempt to preserve the sanctity of the attorney-client relationship by funding the lawyer or the law firm, the question still remains whether a substantive distinction exists between ALF arrangements that finance the client and those that finance the client's lawyer. It would seem that the same ethical considerations are present in both instances, and that those considerations are intrinsic to the ALF structure itself. If that is the case, no contract provisions can eliminate or minimize the very real ethical concerns that may be compromised by ALF.

- For example, in a high-profile case stemming from the September 11, 2001 attacks, a plaintiffs' firm representing a class of Ground Zero first responders attempted to get a federal court to order the class plaintiffs to pay

$6 million of an $11 million interest charge the firm owed to an ALF supplier, Counsel Financial. Apparently, plaintiffs were never told about the ALF agreement or that they may be required to pay interest. The lawyers' interest payment request came in addition to $150 million in attorney's fees awarded in the settlement agreement between the parties. The judge denied the request, telling the plaintiffs' counsel, "In the context of $150 million, I believe you can absorb $6 million." Although we do not have access to the ALF contract between the firm and Counsel Financial in this case, it is reasonable to assume that many of the same safeguards found in the Augusta Capital contract may have been included here as well. In any event, the question is whether ALF agreements create fundamental ethical problems.

Texas Case Law: ALF agreements do not violate public policy

Two Texas courts of appeals have held that ALF agreements that do not violate public policy if they do not vest control over the litigation in uninterested third parties. In Anglo-Dutch Petroleum Int'l Inc. v. Smith and Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, the 14th and 1st District Courts of Appeals in Houston agreed with a Houston trial court that a litigation funding agreement entered into between Anglo-Dutch Petroleum International and several investors was enforceable.

The underlying litigation arose from a dispute between Anglo-Dutch and Halliburton involving the development of an oil and gas field in Kazakhstan. Anglo-Dutch sought financing for its lawsuit against Halliburton and entered into several Claims Investment Agreements in which investors fronted litigation costs in return for a portion of Anglo-Dutch's recovery, if any. If it prevailed, Anglo-Dutch agreed to pay the investors (including Smith and Haskell) their initial investment, plus 85% of the initial investment, and an additional 85% for each year that passed from the date of the agreement to the time of Anglo-Dutch's recovery. The Agreements further stipulated that in the event of Anglo-Dutch's bankruptcy the investors' interests in any cash recovery would not be described as a debt or obligation of Anglo-Dutch. Instead, an assignment of cash recovery was attached to each agreement, providing each investor with a security interest in Anglo-Dutch's cash recovery, if any.

Ultimately, Anglo-Dutch received a $106 million award in the lawsuit, at which time Halliburton settled the case. Prior to settlement, Anglo-Dutch attempted to negotiate new terms with the litigation investors, lowering the amounts of their payments. Smith and Haskell refused to renegotiate ad filed suit against Anglo-Dutch. The trial court entered judgment awarding actual and exemplary damages, and attorney's fees, to the investors, finding that Anglo-Dutch committed fraud, breach of fiduciary duty, conversion, and breach of contract. The Courts of Appeals reversed the exemplary damages award, but upheld the judgment for actual damages and attorney's fees on the breach of contract theory.

In its appeal of the trial court's breach of contract finding, Anglo-Dutch alleged that the Claims Investment Agreements could not be enforced because: (1) the Agreements were usurious loans; (2) alternatively, if the Agreements were not loans, they were void, unregistered securities; and (3) the Agreements were unenforceable because they violated public policy. Both courts of appeals held that: (1) the Agreements did not meet the definition of a "loan" and, consequently, were not usurious transactions; (2) even if the Agreements could be considered securities, the sellers of the securities (Anglo-Dutch) rather than the purchasers (Smith and Haskell) have no standing to bring a claim based on the securities being unregistered; and (3) the Agreements did not violate public policy because they did not vest control over the litigation in uninterested parties.

The basis for the courts of appeals' ruling can be summarized as follows:

(1) A loan means "an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor. The courts determined, however, that the Claims Investment Agreements did not constitute loans under Texas law because Anglo-Dutch did not have an absolute obligation to repay the principal amount amounts that the investors invested. If Anglo-Dutch had not prevailed in its lawsuit against Halliburton, it would have had no obligation to pay the investors anything. As a matter of law, therefore, the agreements could not be usurious. Moreover, Anglo Dutch's "subjective intent" that the agreements were to be treated as loans does not change the terms of the agreements themselves. The agreements established a contingency under which certain amounts would be paid to the investors, but no absolute obligation. The courts of appeals distinguished trial court rulings from other states (New York, Ohio, and Michigan) holding litigation financing agreements to be usurious based on the virtual certainty of recovery (or in the Michigan case, the fact that a jury verdict had already been reached before the litigation financing agreement was made) in the underlying actions in those cases. In this case, the courts asserted, there was no such certainty but a true contingency. By the same token, Smith and Haskell cited other state court opinions from New Jersey, Florida, Montana, and Illinois that enforced litigation financing agreements on the basis that a contingent, nonrecourse investment agreement does not constitute a loan subject to the usury statutes.

(2) Anglo-Dutch argued that the Claims Investment Agreements constituted illegal, unregistered securities and thus void and unenforceable under state and federal law. In support of this argument, Anglo-Dutch argued that one of the investors, Law Funds, was engaged exclusively in the business of financing lawsuits and thus served more as a promoter rather than as an investor. The courts of appeals rejected this argument, holding that only the purchaser has standing to void an unregistered security under the Texas Securities Act.

(3) Anglo-Dutch argued that the Claims Investment Agreements should be void as against public policy because they are "champertous," encourage litigation, and give control over litigation to parties with only a financial interest in the outcome. It also argued public policy should bar agreements in which a third party promises to pay money to a plaintiff in a pending lawsuit in exchange for a cash payment or interest rate, that if the agreement were a loan, would exceed the maximum allowable interest rate under Texas law. The courts of appeals determined that while assignments of causes of action that tend to increase or distort litigation may violate public policy (e.g., Mary Carter agreements), the Claims Investment Agreements at issue did not. Anglo-Dutch presented no evidence that the agreements were indeed champertous, "preyed on financially desperate plaintiffs," or ceded any control over the Halliburton litigation to the investors.

(4) More importantly, the courts of appeals determined that litigation financing agreements do not necessarily increase or prolong litigation. They reasoned that investors only get paid out of the proceeds of the settlement or judgment, so they would have no interest in prolonging legal proceedings. Moreover, investors who are willing to front significant amounts of money may be assumed to have carefully considered the risks of a non-recourse agreement and thus are highly unlikely to fund a "frivolous" claim. The courts of appeals determined further that the structure of the Claims Investment Agreements may actually have encouraged settlement. They thus concluded that the agreements do not violate Texas public policy.

What Should Be Done?

There is broad disagreement in the legal community about what, if anything, should be done about ALF as a matter of public policy. On one end of the spectrum, opponents of ALF call for the prohibition of third party litigation financing altogether. On the other end, proponents of ALF argue that current rules of ethics are sufficient to regulate the industry and no additional statutory protections are necessary. Given the array of legal obligations and ethical duties that attach to the practice of law generally, most would agree that any public policy response to the real and perceived abuses of ALF must be carefully and deliberately considered to assure that the best interests of the client and the integrity of the judicial process are protected.

Ibid.
American Bar Association, ABA Commission on Ethics 20/20, *Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing*, November 23, 2010, at 3.
Ibid.
Black's Law Dictionary, Rev. 4th Ed. (St. Paul, 1968), p. 1106.
Ibid, p. 292.
Ibid, p. 190.
Harriet W. Bentinck v. Joseph Franklin and Galveston City Company, 38 Tex. 458, 473 (1873).
V.T.C.A. Penal Code, §38.12(a).
V.T.C.A. Penal Code, §38.12(b).
V.T.C.A. Penal Code, §38.12(f).
V.T.C.A. Penal Code, §38.12(c).
V.T.C.A. Penal Code, §38.12(d), (g), (h).
V.T.C.A. Government Code, §82.065(a).
V.T.C.A. Government Code, §82.065(b).
Quantum meruit is a common law remedy whereby a person may recover the reasonable value of services rendered as dictated by law and reason, regardless of any agreement as to value or whether the services are rendered pursuant to a legal contract. See *Black's Law Dictionary*, Rev. 4th Ed. (St. Paul: West Publishing Co., 1968), at 1408.
V.T.C.A. Government Code, §82.065(c).
V.T.C.A. Government Code, §82.0651(a).
V.T.C.A. Government Code, §82.0651(b).
V.T.C.A. Government Code, §82.0651(c).
V.T.C.A. Government Code, §82.0651(d).
Rule 7.02(a) prohibits a lawyer from making or sponsoring a false or misleading communication about the qualifications or services of any lawyer or firm.
Texas Disciplinary Rules of Professional Conduct, Rule 1.08(e). Rule 1.05 generally protects confidential client information, including both privileged information and unprivileged information relating to the client.
Texas Disciplinary Rules, Rule 1.08(e).
Texas Disciplinary Rules, Rule 1.08, comment 7, Acquisition of Interest in Litigation.
Texas Disciplinary Rules, Rule 1.06(b)(2).
Texas Disciplinary Rules, Rule 1.06(c).
Texas Disciplinary Rules, Rule 1.04(a)
Texas Disciplinary Rules, Rule 1.05(b). A lawyer may reveal confidential information with the express consent or authority of the client, or when the lawyer has reason to believe it is necessary to comply with a court order, the Disciplinary Rules or other law; to establish a defense in a controversy with the client or to a criminal charge, civil claim, or disciplinary complaint; when the lawyer has reason to believe disclosure is necessary to prevent the client from committing a criminal or fraudulent act or to rectify the consequences of the client's criminal or fraudulent act in the commission of which the lawyer's services had been used. There are some additional exceptions for the disclosure of unprivileged client information. See Rule 1.05(c) and (d).
Texas Disciplinary Rules, Rule 5.04(c).
Texas Disciplinary Rules, Rule 5.04(d). It should also be noted that Rule 5.05 prohibits the unauthorized practice of law by a person who is not a member of the bar.
A number of state bar associations have opined that a lawyer who wishes to share information with an ALF supplier about the nature and value of the case must seek the client's informed consent prior to disclosure. *See* 2006 NC Eth. Op. 12, 2006 WL 6135364, at 1 (N.C. St. Bar Oct. 20, 2006); UT Eth. Op. 06-03, 2006 WL 3694077 (Utah St. Bar Dec. 8, 2006); FL Eth. Op. 00-3, 2002 WL 463991 (Fla. St. Bar Mar. 15, 2002); MI Eth. Op. RI-3-21, 2000 WL 33716933; PA Eth. Op. 95-128, 1995 WL 935642 (Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Sept. 5, 1995).
ABA Commission on Ethics 20/20 Working Group on Alternative Litigation Financing, November 23, 2010, at 4-5; see also *Leader Technologies, Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010), in which the court ruled that that the attorney-client privilege was waived when the lawyer disclosed potentially privileged documents to an ALF supplier.
ABA Commission at 5-6.
ABA Commission at 6-7.
In the event of default, the lender of a non-recourse loan may only seek to satisfy the debt from the collateral. Because they do not allow a lender to recover from any other assets, they often carry higher interest rates than recourse loans.
ABA Commission at 7.
Ibid. See also Texas Disciplinary Rule of Professional Conduct 1.15, which specifies the conditions under which a lawyer must or may ethically withdraw from or terminate representation of the client. The most common situations in which a lawyer may be *required* to withdraw is when the lawyer may be called upon as a material witness against the client's interests, is discharged by the client with or without good cause, or continuing the representation would violate other applicable law or rules of professional conduct.
Binyamin Applebaum, "Lawsuit Loans Add New Risk for the Injured," *The New York Times*, http.www.nytimes.com/2011/01/17/business/17lawsuit.html?_r=1&pagewanted=print (accessed November 28, 2011).
William J. Gorta, "Bitten by lawsuit 'sharks'," *New York Post*, December 12, 2011.
Ibid.
H.B. No. 2987, Engrossed, 79th Tex.Leg. Reg. Session, 2005.
http://www.augustacapital.com/ (accessed November 28, 2011).
Response of Augusta Capital, LLC to Request for Comment: Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing, February 7, 2011, Comments:
Alternative Litigation Financing Working Group Issues Paper, "Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing," ABA Commission on Ethics 20/20 Working Group on Alternative Litigation Financing, pp. 15-18, at p. 16.
See, for example, *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).
See Binyamin Applebaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. Times (Nov. 14, 2010); Bruce Golding, *Judge rejects interest charges on Ground Zero settlements*, N.Y. Post (August 27, 2010).
Anglo-Dutch Petroleum Int'l Inc. v. Smith, 243 S.W.3d 776 (Tex.App. 2007); *Anglo-Dutch Petroleum Int'l Inc. v. Haskell*, 193 S.W.3d 87 (Tex.App. 2006).
See *Anglo-Dutch Petroleum Int'l Inc. v. Haskell*, 193 S.W.3d 87 (Tex.App. 2006) at 92.
See *Anglo-Dutch Petroleum Int'l Inc. v. Smith*, 243 S.W.3d 776 (Tex.App. 2007) at 782.
Haskell, supra at 96, quoting Tex. Fin. Code Ann. §301.002(a)(10) (Vernon Supp. 2005).
Haskell, supra at 97-98.
Haskell, supra at 102-03.
Haskell, supra at 103.
Haskell, supra at 104-05.

TADC

The Texas Association of Defense Counsel, Inc

An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys—Est. 1960

Written Testimony on behalf of the
Texas Association of Defense Counsel
Submitted for consideration to the
House Committee on Judiciary and Civil Jurisprudence

April 18, 2012

RE: Committee Interim Charge #5

Chairman Jackson, & members of the House Committee on Judiciary and Civil Jurisprudence, the Texas Association of Defense Counsel (TADC) is pleased to present the attached written testimony on Interim Charge #5, to study the public policy implications of lawsuit lending and its effects on the civil justice system, before the committee.

The TADC is a professional organization comprised of approximately 2000 members, all of whom are civil trial lawyers engaged primarily in the representation of clients other than personal injury plaintiffs. The practice areas of our members range from the traditional insurance defense practice to general tort and commercial litigation.

We appreciate the opportunity to provide testimony on this important issue. If we may be of any assistance or provide further information, please contact us.

Respectfully submitted,

Thomas E. Ganucheau, President

400 West 15th Street, Suite 420 • Austin, Texas 78701 • p 512.476.5225 f 512.476.5384
Website: www.tadc.org • E-mail: tadc@tadc.org

Alternative Litigation Financing
Proposed Testimony to the Committee on Judiciary & Civil Jurisprudence by the Texas Association of Defense Counsel
April 18, 2012

To the Honorable Members of the House Judiciary & Civil Jurisprudence Committee:

Thank you for the opportunity to submit these comments on the committee's charge to "study the public policy implications of lawsuit lending and its effects on the civil justice system." Lawsuit lending, or "alternative litigation finance" (ALF), appears to be a growing trend in some parts of the country, and we are aware of several state legislatures, bar association ethics committees (including a task force of the American Bar Association), and state attorneys general are taking a close look at the subject to determine whether a public policy response is warranted.

Potential public policy approaches toward ALF take many forms and are being promoted by stakeholders with opposing interests in the issue. On one hand, ALF providers have advocated legislation in a number of states to legitimize the practice through the adoption of model legislation. We are aware of pro-ALF legislative efforts in Maine, Nebraska, Ohio, Nevada, Connecticut, Maryland, Indiana, and Tennessee, though there may be additional states to be added to this list. Proposed legislation generally establishes a regulatory framework that requires ALF providers to obtain a license, usually from the consumer finance agency in the state, and to subject themselves to some level of regulation. These proposals also require ALF contracts with consumers to itemize fees and charges, to limit the accrual of interest beyond a certain time, and to allow the consumer to rescind the contract within a certain period of time. Moreover, they

prohibit an ALF provider from paying finder's fees to third parties and to refrain from any involvement in the litigation itself. Most of the ALF providers we are aware of likewise state in their contracts that they under no circumstances infringe on the ethical duties between the client and the client's lawyer, although we are unaware of how these arrangements work in practice.

On the other side of the issue, legislation has been introduced in a number of states, including Arizona, Indiana, Oklahoma, Illinois, and Rhode Island, to ban or limit ALF. These proposals have taken one of two approaches. For example, the Indiana proposal would prohibit ALF altogether. Proposals in the other states, however, would subject ALF to state consumer lending laws and limit the interest rates that can be charged. It should be noted that bringing ALF agreements under the purview of state consumer finance laws legitimizes the practice in the same manner as regulatory proposals, treating ALF as a loan agreement although under most state laws (including Texas'), ALF does not constitute a loan because there is no absolute duty of the borrower to repay the loan principal.

It appears to us that ALF raises a number of possible ethical issues, though it does not necessarily violate ethical precepts *per se*. As noted in the remarks submitted by the Texas Civil Justice League, both Houston courts of appeals have held that ALF arrangements do not violate public policy in the absence of specific unethical conduct. In other words, both courts held the parties (both of whom were represented by counsel) to their bargain. Among other things, these cases demonstrate that if both parties are represented by counsel and enter into an ALF agreement with their eyes open, the courts

are not likely to disturb them. Even in a consumer context, it is likely in most cases that a plaintiff who seeks ALF is already represented by counsel, who will presumably advise the claimant on whether ALF is appropriate in the particular instance. We would suspect that plaintiff's counsel will consider this option very carefully in view of the potential liability for legal malpractice if the arrangement ends in an adverse result for the client.

Much of this remains speculative, however. A call to our membership to report on their experiences with litigation financing and any adverse impact on the handling or resolution of a case resulted in no reported experiences or issues of an ALF arrangement in Texas litigation. There is some evidence, however, that a few defense firms have been asked to examine the merits of using ALF to help finance expensive and complex commercial litigation and to provide advice to clients, but to our knowledge no ALF deals have actually been made. We are aware that an ALF provider has financed or is financing claims against a railroad in Texas, but our members are not involved in the case and can offer no insight on the effect ALF may be having on the litigation.

We will continue to study this issue and monitor our members' exposure to ALF arrangements.

STATE BAR COURT RULES COMMITTEE

PROPOSED AMENDMENT TO TEXAS RULE OF APPELLATE PROCEDURE 9.4

I. Exact Language of Existing Rule

9.4. Form

Except for the record, a document filed with an appellate court, including a paper copy of an electronically filed document, must--unless the court accepts another form in the interest of justice -- be in the following form:

(a) *Printing*. A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing must be on one side of the paper.

(b) *Paper Type and Size*. The paper on which a document is produced must be 8 1/2 by 11 inches, white or nearly white, and opaque.

(c) *Margins*. Documents must have at least one-inch margins on both sides and at the top and bottom.

(d) *Spacing*. Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced.

(e) *Typeface*. A document produced on a computer must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. A typewritten document must be printed in standard 10-character-per-inch (cpi) monospaced typeface.

(f) *Binding and Covering*. A paper document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A paper document should be stapled once in the top left-hand corner or be bound so that it will lie flat when open. A paper petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue.

(g) *Contents of Cover*. A document's front cover, if any, must contain the case style, the case number, the title of the document being filed, the name of the party filing the document, and the name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover of that party's first brief.

(h) *Appendix and Original Proceeding Record*. A paper appendix may be bound either with the document to which it is related or separately. If

separately bound, the appendix must comply with paragraph (f). A paper record in an original proceeding or a paper appendix must be tabbed and indexed. An electronically filed record in an original proceeding or an electronically filed appendix that includes more than one item must contain bookmarks to assist in locating each item.

(i) *Length.*

(1) Contents Included and Excluded. In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

(2) Maximum Length. The documents listed below must not exceed the following limits:

(A) A brief and response in a direct appeal to the Court of Criminal Appeals in a case in which the death penalty has been assessed: 37,500 words if computer-generated, and 125 pages if not.

(B) A brief and response in an appellate court (other than a brief under subparagraph (A)) and a petition and response in an original proceeding in the court of appeals: 15,000 words if computer-generated, and 50 pages if not. In a civil case in the court of appeals, the aggregate of all briefs filed by a party must not exceed 27,000 words if computer-generated, and 90 pages if not.

(C) A reply brief in an appellate court and a reply to a response to a petition in an original proceeding in the court of appeals: 7,500 words if computer-generated, and 25 pages if not.

(D) A petition and response in an original proceeding in the Supreme Court, a petition for review and response in the Supreme Court, a petition for discretionary review in the Court of Criminal Appeals, and a motion for rehearing in an appellate court: 4,500 words if computer-generated, and 15 pages if not.

(E) A reply to a response to a petition for review in the Supreme Court, a reply to a response to a petition in an original proceeding in the Supreme Court, and a reply to a petition for discretionary review in the Court of Criminal Appeals: 2,400 words if computer-generated, and 8 pages if not.

(3) Certificate of Compliance. A computer-generated document that is subject to a word limit under this rule must include a certificate by counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.

(4) Extensions. A court may, on motion, permit a document that exceeds the prescribed limit.

(j) *Electronically Filed Documents.* An electronically filed document must:

(1) be in text-searchable portable document format (PDF);

(2) be directly converted to PDF rather than scanned, if possible;

(3) not be locked;

(4) be combined with any appendix into one computer file, unless that file would exceed the size limit prescribed by the electronic filing manager; and

(5) otherwise comply with the Technology Standards set by the Judicial Committee on Information Technology and approved by the Supreme Court.

(k) *Nonconforming Documents*. If a document fails to conform with these rules, the court may strike the document or identify the error and permit the party to resubmit the document in a conforming format by a specified deadline.

II. Proposed Changes to Existing Rule

9.4. Form

Except for the record, a document filed with an appellate court, including a paper copy of an electronically filed document, must--unless the court accepts another form in the interest of justice -- be in the following form:

(a) *Printing*. A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing must be on one side of the paper.

(b) *Paper Type and Size*. The paper on which a document is produced must be 8 1/2 by 11 inches, white or nearly white, and opaque.

(c) *Margins*. Documents must have at least one-inch margins on both sides and at the top and bottom.

(d) *Spacing*. Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced.

(e) *Typeface*. A document produced on a computer must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. A typewritten document must be printed in standard 10-character-per-inch (cpi) monospaced typeface.

(f) *Binding and Covering*. A paper document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A paper document should be stapled once in the top left-hand corner or be bound so that it will lie flat when open. A paper petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue.

(g) *Contents of Cover*. A document's front cover, if any, must contain the case style, the case number, the title of the document being filed, the name of the party filing the document, and the name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover of that party's first brief.

(h) *Appendix and Original Proceeding Record*. A paper appendix may be bound either with the document to which it is related or separately. If separately bound, the appendix must comply with paragraph (f). A paper record in an original proceeding or a paper appendix must be tabbed and indexed. An electronically filed record in an original proceeding or an electronically filed appendix that includes more than one item must contain bookmarks to assist in locating each item.

(i) *Length*.

> (1) Contents Included and Excluded. In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of parties and counsel, statement

regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, **statement of error preservation,** statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

(2) Maximum Length. The documents listed below must not exceed the following limits:

(A) A brief and response in a direct appeal to the Court of Criminal Appeals in a case in which the death penalty has been assessed: 37,500 words if computer-generated, and 125 pages if not.

(B) A brief and response in an appellate court (other than a brief under subparagraph (A)) and a petition and response in an original proceeding in the court of appeals: 15,000 words if computer-generated, and 50 pages if not. In a civil case in the court of appeals, the aggregate of all briefs filed by a party must not exceed 27,000 words if computer-generated, and 90 pages if not.

(C) A reply brief in an appellate court and a reply to a response to a petition in an original proceeding in the court of appeals: 7,500 words if computer-generated, and 25 pages if not.

(D) A petition and response in an original proceeding in the Supreme Court, a petition for review and response in the Supreme Court, a petition for discretionary review in the Court of Criminal Appeals, and a motion for rehearing in an appellate court: 4,500 words if computer-generated, and 15 pages if not.

(E) A reply to a response to a petition for review in the Supreme Court, a reply to a response to a petition in an original proceeding in the Supreme Court, and a reply to a petition for discretionary review in the Court of Criminal Appeals: 2,400 words if computer-generated, and 8 pages if not.

(3) Certificate of Compliance. A computer-generated document that is subject to a word limit under this rule must include a certificate by counsel or an unrepresented party stating the number of words in the

document. The person certifying may rely on the word count of the computer program used to prepare the document.

(4) Extensions. A court may, on motion, permit a document that exceeds the prescribed limit.

(j) *Electronically Filed Documents.* An electronically filed document must:

(1) be in text-searchable portable document format (PDF);

(2) be directly converted to PDF rather than scanned, if possible;

(3) not be locked;

(4) be combined with any appendix into one computer file, unless that file would exceed the size limit prescribed by the electronic filing manager; and

(5) otherwise comply with the Technology Standards set by the Judicial Committee on Information Technology and approved by the Supreme Court.

(k) *Nonconforming Documents*. If a document fails to conform with these rules, the court may strike the document or identify the error and permit the party to resubmit the document in a conforming format by a specified deadline.

III. Brief Statement of Reasons for Proposed Amendment

The proposed revision is a companion to the proposed revision of Texas Rule of Appellate Procedure 38.1 and provides that a statement of error preservation is not included when calculating a document's length.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
May 1, 2015

STATE BAR COURT RULES COMMITTEE

PROPOSED AMENDMENT TO TEXAS RULE OF APPELLATE PROCEDURE 38.1

I. Exact Language of Existing Rules

38.1. Appellant's Brief

The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

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

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

(d) *Statement of the Case.* The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Any Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of the party's brief.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(g) *Statement of Facts*. The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

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

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

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

(k) *Appendix in Civil Cases.*

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

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

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

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

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

II. Proposed Changes to Existing Rule

38.1. Appellant's Brief

The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

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

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

(d) *Statement of the Case.* The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Any Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of the party's brief.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(g) *Statement of Error Preservation.* For each issue presented for review, the brief must provide either

(1) citations, without argument, to the record showing that

(A) the complaint was made to the trial court by a timely request, objection, or motion;~~,~~ and

(B) the trial court

(i) ruled on the request, objection, or motion, either expressly or implicitly; or

(ii) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal; or

(2) citations, without argument, to appropriate authority that the complaint was not required to be raised in the trial court.

(h) *Statement of Facts*. The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

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

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

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

(*l*) *Appendix in Civil Cases*.

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

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

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

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

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

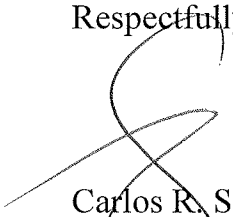
III. Brief Statement of Reasons for Proposed Amendment

Preservation of error in the trial court is a prerequisite to appellate review of most complaints, but the rules of appellate procedure currently do not require the complaining party to provide citations to the record showing that a complaint was preserved. As a result, the appellate courts bear the burden of sifting the record to determine whether the complaint was raised and whether the trial court ruled on it. In the absence of an express

ruling, the appellate court also must determine whether the trial court implicitly ruled. If the error was not preserved, then the time the attorney spent in briefing the issue, the money the client paid for the work, and the judicial resources expended in reading the argument, reviewing the record, and opining that the error was unpreserved all are wasted.

Because the party raising an appellate complaint is in the best position to know whether the error was preserved in the trial court, it would be both more efficient and more equitable to place the burden of showing that the prerequisites to appellate review have been satisfied on the party seeking the benefit of that review.

Respectfully submitted,



Carlos R. Soltero
Chair, State Bar Court Rules Committee
May 1, 2015

STATE BAR COURT RULES COMMITTEE

PROPOSED AMENDMENT TO TEXAS RULE OF APPELLATE PROCEDURE 38.2

I. Exact Language of Existing Rule

38.2. Appellee's Brief

(a) *Form of Brief.*

(1) An appellee's brief must conform to the requirements of Rule 38.1, except that:

(A) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list;

(B) the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief; and

(C) the appendix to the appellee's brief need not contain any item already contained in an appendix filed by the appellant.

(2) When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.

(b) *Cross-Points.*

(1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint. Included in this requirement is a point that:

(A) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or

(B) the verdict should be set aside because of improper argument of counsel.

(2) When Evidentiary Hearing Needed. The appellate court must remand a case to the trial court to take evidence if:

(A) the appellate court has sustained a point raised by the appellant; and

(B) the appellee raised a cross-point that requires the taking of additional evidence.

II. Proposed Changes to Existing Rule

38.2. Appellee's Brief

(a) *Form of Brief.*

(1) An appellee's brief must conform to the requirements of Rule 38.1, except that:

(A) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list;

(B) the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief; ~~and~~

(C) the appellee's brief is required to include a statement of error preservation only as to issues brought forward by the appellee; and

(D) the appendix to the appellee's brief need not contain any item already contained in an appendix filed by the appellant.

(2) When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.

(b) *Cross-Points.*

(1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an

affirmance of the judgment waives that complaint. Included in this requirement is a point that:

> (A) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or
>
> (B) the verdict should be set aside because of improper argument of counsel.

(2) When Evidentiary Hearing Needed. The appellate court must remand a case to the trial court to take evidence if:

> (A) the appellate court has sustained a point raised by the appellant; and
>
> (B) the appellee raised a cross-point that requires the taking of additional evidence.

III. Brief Statement of Reasons for Proposed Amendment

The proposed revision is a companion to the proposed revision of Texas Rule of Appellate Procedure 38.1 and provides that a statement of error preservation must be included in an appellee's brief only if the appellee is complaining of error.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
May 1, 2015

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 18.1(a)

I. Exact Language of Existing Rule 18

Rule 18. Mandate

18.1. Issuance

The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed and to all parties to the proceeding when one of the following periods expires:

(a) *In the Court of Appeals*.

(1) Ten days after the time has expired for filing a motion to extend time to file a petition for review or a petition for discretionary review if:

(A) no timely petition for review or petition for discretionary review has been filed;

(B) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending; and

(C) in a criminal case, the Court of Criminal Appeals has not granted review on its own initiative.

(2) Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review, if no timely filed motion for rehearing or motion to extend time is pending.

(b) *In the Supreme Court and the Court of Criminal Appeals*. Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing if no timely filed motion for rehearing or motion to extend time is pending.

(c) *Agreement to Issue*. The mandate may be issued earlier if the parties so agree, or for
good cause on the motion of a party.

18.2. Stay of Mandate

A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are

substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

18.3. Trial Court Case Number

The mandate must state the trial court case number.

18.4. Filing of Mandate

The clerk receiving the mandate will file it with the case's other papers and note it on the docket.

18.5. Costs

The mandate will be issued without waiting for costs to be paid. If the Supreme Court declines to grant review, Supreme Court costs must be included in the court of appeals' mandate.

18.6. Mandate in Accelerated Appeals

The appellate court's judgment on an appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate with its judgment or delay the mandate until the appeal is finally disposed of. If the mandate is issued, any further proceeding in the trial court must conform to the mandate.

18.7. Recall of Mandate

If an appellate court vacates or modifies its judgment or order after issuing its mandate, the appellate clerk must promptly notify the clerk of the court to which the mandate was directed and all parties. The mandate will have no effect and a new mandate may be issued.

Notes and Comments

Comment to 1997 change: This is a new rule that combines the provisions of former Rules 43(g), 86, 186, 231, and 232.

Comment to 2002 change: Subdivision 18.1 is amended consistent with the change in subdivision 12.6.

II. Proposed Amendment to Existing Rule 18.1(a)

Rule 18. Mandate

18.1. Issuance

The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed and to all parties to the proceeding when one of the following periods expires:

(a) *In the Court of Appeals*.

~~(1) Ten days after the time has expired for filing a motion to extend time to file a petition for review or a petition for discretionary review if:~~

~~(A) no timely petition for review or petition for discretionary review has been filed;~~

~~(B) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending; and~~

~~(C) in a criminal case, the Court of Criminal Appeals has not granted review on its own initiative.~~

~~(2) Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review, if no timely filed motion for rehearing or motion to extend time is pending.~~

(1) If no party has filed:

(A) a petition for review or petition for discretionary review, ten days after the time has expired to file a motion for extension of time for such petition; or

(B) a motion for extension of time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review or petition for discretionary review, ten days after the time has expired to file such motion for extension of time.

(2) If a party has filed:

(A) a motion for extension of time to file a petition for review, petition for discretionary review, or motion for rehearing of a denial, refusal, or dismissal of a petition for review or petition for discretionary review, ten days after such motion is denied; or

(B) a motion for rehearing of a denial, refusal, or dismissal of a petition for review or petition for discretionary review, ten days after such denial if denied without opinion.

(3) In a criminal case, if no party has filed a petition for discretionary review, or a motion for extension of time to file such petition, and the Court of Criminal Appeals has not granted review on its own initiative, ten days after the time has expired to file a motion for extension of time for such petition.

(4) If the Supreme Court or Court of Criminal Appeals sets aside a petition for review or petition for discretionary review, ten days from the date the petition for review or petition for discretionary review is set aside.

(b) *In the Supreme Court and the Court of Criminal Appeals*. Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing if no timely filed motion for rehearing or motion to extend time is pending.

(c) *Agreement to Issue*. The mandate may be issued earlier if the parties so agree, or for
good cause on the motion of a party.

18.2. Stay of Mandate

A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

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The mandate must state the trial court case number.

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The clerk receiving the mandate will file it with the case's other papers and note it on the docket.

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18.6. Mandate in Accelerated Appeals

The appellate court's judgment on an appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate with its judgment or delay the mandate until the appeal is finally disposed of. If the mandate is issued, any further proceeding in the trial court must conform to the mandate.

18.7. Recall of Mandate

If an appellate court vacates or modifies its judgment or order after issuing its mandate, the appellate clerk must promptly notify the clerk of the court to which the mandate was directed and all parties. The mandate will have no effect and a new mandate may be issued.

Notes and Comments

Comment to 1997 change: This is a new rule that combines the provisions of former Rules 43(g), 86, 186, 231, and 232.

Comment to 2002 change: Subdivision 18.1 is amended consistent with the change in subdivision 12.6.

Comment to Proposed Change: Subsection (a) of Rule 18.1 is revised to clarify when the mandate should issue from a court of appeals.

III. Brief Statement of Reasons for the Requested Amendments and Advantages Served by Them

Rule 18.1(a) provides when a court of appeals must issue its mandate. The current rule addresses several different scenarios that include: if no timely petition for review or petition for discretionary review has been filed; no timely motion for extension of time to file a petition for review or petition for discretionary review has been filed; the court of criminal appeals has not granted review on its own initiative; and, if no timely filed motion for rehearing or motion to extend time is pending, if the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or refusal or dismissal of a petition for review or refusal of a petition for discretionary review.

But Rule 18.1(a) is silent about when a court of appeals must issue its mandate for a number of other common scenarios—leading to confusion among members of the bench and bar. Those scenarios include if: a petition for review or petition for discretionary review has been granted but is later set aside; if a motion for extension of time is on file when the deadline for it arises but is subsequently denied; or if a motion for rehearing of a denial, refusal, or dismissal is denied without opinion by the Supreme Court or Court of Criminal Appeals, meaning that no further motion for rehearing can be filed.

The purpose of this amendment is to clarify and address these additional common scenarios and thus provide needed certainty to this rule. This amendment is also intended to clarify the rule by categorizing the deadlines to issue the mandate by whether a party has or has not filed something in subsections (a)(1) and (a)(2).

From: Victoria Katz
To: Rulescomments; Blake Hawthorne
Subject: TRCP 4 clarification
Date: Wednesday, June 5, 2024 1:58:37 PM
Attachments: image538625.png

Good afternoon,

Although TRCP 4 does not have amendments pending and is not out for comment, we are writing in the hopes of receiving clarification of the term “next day” as used therein. If there is a more appropriate person/e-mail to whom to direct our question, we would appreciate being provided that information.

TRCP 4 says, “The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.” [Emphasis added.] However, the term “next day” is not defined.

When counting forward from an event there is little ambiguity as to what is considered the "next day" under TRCP 4. However, when counting backwards, if the deadline falls on a weekend or holiday, it is uncertain what is the "next day." Is the next day the preceding day (backward), counting in the same direction as the initial time period, or is it the succeeding day (forward)? For example, TRCO 166a(c) says that the deadline to file and serve opposing affidavits and other responses to a summary judgment motion is “not later than seven days prior to the day of hearing.” If the 7th day prior to the hearing falls on a weekend or holiday, would the deadline move forward to the 6th day prior to the hearing, or backwards to the 8th day prior to the hearing?

We are aware of the case *Hammonds v. Thomas*, 770 S.W.2d 1, 2-3 (Tex. App.—Texarkana 1989, no writ), which ruled that the summary judgment response deadline moves forward to the 6th day prior to the hearing, however it is our understanding that at least one later case disagreed with this ruling. We also are aware of the case *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994), which ruled that TRCP 4 applies to all deadlines, not just forward counting deadlines. The *Lewis* court, however, was limited to whether extra time should be added to the deadline to serve notice of a motion for summary judgment when the notice is served by mail. It did not address what direction a deadline moves under TRCP 4 when the last day falls on a weekend or holiday.

Further, to avoid confusion in the future regarding backward counting deadlines in Texas state courts, we respectfully propose that the Texas courts amend TRCP 4 to define the term “next day” for both forward and backward counting deadlines. A model for such amendment might be the amendment to the Federal Rules of Civil Procedure (“FRCP”), which was made to clarify a very similar ambiguity. FRCP 6(a)(5) now says, “The ‘next day’ is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.“

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing in the Texas state courts. Because this ambiguity in TRCP 4 is causing considerable confusion for our users, we would greatly appreciate any information you are able to provide us regarding this issue.

Sincerely,

Victoria Katz
Senior Rules Attorney

Email: victoria.katz@aderant.com
Support: +1-850-224-2004

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April 2, 2024

Honorable Mike Johnson
Speaker, United States House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and new rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2023; a blackline version of the rules with committee notes; an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 2, 2024

Honorable Kamala D. Harris
President, United States Senate
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and new rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2023; a blackline version of the rules with committee notes; an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 2, 2024

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Evidence are amended to include amendments to 613, 801, 804, and 1006, and new Rule 107.

[*See infra* pp. __ __ __.]

2. The foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2024, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 107. Illustrative Aids

(a) **Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) **Use in Jury Deliberations.** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) **Record.** When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Rule 613. Witness's Prior Statement

* * * * *

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * * * *

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the

scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(3) ***Statement Against Interest.*** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by

corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

* * * * *

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 23, 2023

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 613, 801, 804, and 1006, and new Rule 107 of the Federal Rules of Evidence, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules and new rule along with committee notes; (ii) an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

[1] New material is underlined; matter to be omitted is lined through.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Committee Note

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 107.

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence or argument. *Cf*. Fed. R. Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must

weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should prohibit the use of—or order the modification of—the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. *Cf*. Rule 105.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations.

If the court does allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

Rule 613. Witness's Prior Statement

* * * * *

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, ~~E~~extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it~~, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *before* the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to impeachment with prior inconsistent statements. *See, e.g.*, *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching

statement."). The existing rule imposes no timing preference or sequence and thus permits an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * * * *

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the

scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's

principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered. The rule does not apply, however, if the statement is admissible against the agent but not against the principal—for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(3) ***Statement Against Interest.*** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) <u>if offered in a criminal case as one that tends to expose the declarant to criminal liability,</u> is supported by

corroborating circumstances that clearly indicate its trustworthiness~~, if offered in a criminal case as one that tends to expose the declarant to criminal liability~~—after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

* * * * *

Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by "corroborating circumstances that clearly indicate its trustworthiness," the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the

timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. The court must also consider information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that undermines the declarant's account.

Although it utilizes slightly different language to fit within the framework of Rule 804(b)(3), the amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. The amendment is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like *Donnelly v. United States*, 228 U.S. 243 (1913), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the rule by some

courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings—or a portion of them—*have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, however, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has discretion in determining the reasonableness of the production in each case but must ensure that all parties have a fair opportunity to evaluate the summary. *Cf*. Fed. R. Evid. 404(b)(3) and 807(b).

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court," the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous admissible information offered to prove a fact, and illustrations offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 107.

Agenda E-19
Rules
September 2023

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 6, 2023. All members participated.

* * * * *

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would

provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

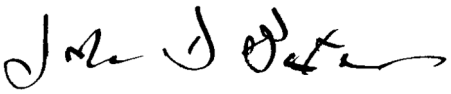
Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Robert J. Giuffra, Jr.	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Carolyn B. Kuhl	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 10, 2023

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met in Washington, D.C., on April 28, 2023. At the meeting the Committee discussed and gave final approval to five proposed amendments that had been published for public comment in August 2022. The Committee also tabled a proposed amendment.

The Committee made the following determinations at the meeting:

● It unanimously approved proposals to add a new Rule 107 and to amend Rules 613(b), 801(d)(2), 804(b)(3), and 1006, and recommends that the Standing Committee approve the proposed rules amendments and new rule.

* * * * *

II. Action Items

A. New Rule 107, for Final Approval

At the Spring 2022 meeting, the Committee unanimously approved a proposal to add a new rule to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. Similar confusion exists in distinguishing a summary of voluminous evidence, covered by Rule 1006, and a summary that is not evidence but rather presented to assist the trier of fact in understanding evidence. In addition, the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards.

The proposed amendment, published for public comment as a new Rule 611(d), allowed illustrative aids to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. The pitch of that balance was left open for public comment --- whether the negative factors would have to *substantially* outweigh the usefulness of the aid (the same balance as Rule 403), or whether the aid would be prohibited if the negative factors simply outweighed the usefulness of the aid.

Because illustrative aids are not evidence, adverse parties do not receive pretrial discovery of such aids. The proposal issued for public comment would have required notice to be provided, unless the court for good cause orders otherwise. This notice requirement was most controversial when applied to the use of illustrative aids on opening and closing --- leading the Committee to exclude openings and closings from the proposal as issued for public comment.

Lawyer groups (such as bar associations) and the Federal Magistrate Judges' Association submitted comments in favor of the proposed amendment. But most practicing lawyers were critical. Most of the negative public comment went to the notice requirement; the commenters argued that a notice requirement was burdensome and would lead to motion practice and less use of illustrative aids. Other comments questioned the need for the rule. Others argued (in the face of contrary case law) that the courts were having no problems in regulating illustrative aids.

In light of the public comment, as well as comments from the Standing Committee and those received at the symposium on the rule proposal in the Fall of 2022, the Committee unanimously agreed on the following changes: 1) deletion of the notice requirement; 2) extending the rule to openings and closings (reasoning that after lifting the notice requirement, there was no

reason not to cover openings and closings, especially because courts already regulate illustrative aids used in openings and closings and it would be best to have all uses at trial covered by a single rule); 3) providing that illustrative aids can be used unless the negative factors *substantially* outweigh the educative value of the aid (reasoning that it would be confusing to have a different balancing test than Rule 403, especially when the line between substantive evidence and illustrative aids may sometimes be difficult to draw); 4) specifying in the text of the rule that illustrative aids are not evidence; 5) adding a subdivision providing that summaries of voluminous evidence are themselves evidence and are governed by Rule 1006; and 6) relocating the proposal to a new Rule 107 (reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony).

Because illustrative aids are not evidence, the proposed rule provides that an aid should not be allowed into the jury room during deliberations, unless the court, for good cause, orders otherwise. The committee note specifies that if the court does allow an illustrative aid to go to the jury room, the court must upon request instruct the jury that the aid is not evidence.

Finally, to assist appellate review of illustrative aids, the rule provides that illustrative aids must be entered into the record, unless it is impracticable to do so.

The Committee strongly believes that this rule on illustrative aids will provide an important service to courts and litigants. Illustrative aids are used in almost every trial, and yet nothing in the rules specifically addresses their use. This amendment rectifies that problem.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed new Rule 107. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

* * * * *

B. Proposed Amendment to Rule 1006, for Final Approval[1]

Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and much of the problem is that some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). Some courts have stated that summaries admissible under Rule 1006 are "not evidence," which is incorrect. Other courts have stated that all of the underlying evidence must be admitted before the summary can be admitted; that, too, is incorrect. Still other courts state that the summary is inadmissible if any of the underlying evidence *has* been admitted; that is also wrong.

[1] This rule is taken out of numerical sequence because it is of a piece with the proposed amendment on illustrative aids.

After extensive research and discussion, the Committee unanimously approved an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006.

The proposal to amend Rule 1006 dovetails with the proposal to establish a rule on illustrative aids, discussed above. These two rules serve to distinguish a summary of voluminous evidence (which is itself evidence and governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

The rule proposal for public comment received only a few public comments, largely favorable.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 1006. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

* * * * *

C. Proposed Amendment to Rule 613(b) for Final Approval

The common law provided that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The existing Rule 613(b) rejects that "prior presentation" requirement. It provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. It turns out, though, that most courts have retained the common law "prior presentation" requirement. These courts have found that a prior presentation requirement saves time, because a witness will often concede that she made the inconsistent statement, and that makes it unnecessary for anyone to introduce extrinsic evidence. The prior presentation requirement also avoids the difficulties inherent in calling a witness back to the stand to give her an opportunity at some later point to explain or deny a prior statement that has been proven through extrinsic evidence.

The Committee has unanimously determined that the better rule is to require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity (for example, when the prior inconsistent statement is not discovered until after the witness testifies). The amendment will bring the rule into alignment with what appears to be the practice of most trial judges --- a practice that the Committee concluded is superior to the practice described in the current rule.

The rule published for public comment provides that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny

the statement. It gives the court the discretion to dispense with the requirement, in order to allow flexibility. The default rule brings the courts into uniformity and opts for the rule that provides more fairness to the witness and a more efficient result to the court. The rule received only a few public comments, largely favorable.

At the Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 613(b). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

* * * * *

D. Proposed Amendment to Rule 801(d)(2) Governing Successors-in-Interest, for Final Approval

Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. Some circuits would permit the statements made by the declarant to be offered against the successor as a party-opponent statement under Rule 801(d)(2), while others would foreclose admissibility because the statement was made by one who is technically not the party-opponent in the case.

The Committee has determined that the dispute in the courts about the admissibility of party-opponent statements against successors should be resolved by a rule amendment, because the problem arises with some frequency in a variety of predecessor/successor situations (most commonly, decedent and estate in a claim brought for damages under 42 U.S.C. § 1983). The Committee unanimously determined that the appropriate result should be that a hearsay statement would be admissible against the successor-in-interest. The Committee reasoned that admissibility was fair when the successor-in-interest is standing in the shoes of the declarant --- because the declarant is in substance the party-opponent. Moreover, a contrary rule results in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement. The Committee approved the following addition to Rule 801(d)(2):

> <u>If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.</u>

The proposed committee note emphasizes that to be admissible against the successor, the declarant must have made the statement before the transfer of the claim or defense. It also specifies that if a statement made by an agent is not admissible against a principal, then it is not admissible against any successor to the principal.

The rule as published for public comment received only a few comments, largely favorable.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 801(d)(2). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

* * * * *

E. Proposed Amendment to the Rule 804(b)(3) Corroborating Circumstances Requirement, for Final Approval

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest as well as independent evidence corroborating (or refuting) the accuracy of the statement. But some courts do not permit inquiry into independent evidence --- limiting judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. This latter view --- denying consideration of independent corroborative evidence --- is inconsistent with the 2019 amendment to Rule 807 (the residual exception), which requires courts to look at corroborative evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under that exception. The rationale is that corroborative evidence can shore up concerns about the potential unreliability of a statement --- a rationale that is applied in many other contexts, such as admissibility of co-conspirator hearsay, and tips from informants in determining probable cause.

The Committee believes that it is important to rectify the dispute among the circuits about the meaning of "corroborating circumstances" and that requiring consideration of corroborating evidence not only avoids inconsistency with the residual exception, but is also supported by logic and by the legislative history of Rule 804(b)(3).

The proposal published for public comment provided as follows:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) <u>if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it</u> ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness --- <u>after considering the</u>

totality of circumstances under which it was made and evidence, if any, corroborating it. ~~if it is offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

There were only a few public comments to the rule, and all were favorable about requiring consideration of corroborating evidence. But there was some confusion about the two different uses of the word "corroborating" in the rule. What is the difference between "corroborating circumstances" and "corroborating evidence"? The answer is that "corroborating circumstances" is a term of art --- an undeniably confusing one, because it combines the notion of corroborating evidence and circumstantial guarantees of trustworthiness. In contrast, "corroborating evidence" refers to independent evidence that supports the declarant's account --- under the proposal, that kind of information must be considered in assessing whether "corroborating circumstances" are found.

In using the term "corroborating evidence" the Committee was intending to use the exact language that was adopted in the residual exception, Rule 807, in 2019. But after considerable discussion at the Spring 2023 meeting, the Committee concluded that the better result would be to use a different word than "corroborating"; the deviation from the Rule 807 language is justified by the fact that Rule 807 refers to "trustworthiness" --- not "corroborating circumstances" --- so use of "corroborating" in that rule is not confusing. The Committee determined that it could reach the same result with different terminology.

The proposal unanimously approved by the Committee, for which it seeks final approval, reads as follows:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and any evidence that *supports or contradicts* it. ~~if it is offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

A major advantage of this revision is that (freed from uniformity with Rule 807) it can specifically require the court to consider both evidence supporting the statement and evidence that contradicts it.

Excerpt from the May 10, 2023, Report of the Advisory Committee on Evidence Rules

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 804(b)(3). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

* * * * *

ERRATA

April 2024: Before this package was sent to Congress, corrections were made to correct scrivener's errors in Bankruptcy Rule 1007(c)(4)(B) at page 1013 and Bankruptcy Rule 1007(c)(5) at page 576.