# The Supreme Court of Texas



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August 4, 2015

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Dear Chip:

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

**Parental Notification Rules and Forms.** HB 3994, passed by the 84th Legislature, makes substantive amendments to Chapter 33 of the Family Code, which governs parental notice of an abortion for an unemancipated minor. In 1999, with the help of the Advisory Committee, the Court promulgated rules to govern proceedings to obtain a court order and forms for use in these proceedings. The rules and forms must be updated to reflect the recent statutory amendments. The Committee should also consider whether parental-notification proceedings should be subject to or exempt from the electronic-filing mandate for civil cases. Because HB 3994 takes effect on January 1, 2016, the Court must have the Committee's recommendations by October 16, 2015.

**Three-Judge District Court.** SB 455, passed by the 84th Legislature, adds to the Government Code Chapter 22A, which authorizes the Attorney General to request the convention of a special three-judge district court in school-finance and redistricting cases. Section 22A.004(b) authorizes the Court to adopt rules for the operation of a three-judge district court convened under Chapter 22A and for proceedings of the court.

**Ex Parte Communications.** The Internet and social media have made it easy for any person to direct a communication, or instigate mass communications, to a judge about a pending case. Canon 3(B)(8) of the Code of Judicial Conduct prohibits a judge from "initiat[ing], permit[ting], or consider[ing] *ex parte* communications," but it does not give specific guidance on the ethical duty of a judge who receives an improper communication or a mass of improper communications about a case. The Court

requests the Advisory Committee's recommendations on whether and how the Code should be amended to specifically address the duty of a judge who receives improper communications about a case, including communications sent by e-mail or through social media.

**ADR and Constitutional County Court Judges.** The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachment

# THE COUNTY COURT
## OF
## KERR COUNTY, TEXAS

700 Main Street, Ste. 101, Kerrville, Texas 78028
Tel: (830) 792-2211
Fax: (830) 792-2218
Email: commissioners@co.kerr.tx.us

COUNTY JUDGE
TOM POLLARD

COURT COORDINATOR
JODY GRINSTEAD

COMMISSIONERS COURT
H. A. "BUSTER" BALDWIN, PCT. 1
TOM MOSER, PCT. 2
JONATHAN LETZ, PCT. 3
BRUCE OEHLER, PCT. 4


May 12, 2015

Clerk of the Court
Supreme Court of the State of Texas
P. O. Box 12248
Austin, Texas 78711

**Attn: Ms. Martha Newton**

**Re: Request for Revision/update of Cannon 4 F. of the Texas Code of Judicial Conduct**

Dear Ms. Newton:

Background:

I am, and have been for 48 years, a licensed Texas Attorney as well as the duly elected constitutional County Judge of Kerr County, Texas. I estimate that 65% of my time involves handling judicial matters such as guardianships, probates, mental health commitments and I am the judge of the juvenile court. The balance of my time, 35% or so, is spent on administrative/non-judicial matters for Kerr County, Texas*.

The Texas Code of Judicial Conduct, Canon 4 F provides that "An active ***full-time*** (emphasis added) judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties."

*I note that I am permitted to have a private law practice for compensation so long as it does not relate to a matter pending in my Court, per Canon 4G and Canon 6 B(3).*

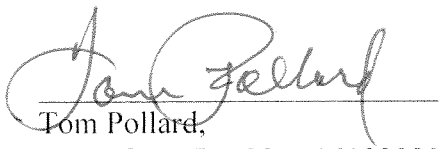
**REQUEST:**

I respectfully request that the Texas Supreme Court review and update the Texas Code of Judicial Conduct, specifically Canon 4F. by adding the following sentence (or similar language to the same effect), to-wit:

> "Constitutional County Judges may be mediators and/or arbitrators for compensation so long as the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court.

Thank you very much!.

Sincerely,



Tom Pollard,
Texas State Bar No.: 16100000
Kerr County Judge

Encl: (as stated)

* See attached general description of the Kerr County Judge judicial and administrative duties.

## County Judge

The Texas Constitution vests broad judicial and administrative powers in the position of County Judge, who presides over a five-member commissioner's court, which has budgetary and administrative authority over county government operations.

The County Judge handles such widely varying matters as hearings for beer and wine license applications, hearing on admittance to state hospitals for the mentally ill and mentally handicapped, juvenile work permits and temporary guardianships for special purposes. The judge is also responsible for calling elections, posting election notices and for receiving and canvassing the election returns. The county judge may also perform marriages.

A County Judge in Texas may have judicial responsibility for certain criminal, civil and probate matters - responsibility for these functions vary from county to county. In those counties in which the judge has judicial responsibilities, the judge has appellate jurisdiction over matters arising from the justice courts. In Kerr County, when the office of County Judge is held by a licensed attorney, the County Judge has traditionally been the Presiding Judge of the Probate, Mental Health and Juvenile dockets. The County Judge is also head of civil defense and disaster relief, county welfare and in counties with a population of under 225,000 the judge prepares the county budget along with the County Auditor's Office.

# Item 5 – Judicial By-Pass Rules (Parental Notification)

AN ACT

relating to notice of and consent to an abortion for a minor and associated requirements; amending provisions subject to a criminal penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The heading to Chapter 33, Family Code, is amended to read as follows:

CHAPTER 33. NOTICE OF AND CONSENT TO ABORTION

SECTION 2. Section 33.001, Family Code, is amended by adding Subdivision (3-a) to read as follows:

(3-a) "Medical emergency" has the meaning assigned by Section 171.002, Health and Safety Code.

SECTION 3. Section 33.002, Family Code, is amended by amending Subsections (a), (e), (f), (h), and (i) and adding Subsections (j), (k), and (l) to read as follows:

(a) A physician may not perform an abortion on a pregnant unemancipated minor unless:

(1) the physician performing the abortion gives at least 48 hours actual notice, in person or by telephone, of the physician's intent to perform the abortion to:

(A) a parent of the minor, if the minor has no managing conservator or guardian; or

(B) a court-appointed managing conservator or guardian;

(2) the physician who is to perform the abortion receives an order issued by a court under Section 33.003 or 33.004 [~~judge of a court having probate jurisdiction, the judge of a county court at law, the judge of a district court, including a family district court, or a court of appellate jurisdiction issues an order~~] authorizing the minor to consent to the abortion as provided by Section 33.003 or 33.004; or

(3) [~~a probate court, county court at law, district court, including a family district court, or court of appeals, by its inaction, constructively authorizes the minor to consent to the abortion as provided by Section 33.003 or 33.004; or~~

[~~(4)~~] the physician who is to perform [~~performing~~] the abortion:

(A) concludes that a medical emergency exists [~~on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function~~]; [~~and~~]

(B) certifies in writing to the [~~Texas~~] Department of State Health Services and in the patient's medical record the medical indications supporting the physician's judgment that a medical emergency exists; and

(C) provides the notice required by Section 33.0022 [~~the circumstances described by Paragraph (A) exist~~].

(e) The [~~Texas~~] Department of State Health Services shall

prepare a form to be used for making the certification required by Subsection (a)(3)(B) [~~(a)(4)~~].

(f) A certification required by Subsection (a)(3)(B) [~~(a)(4)~~] is confidential and privileged and is not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. Personal or identifying information about the minor, including her name, address, or social security number, may not be included in a certification under Subsection (a)(3)(B) [~~(a)(4)~~]. The physician must keep the medical records on the minor in compliance with the rules adopted by the Texas [~~State Board of~~] Medical Board [~~Examiners~~] under Section 153.003, Occupations Code.

(h) It is a defense to prosecution under this section that the minor falsely represented her age or identity to the physician to be at least 18 years of age by displaying an apparently valid proof of identity and age described by Subsection (k) [~~governmental record of identification~~] such that a reasonable person under similar circumstances would have relied on the representation. The defense does not apply if the physician is shown to have had independent knowledge of the minor's actual age or identity or failed to use due diligence in determining the minor's age or identity. In this subsection, "defense" has the meaning and application assigned by Section 2.03, Penal Code.

(i) In relation to the trial of an offense under this section in which the conduct charged involves a conclusion made by the physician under Subsection (a)(3)(A) [~~(a)(4)~~], the defendant may seek a hearing before the Texas [~~State Board of~~] Medical Board

[~~Examiners~~] on whether the physician's conduct was necessary because of a medical emergency [~~to avert the death of the minor or to avoid a serious risk of substantial and irreversible impairment of a major bodily function~~]. The findings of the Texas [~~State Board of~~] Medical Board [~~Examiners~~] under this subsection are admissible on that issue in the trial of the defendant. Notwithstanding any other reason for a continuance provided under the Code of Criminal Procedure or other law, on motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit a hearing under this subsection to take place.

(j) A physician shall use due diligence to determine that any woman on which the physician performs an abortion who claims to have reached the age of majority or to have had the disabilities of minority removed has, in fact, reached the age of majority or has had the disabilities of minority removed.

(k) For the purposes of this section, "due diligence" includes requesting proof of identity and age described by Section 2.005(b) or a copy of the court order removing disabilities of minority.

(l) If proof of identity and age cannot be provided, the physician shall provide information on how to obtain proof of identity and age. If the woman is subsequently unable to obtain proof of identity and age and the physician chooses to perform the abortion, the physician shall document that proof of identity and age was not obtained and report to the Department of State Health Services that proof of identity and age was not obtained for the woman on whom the abortion was performed. The department shall

report annually to the legislature regarding the number of abortions performed without proof of identity and age.

SECTION 4. Chapter 33, Family Code, is amended by adding Sections 33.0021 and 33.0022 to read as follows:

Sec. 33.0021. CONSENT REQUIRED. A physician may not perform an abortion in violation of Section 164.052(a)(19), Occupations Code.

Sec. 33.0022. MEDICAL EMERGENCY NOTIFICATION; AFFIDAVIT FOR MEDICAL RECORD. (a) If the physician who is to perform the abortion concludes under Section 33.002(a)(3)(A) that a medical emergency exists and that there is insufficient time to provide the notice required by Section 33.002 or obtain the consent required by Section 33.0021, the physician shall make a reasonable effort to inform, in person or by telephone, the parent, managing conservator, or guardian of the unemancipated minor within 24 hours after the time a medical emergency abortion is performed on the minor of:

(1) the performance of the abortion; and

(2) the basis for the physician's determination that a medical emergency existed that required the performance of a medical emergency abortion without fulfilling the requirements of Section 33.002 or 33.0021.

(b) A physician who performs an abortion as described by Subsection (a), not later than 48 hours after the abortion is performed, shall send a written notice that a medical emergency occurred and the ability of the parent, managing conservator, or guardian to contact the physician for more information and medical

records, to the last known address of the parent, managing conservator, or guardian by certified mail, restricted delivery, return receipt requested. The physician may rely on last known address information if a reasonable and prudent person, under similar circumstances, would rely on the information as sufficient evidence that the parent, managing conservator, or guardian resides at that address. The physician shall keep in the minor's medical record:

(1) the return receipt from the written notice; or

(2) if the notice was returned as undeliverable, the notice.

(c) A physician who performs an abortion on an unemancipated minor during a medical emergency as described by Subsection (a) shall execute for inclusion in the medical record of the minor an affidavit that explains the specific medical emergency that necessitated the immediate abortion.

SECTION 5. Section 33.003, Family Code, is amended by amending Subsections (a), (b), (c), (e), (g), (h), (i), (j), (k), and (l) and adding Subsections (g-1), (i-1), (i-2), (i-3), (l-1), (l-2), (o), (p), (q), and (r) to read as follows:

(a) A pregnant minor [~~who wishes to have an abortion without notification to one of her parents, her managing conservator, or her guardian~~] may file an application for a court order authorizing the minor to consent to the performance of an abortion without notification to and consent [~~either~~] of [~~her parents or~~] a parent, managing conservator, or guardian.

(b) The application must [~~may~~] be filed in:

(1) a [~~any~~] county court at law, court having probate jurisdiction, or district court, including a family district court, in the minor's county of residence;

(2) if the minor's parent, managing conservator, or guardian is a presiding judge of a court described by Subdivision (1):

(A) a county court at law, court having probate jurisdiction, or district court, including a family district court, in a contiguous county; or

(B) a county court at law, court having probate jurisdiction, or district court, including a family district court, in the county where the minor intends to obtain the abortion;

(3) if the minor's county of residence has a population of less than 10,000:

(A) a court described by Subdivision (1);

(B) a county court at law, court having probate jurisdiction, or district court, including a family district court, in a contiguous county; or

(C) a county court at law, court having probate jurisdiction, or district court, including a family district court, in the county in which the facility at which the minor intends to obtain the abortion is located; or

(4) a county court at law, court having probate jurisdiction, or district court, including a family district court, in the county in which the facility at which the minor intends to obtain the abortion is located, if the minor is not a resident of this state.

(c) The application must:

(1) be made under oath;

(2) [~~and~~] include:

(A) [~~(1)~~] a statement that the minor is pregnant;

(B) [~~(2)~~] a statement that the minor is unmarried, is under 18 years of age, and has not had her disabilities removed under Chapter 31;

(C) [~~(3)~~] a statement that the minor wishes to have an abortion without the notification to and consent of [~~either of her parents or~~] a parent, managing conservator, or guardian; [~~and~~]

(D) [~~(4)~~] a statement as to whether the minor has retained an attorney and, if she has retained an attorney, the name, address, and telephone number of her attorney; and

(E) a statement about the minor's current residence, including the minor's physical address, mailing address, and telephone number; and

(3) be accompanied by the sworn statement of the minor's attorney under Subsection (r), if the minor has retained an attorney to assist the minor with filing the application under this section.

(e) The court shall appoint a guardian ad litem for the minor who shall represent the best interest of the minor. If the minor has not retained an attorney, the court shall appoint an attorney to represent the minor. The [~~If the~~] guardian ad litem may not also [~~is an attorney admitted to the practice of law in this state, the court may appoint the guardian ad litem to~~] serve as the

minor's attorney ad litem.

(g) The court shall fix a time for a hearing on an application filed under Subsection (a) and shall keep a record of all testimony and other oral proceedings in the action[~~. The court shall enter judgment on the application immediately after the hearing is concluded~~].

(g-1) The pregnant minor must appear before the court in person and may not appear using videoconferencing, telephone conferencing, or other remote electronic means.

(h) The court shall rule on an application submitted under this section and shall issue written findings of fact and conclusions of law not later than 5 p.m. on the fifth [~~second~~] business day after the date the application is filed with the court. On request by the minor, the court shall grant an extension of the period specified by this subsection. If a request for an extension is made, the court shall rule on an application and shall issue written findings of fact and conclusions of law not later than 5 p.m. on the fifth [~~second~~] business day after the date the minor states she is ready to proceed to hearing. [~~If the court fails to rule on the application and issue written findings of fact and conclusions of law within the period specified by this subsection, the application is deemed to be granted and the physician may perform the abortion as if the court had issued an order authorizing the minor to consent to the performance of the abortion without notification under Section 33.002.~~] Proceedings under this section shall be given precedence over other pending matters to the extent necessary to assure that the court reaches a decision promptly,

regardless of whether the minor is granted an extension under this subsection.

(i) The court shall determine by clear and convincing [~~a preponderance of the~~] evidence, as described by Section 101.007, whether:

(1) the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to or consent of a parent, [~~either of her parents or a~~] managing conservator, or guardian; or

(2) the [~~, whether~~] notification and attempt to obtain consent would not be in the best interest of the minor[~~, or whether notification may lead to physical, sexual, or emotional abuse of the minor~~].

(i-1) In determining whether the minor meets the requirements of Subsection (i)(1), the court shall consider the experience, perspective, and judgment of the minor. The court may:

(1) consider all relevant factors, including:

(A) the minor's age;

(B) the minor's life experiences, such as working, traveling independently, or managing her own financial affairs; and

(C) steps taken by the minor to explore her options and the consequences of those options;

(2) inquire as to the minor's reasons for seeking an abortion;

(3) consider the degree to which the minor is informed about the state-published informational materials described by

Chapter 171, Health and Safety Code; and

(4) require the minor to be evaluated by a licensed mental health counselor, who shall return the evaluation to the court for review within three business days.

(i-2) In determining whether the notification and the attempt to obtain consent would not be in the best interest of the minor, the court may inquire as to:

(1) the minor's reasons for not wanting to notify and obtain consent from a parent, managing conservator, or guardian;

(2) whether notification or the attempt to obtain consent may lead to physical or sexual abuse;

(3) whether the pregnancy was the result of sexual abuse by a parent, managing conservator, or guardian; and

(4) any history of physical or sexual abuse from a parent, managing conservator, or guardian.

(i-3) The [~~If the court finds that the minor is mature and sufficiently well informed, that notification would not be in the minor's best interest, or that notification may lead to physical, sexual, or emotional abuse of the minor, the~~] court shall enter an order authorizing the minor to consent to the performance of the abortion without notification to and consent [~~either~~] of [~~her parents or~~] a parent, managing conservator, or guardian and shall execute the required forms if the court finds by clear and convincing evidence, as defined by Section 101.007, that:

(1) the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to or consent of a parent, managing conservator, or

guardian; or

(2) the notification and attempt to obtain consent would not be in the best interest of the minor.

(j) If the court finds that the minor does not meet the requirements of Subsection (i-3) [~~(i)~~], the court may not authorize the minor to consent to an abortion without the notification authorized under Section 33.002(a)(1) and consent under Section 33.0021.

(k) The court may not notify a parent, managing conservator, or guardian that the minor is pregnant or that the minor wants to have an abortion. The court proceedings shall be conducted in a manner that protects the confidentiality of the identity [~~anonymity~~] of the minor. The application and all other court documents pertaining to the proceedings are confidential and privileged and are not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. Confidential records pertaining to a minor under this subsection may be disclosed to the minor [~~The minor may file the application using a pseudonym or using only her initials~~].

(l) An order of the court issued under this section is confidential and privileged and is not subject to disclosure under Chapter 552, Government Code, or discovery, subpoena, or other legal process. The order may not be released to any person but the pregnant minor, the pregnant minor's guardian ad litem, the pregnant minor's attorney, the physician who is to perform the abortion, another person designated to receive the order by the minor, or a governmental agency or attorney in a criminal or

administrative action seeking to assert or protect the interest of the minor. The supreme court may adopt rules to permit confidential docketing of an application under this section.

(l-1) The clerk of the court, at intervals prescribed by the Office of Court Administration of the Texas Judicial System, shall submit a report to the office that includes, for each case filed under this section:

(1) the case number and style;

(2) the applicant's county of residence;

(3) the court of appeals district in which the proceeding occurred;

(4) the date of filing;

(5) the date of disposition; and

(6) the disposition of the case.

(l-2) The Office of Court Administration of the Texas Judicial System shall annually compile and publish a report aggregating the data received under Subsections (l-1)(3) and (6). A report submitted under Subsection (l-1) is confidential and privileged and is not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. A report under this subsection must protect the confidentiality of:

(1) the identity of all minors and judges who are the subject of the report; and

(2) the information described by Subsection (l-1)(1).

(o) A minor who has filed an application under this section may not withdraw or otherwise non-suit her application without the permission of the court.

(p) Except as otherwise provided by Subsection (q), a minor who has filed an application and has obtained a determination by the court as described by Subsection (i) may not initiate a new application proceeding and the prior proceeding is res judicata of the issue relating to the determination of whether the minor may or may not be authorized to consent to the performance of an abortion without notification to and consent of a parent, managing conservator, or guardian.

(q) A minor whose application is denied may subsequently submit an application to the court that denied the application if the minor shows that there has been a material change in circumstances since the time the court denied the application.

(r) An attorney retained by the minor to assist her in filing an application under this section shall fully inform himself or herself of the minor's prior application history, including the representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated. If an attorney assists the minor in the application process in any way, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement.

SECTION 6. Section 33.004, Family Code, is amended by amending Subsections (b) and (f) and adding Subsection (c-1) to read as follows:

(b) The court of appeals shall rule on an appeal under this

section not later than 5 p.m. on the fifth [~~second~~] business day after the date the notice of appeal is filed with the court that denied the application. On request by the minor, the court shall grant an extension of the period specified by this subsection. If a request for an extension is made, the court shall rule on the appeal not later than 5 p.m. on the fifth [~~second~~] business day after the date the minor states she is ready to proceed. [~~If the court of appeals fails to rule on the appeal within the period specified by this subsection, the appeal is deemed to be granted and the physician may perform the abortion as if the court had issued an order authorizing the minor to consent to the performance of the abortion without notification under Section 33.002.~~] Proceedings under this section shall be given precedence over other pending matters to the extent necessary to assure that the court reaches a decision promptly, regardless of whether the minor is granted an extension under this subsection.

(c-1) Notwithstanding Subsection (c), the court of appeals may publish an opinion relating to a ruling under this section if the opinion is written in a way to preserve the confidentiality of the identity of the pregnant minor.

(f) An expedited confidential appeal shall be available to any pregnant minor to whom a court of appeals denies an application to authorize [~~order authorizing~~] the minor to consent to the performance of an abortion without notification to or consent of [~~either of her parents or~~] a parent, managing conservator, or guardian.

SECTION 7. Chapter 33, Family Code, is amended by adding

Section 33.0065 to read as follows:

Sec. 33.0065. RECORDS. The clerk of the court shall retain the records for each case before the court under this chapter in accordance with rules for civil cases and grant access to the records to the minor who is the subject of the proceeding.

SECTION 8. Section 33.008, Family Code, is amended to read as follows:

Sec. 33.008. PHYSICIAN'S DUTY TO REPORT ABUSE OF A MINOR; INVESTIGATION AND ASSISTANCE. (a) If a minor claims to have been physically or sexually abused or a [~~A~~] physician or physician's agent [~~who~~] has reason to believe that a minor has been [~~or may be~~] physically or sexually abused [~~by a person responsible for the minor's care, custody, or welfare, as that term is defined by Section 261.001~~], the physician or physician's agent shall immediately report the suspected abuse and the name of the abuser to the Department of Family and Protective Services and to a local law enforcement agency and shall refer the minor to the department for services or intervention that may be in the best interest of the minor. The local law enforcement agency shall respond and shall write a report within 24 hours of being notified of the alleged abuse. A report shall be made regardless of whether the local law enforcement agency knows or suspects that a report about the abuse may have previously been made.

(b) The appropriate local law enforcement agency and the Department of Family and Protective Services shall investigate suspected abuse reported under this section and, if warranted [~~appropriate~~], shall refer the case to the appropriate prosecuting

authority [~~assist the minor in making an application with a court under Section 33.003~~].

(c) When the local law enforcement agency responds to the report of physical or sexual abuse as required by Subsection (a), a law enforcement officer or appropriate agent from the Department of Family and Protective Services may take emergency possession of the minor without a court order to protect the health and safety of the minor as described by Chapter 262.

SECTION 9. Chapter 33, Family Code, is amended by adding Section 33.0085 to read as follows:

Sec. 33.0085. DUTY OF JUDGE OR JUSTICE TO REPORT ABUSE OF MINOR. (a) Notwithstanding any other law, a judge or justice who, as a result of court proceedings conducted under Section 33.003 or 33.004, has reason to believe that a minor has been or may be physically or sexually abused shall:

(1) immediately report the suspected abuse and the name of the abuser to the Department of Family and Protective Services and to a local law enforcement agency; and

(2) refer the minor to the department for services or intervention that may be in the best interest of the minor.

(b) The appropriate local law enforcement agency and the Department of Family and Protective Services shall investigate suspected abuse reported under this section and, if warranted, shall refer the case to the appropriate prosecuting authority.

SECTION 10. Section 33.010, Family Code, is amended to read as follows:

Sec. 33.010. CONFIDENTIALITY. Notwithstanding any other

law, information obtained by the Department of Family and Protective Services or another entity under Section 33.008, 33.0085, or 33.009 is confidential except to the extent necessary to prove a violation of Section 21.02, 22.011, 22.021, or 25.02, Penal Code.

SECTION 11. Chapter 33, Family Code, is amended by adding Sections 33.012, 33.013, and 33.014 to read as follows:

Sec. 33.012. CIVIL PENALTY. (a) A person who is found to have intentionally, knowingly, recklessly, or with gross negligence violated this chapter is liable to this state for a civil penalty of not less than $2,500 and not more than $10,000.

(b) Each performance or attempted performance of an abortion in violation of this chapter is a separate violation.

(c) A civil penalty may not be assessed against:

(1) a minor on whom an abortion is performed or attempted; or

(2) a judge or justice hearing a court proceeding conducted under Section 33.003 or 33.004.

(d) It is not a defense to an action brought under this section that the minor gave informed and voluntary consent.

(e) The attorney general shall bring an action to collect a penalty under this section.

Sec. 33.013. CAPACITY TO CONSENT. An unemancipated minor does not have the capacity to consent to any action that violates this chapter.

Sec. 33.014. ATTORNEY GENERAL TO ENFORCE. The attorney general shall enforce this chapter.

SECTION 12. Section 245.006(a), Health and Safety Code, is amended to read as follows:

(a) The department shall inspect an abortion facility at random, unannounced, and reasonable times as necessary to ensure compliance with this chapter, [~~and~~] Subchapter B, Chapter 171, and Chapter 33, Family Code.

SECTION 13. Section 164.052(a), Occupations Code, is amended to read as follows:

(a) A physician or an applicant for a license to practice medicine commits a prohibited practice if that person:

(1) submits to the board a false or misleading statement, document, or certificate in an application for a license;

(2) presents to the board a license, certificate, or diploma that was illegally or fraudulently obtained;

(3) commits fraud or deception in taking or passing an examination;

(4) uses alcohol or drugs in an intemperate manner that, in the board's opinion, could endanger a patient's life;

(5) commits unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 164.053, or injure the public;

(6) uses an advertising statement that is false, misleading, or deceptive;

(7) advertises professional superiority or the performance of professional service in a superior manner if that advertising is not readily subject to verification;

(8) purchases, sells, barters, or uses, or offers to purchase, sell, barter, or use, a medical degree, license, certificate, or diploma, or a transcript of a license, certificate, or diploma in or incident to an application to the board for a license to practice medicine;

(9) alters, with fraudulent intent, a medical license, certificate, or diploma, or a transcript of a medical license, certificate, or diploma;

(10) uses a medical license, certificate, or diploma, or a transcript of a medical license, certificate, or diploma that has been:

(A) fraudulently purchased or issued;

(B) counterfeited; or

(C) materially altered;

(11) impersonates or acts as proxy for another person in an examination required by this subtitle for a medical license;

(12) engages in conduct that subverts or attempts to subvert an examination process required by this subtitle for a medical license;

(13) impersonates a physician or permits another to use the person's license or certificate to practice medicine in this state;

(14) directly or indirectly employs a person whose license to practice medicine has been suspended, canceled, or revoked;

(15) associates in the practice of medicine with a person:

(A) whose license to practice medicine has been suspended, canceled, or revoked; or

(B) who has been convicted of the unlawful practice of medicine in this state or elsewhere;

(16) performs or procures a criminal abortion, aids or abets in the procuring of a criminal abortion, attempts to perform or procure a criminal abortion, or attempts to aid or abet the performance or procurement of a criminal abortion;

(17) directly or indirectly aids or abets the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the board;

(18) performs an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy unless:

(A) the abortion is necessary to prevent the death of the woman;

(B) the viable unborn child has a severe, irreversible brain impairment; or

(C) the woman is diagnosed with a significant likelihood of suffering imminent severe, irreversible brain damage or imminent severe, irreversible paralysis;

(19) performs an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided by Section 33.003 or 33.004, Family Code, unless the abortion is necessary due to a medical emergency, as defined by Section 171.002, Health and Safety Code;

(20) otherwise performs an abortion on an unemancipated minor in violation of Chapter 33, Family Code [~~, authorizing the minor to consent to the abortion, unless the physician concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the child's parent, managing conservator, or legal guardian~~]; or

(21) [~~(20)~~] performs or induces or attempts to perform or induce an abortion in violation of Subchapter C, Chapter 171, Health and Safety Code.

SECTION 14. (a) Section 33.002, Family Code, as amended by this Act, applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

(b) Sections 33.003 and 33.004, Family Code, as amended by this Act, apply only to an application filed on or after the effective date of this Act. An application filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

(c) The Office of Court Administration of the Texas Judicial System is not required to publish the initial report under Section 33.003(l-2), Family Code, as added by this Act, before January 1, 2017.

SECTION 15. Section 33.012, Family Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 16. Every provision in this Act and every application of the provisions in this Act are severable from each other. If any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, the remainder of this Act and the application of the Act's provisions to all other persons and circumstances may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction of relevant cases, the remaining valid applications shall be severed and allowed to remain in force.

SECTION 17. This Act takes effect January 1, 2016.

President of the Senate

Speaker of the House

I certify that H.B. No. 3994 was passed by the House on May 14, 2015, by the following vote: Yeas 93, Nays 46, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 3994 on May 29, 2015, by the following vote: Yeas 102, Nays 43, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 3994 was passed by the Senate, with amendments, on May 26, 2015, by the following vote: Yeas 21, Nays 10.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

To: Supreme Court Advisory Committee

From: Judicial Bypass Subcommittee

Date: October 9, 2015

RE: H.B. 3994: Proposed Amendments to Parental Notification Rules and Forms

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The 84th Legislature passed H.B. 3994, which amended Chapter 33 of the Family Code, effective January 1, 2016. Chapter 33 provides a means to obtain a court order to "bypass" the parental notification and consent requirements that the law mandates before an unemancipated minor may have an abortion. In 1999, when Chapter 33 was originally adopted, the Court promulgated rules and forms for the judicial bypass. These rules and forms must be amended in light of the 2015 amendments to Chapter 33.

The Subcommittee attaches its proposal—in both red-lined and clean copy—for this Committee's consideration and comment, and a copy of the amendments. The Subcommittee identified the following areas for discussion:

**Confidentiality v. Anonymity.** Previously, Chapter 33 required all bypass proceedings to be confidential and anonymous. The amendments to Chapter 33 removed references to anonymity and a provision that allowed a minor to use initials and pseudonyms. The statute still requires that the proceedings be confidential. The practical distinction between confidentiality and anonymity is not clear.

In any event, the anonymity requirement is a necessary component of the constitutionally required bypass procedure:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with ***anonymity*** and ***sufficient expedition*** to provide an effective opportunity for an abortion to be obtained.

*Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (emphasis added).

Also, significantly, Chapter 33 does not require (and has never required) the minor's name be included in any filing. Nor does the statute prohibit the use of pseudonyms or initials. And the supreme court has previously determined that all minors who find themselves the subject of a judicial proceeding deserve the privacy protection that

pseudonyms and initials provide whenever it is possible. *See, e.g.*, TEX. R. CIV. P. 21c(a), (b) (unless required by statute, minor's name should not be in included in court case records); TEX. R. APP. P. 9.8 (adopting procedures to protect minor's identity in all appeals). Therefore, the subcommittee's proposal continues to allow a minor to use initials or pseudonyms. The proposal also deletes the previous requirement that the minor's name be included on the verification page of the application. While, as a practical matter, the minor's name will be included on that document if the minor completes the application herself and signs the required verification, the statute does not require that her name appear if someone completes the application on her behalf.

Two members of the Subcommittee, however, disagree with the statement above and submitted this comment. They expressed concern that the proposed rule revisions may not sufficiently reflect the Legislature's intent when enacting the 2015 amendments to Chapter 33. Especially against the backdrop of the Texas Supreme Court's emphasis on (and deference to) statutory text as the primary guide to legislative intent, they reason, it is potentially significant that the Legislature has replaced a former requirement that judicial-bypass proceedings "be conducted in a manner that protects the *anonymity* of the minor," accompanied by an express authorization to use pseudonyms or initials, with a provision requiring that the proceedings "be conducted in a manner that protects the *confidentiality of the identity* of the minor" and deleting any authorization to use pseudonyms. In their view, "confidentiality of the identity of the minor" would imply that the identity of the minor is made known, at least within the confidential proceeding, as opposed to being kept unknown (i.e., anonymous). While they acknowledge that some continued form of anonymity protection would seemingly be necessary in order to comply with the statutory requirement of *confidentiality* when and if the existence of a bypass proceeding is made public (e.g., Texas Supreme Court opinions), they conclude that the amended statute may represent legislative intent that the minor's actual name be reflected in the confidential court papers to a greater degree than would be done in the Subcommittee's proposal, which would not only carry forward the current Rule 1.3(b) requirement that the minor's name not appear "in any order, decision, finding or notice, or on the record," but also would eliminate the current limited exception requiring the minor's name to be reflected in a "verification page."

The purpose of these statutory amendments, these members further suggest, may relate to other amendments the legislature made to Chapter 33 in 2015. These include new provisions calculated to combat "forum shopping" (including prohibitions against strategic nonsuiting and refiling), a new res judicata provision, and a new requirement that the minor's attorney "fully inform himself or herself of the minor's application history . . . and whether a prior application has been filed or initiated." Administration and enforcement of these new requirements would seemingly be undermined, the reasoning goes, if minors were identified only as "Jane Doe" in the files and even courts could not ascertain or verify a minor's application history from those records.

As for any asserted constitutional objections, these members would observe that such arguments are myriad and diverse in this jurisprudentially volatile area and could be debated

at length without definitive resolution. The Explanatory Statement to the current rules acknowledges this, and also reflects a historical approach of drafting the bypass rules "merely [to] track statutory requirements of the Legislature" and leaving any potential constitutional debates to "adversarial proceeding[s] with full briefing and argument." These members would urge the same approach here.

**Consequence for Failure to Rule**. The amended statute no longer provides a consequence if a trial court does not comply with its obligation to rule within the statutory deadline. Previously, the application would be deemed granted as a matter of law. The amendments removed that provision. The omission leaves a significant gap in the bypass procedure.

The committee identified several potential problems, but the two critical ones being:

- a trial court holds a hearing but refuses to rule; or
- a trial court refuses to hold a hearing at all.

The committee considered several proposals on how to expeditiously address these issues. One proposal would, by rule, deem an application denied upon the passing of the statutory deadline. Another proposal would allow the regional presiding judge to appoint a different judge to hear the case if a trial court refused to set a hearing. Yet another would require the clerk to certify the lack of decision (similar to what is done now), allow the applicant to show by affidavit what it would have presented at the trial (similar to an offer of proof), and provide that the certification itself was an appealable order.

Ultimately, the subcommittee decided that to adopt an expedited motion procedure (in the nature of a writ of mandamus but more akin to a motion used to review an indigency determination) and to allow the motion to be filed directly with the supreme court. The supreme court is in a better position to act if the non-compliance is the refusal to find a judge to hear the case. A direct motion to the supreme court would also ensure an expeditious appellate writ for non-compliance. Although the subcommittee was cognizant of the potential burden on the high court, the subcommittee had enough confidence on the judiciary as a whole to believe that very rarely would a trial court refuse to set a hearing or refuse to rule, potentially in violation of the Code of Judicial Conduct. *See* Canon 3B(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.").

**E-filing**. The referral from the supreme court specifically asked the committee to consider whether applications under Chapter 33 should be e-filed. The subcommittee recommends that bypass applications be exempted from the e-filing mandate.

The statewide e-filing rules already provide that "documents to which access is otherwise restricted by law or court order" "must not be filed electronically." TEX. R. CIV. P. 21(f)(4)(B); *see also* TEX. R. APP. P. 9(c) (documents to which access is restricted by law must not be electronically filed). Chapter 33 demands confidentiality and clearly restricts access to any documents related to the proceeding. Thus, the rules already contemplate that a judicial bypass application would not be e-filed. The subcommittee recommends the prohibition be expressly included in the draft rules.

That said, the subcommittee was concerned that a minor or her attorney may be too far away from the courthouse – particularly the supreme court or a court of appeals – to file in person. (Practically speaking, trial court filings are always done in person because showing up in person is the only way to get a hearing set promptly.) Therefore, the subcommittee amended Rule 1.5(a) to allow bypass papers to be filed by fax or email.

**Attorney Sworn Statement.** Another new requirement in Chapter 33 is an obligation on the part of an attorney retained to assist in filing the application to file a sworn statement regarding the proceeding. The statute now requires the application to "be accompanied by the sworn statement of the minor's attorney under Subsection (r), if the minor has retained an attorney to assist the minor with filing the application …." TEX. FAM. CODE §33.003(c)(3). In turn, subsection (r) provides:

> an attorney retained by the minor to assist her in filing an application under this section shall fully inform himself or herself of the minor's prior application history, including the representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated. If an attorney assists the minor in the application process in any way with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement.

TEX. FAM. CODE §33.003(r).

Because the statute specifically refers to the "attorney who assists the minor in filing an application," it appears that the intent was to cover attorneys who were assisting the minor with the application, not attorneys who were appointed by the court to represent the minor after she filed a pro se application. It also would not apply to a hot-line volunteer who happened to be an attorney who did not assist in the application.

The requirement that an attorney (as opposed to a client) swear to the contents of an application is rare, if not unprecedented. The requirement under these circumstances is particularly impossible given that any records concerning a "prior application" are sealed,

inaccessible to the minor's attorney, and physically checking or inquiring of the minor's residence might violate the confidentiality requirements. Thus, the subcommittee believes, the attorney will ordinarily be limited to representations from the minor about these issues. Thus, consistent with Texas Rule of Civil Procedure 13, concerning the effect of signing pleadings, the proposed rule requires the attorney to swear that the underlying facts are true "to the best of their knowledge, information, and belief formed after reasonable inquiry."

Moreover, under current law, a declaration made under penalty of perjury will suffice for sworn accounts. TEX. CIV. PRAC. & REM. CODE §132.001 ("[A]n unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute…."). The proposed rule incorporates this alternative.

**Report to OCA.** The new statute requires trial court clerks to submit quarterly reports to the Office of Court Administration regarding judicial bypass proceedings and OCA to then publish a report on these proceedings—but only by court of appeals district. The subcommittee decided the reporting need not be included in the rules provision. The only proposed amendment in response to the reporting requirements is a reminder in Rule 2.2(b) that the case number and style of the case should not identify the court or the assigned judge or the minor to protect confidentiality.

**Abuse Reporting.** There are several reporting requirements relevant to a judicial bypass proceeding:

- Section 33.009 has always required a "court or the guardian ad litem or attorney ad litem for the minor shall report conduct reasonably believed to violate [Penal Code] Section 21.02 [continuous sexual assault], 22.011 [sexual assault], 22.021 [aggravated sexual assault], or 25.02 [prohibited sexual acts, aka incest]" to an appropriate agency. The statute provides several options concerning to whom the report should be made.

- H.B. 3994 added new section 33.0085 that places a duty on a "judge or justice" to report if a minor may be "physical or sexually abused" to DFPS and local law enforcement.

- Section 261.001, Family Code, has long provided a general obligation on a "person" and "professionals" to report "abuse and neglect" which Section 261.001 defines with a laundry list of types of abuse including Penal Code Sections 21.02 (continuous sex assault), 22.011 (sex assault), 22.021 (aggravated sex assault), and 21.11 (indecency with a child). Chapter 261 also provides several options concerning to whom the report should be made.

The subcommittee studied these requirements and determined that there was not much difference in the types of abuse that may need to be reported. For example, Section 261.001 does not list Penal Code 25.02 (incest) but would require reporting it given the broad

categories of abuse described. And Section 33.009 does not include Penal Code 21.11 (indecency with a child) but Penal Code 22.011 (sex assault) prohibits the same acts (namely sex with someone under 17 when the age difference is more than 3 years, forcible sex, etc.). The main difference appears to be that there is less discretion concerning to whom the report must be made. There is more discretion under Sections 33.009 and 261.103. The judge must very clearly report to both DFPS and local law enforcement.

The amendments proposed simply alert the relevant entities to the statutory reporting requirements.

**Ad litems**. Current Rules reference the application of Chapter 107, Family Code, as reflecting legislative intent that competent and qualified person represent the minor and serve as guardian ad litem. *See* Rule 2, Cmt. 3. In 2015, the Legislature passed two bills greatly expanding Chapter 107. *See* H.B. 3003, H.B. 1449. These bills amend or add subchapters to Chapter 107 that do not concern bypass proceedings. Consequently the references to the standards for ad litem in the Rules should be directed to Chapter 107, Subchapter A, as those are the relevant provisions.

The Legislature also passed H.B. 1369 which adds a new chapter 36 to the Government Code concerning judicial reports of ad litem payments. The language is similar to the miscellaneous order of the Supreme Court referenced in current Rule 1.9(e) but Chapter 36 specifically exempts from reporting certain types of cases including any that are confidential under state or federal law. Tex. Gov't Code § 36.003(2). Consequently the language in Rule 1.9(e) is amended with updated references to reporting laws and the exemption or confidential bypass cases.

The rules reference both the "attorney" and the "attorney ad litem." These references are meant to include any counsel who represents the minor whether retained, volunteered, or is appointed by the court.

# TEXAS PARENTAL ~~NOTIFICATION~~ CONSENT JUDICIAL BYPASS RULES AND FORMS

*effective date ~~March~~January 1, ~~2007~~2016*

## EXPLANATORY STATEMENT

Chapter 33 of the Texas Family Code, adopted ~~by Act of May 25,~~in 1999~~, 76th Leg., R.S., ch. 395, 1999 Tex. Gen. Laws 2466 (S.B. 30),~~ and later amended in 2005 and 2015, provides for judicial authorization of an unemancipated minor to consent to an abortion in Texas without ~~notice to her parents~~notification and consent of a parent, managing conservator, or guardian~~.~~, under certain circumstances, as provided by Section 33.003 or 33.004, Family Code (a "judicial bypass"). Section 2 of the 1999 Act ~~states: "~~required the Supreme Court of Texas ~~shall~~ to "issue promptly such rules as may be necessary in order that the process established by Sections 33.003 and 33.004, Family Code, as added by this Act, may be conducted in a manner that will ensure confidentiality and sufficient precedence over all other pending matters to ensure promptness of disposition." *See also* Tex. Fam. Code §§ 33.003(l), 33.004(c). Section 6 of the 1999 Act adds: "The clerk of the Supreme Court of Texas shall adopt the application form and notice of appeal form to be used under Sections 33.003 and 33.004, Family Code, as added by this Act, not later than December 15, 1999." *See also* Tex. Fam. Code §§ 33.003(m), 33.004(d). The Texas Medical Board has adopted the forms necessary for physicians to obtain the consent required by law to perform an abortion upon an unemancipated minor. *See* Tex. Occ. Code §164.052(c). Those forms are published at 22 Tex. Admin. Code §165.6(f) and are available on the Texas Medical Board's website, at www.tmb.state.tx.us/page/board-rules.

~~The following~~These rules and forms ~~are~~were promulgated as directed by the Act ~~without~~in 1999, and amended in 2007 and 2015, and merely provide a process for the judicial bypass, tracking the statutory requirements. These rules and forms do not include any determination that the Act or any part of it comports with the United States Constitution or the Texas Constitution~~. During the public hearings and debates on the rules and forms, questions were raised concerning the constitutionality of Chapter 33, among which were whether the statute can make court rulings secret, and whether the statute can require courts to act within the specified, short deadlines it imposes.~~, because such issues should not be resolved outside an adversarial proceeding with full briefing and argument~~, the~~. These rules and forms ~~merely track statutory requirements of the Legislature. Adoption of these rules does~~do not, of course, imply that abortion is or is not permitted in any specific situation. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); Tex. ~~Rev. Civ. Stat. Ann. art. 4495b, § 4.011~~Health & Safety Code § 170.002 (restrictions on third trimester abortions of viable fetuses).

~~In 2005, the Legislature amended the Texas Occupations Code to prohibit a~~

~~physician from performing an abortion on an unemancipated minor~~

> ~~without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided by Section 33.003 or 33.004, Family Code, authorizing the minor to consent to the abortion, unless the physician concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the child's parent, managing conservator, or legal guardian.~~

~~Act of May 27, 2005, 79th Leg., R.S., ch. 269, §1.42, 2005 Tex. Gen. Laws 734 (S.B. 419) (codified at Tex. Occ. Code §164.052(a)(19)). The parental consent law does not direct the Supreme Court to provide procedural rules implementing its provisions but instead expressly references the judicial bypass provisions in the parental notification law as providing an exception to the parental consent requirement. The procedures governing application for a judicial bypass to the parental notification requirement are set forth in the existing Parental Notification Rules. In addition, the parental consent law requires the Texas Medical Board to adopt the forms necessary for physicians to obtain the consent required by law to perform an abortion upon an unemancipated minor. *See id.* (codified at Tex. Occ. Code §164.052(c)). Those forms are published at 22 Tex. Admin. Code §165.6(f) and are available on the Texas Medical Board's website, at www.tmb.state.tx.us/rules/docs/Current%20Rules%20-%20%201-4-07.doc.~~

The notes and comments appended to the rules are intended to inform their construction and application by courts and practitioners.

## RULE 1. GENERAL PROVISIONS

**1.1 Applicability of These Rules.** These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to or consent from either of her parents or a managing conservator or guardian under Chapter 33, Family Code ~~(or as amended).~~. All references in these rules to "minor" refer to the minor applicant. Other Texas court rules — including the Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Judicial Administration, and local rules approved by the Supreme Court — also apply, but when the application of another rule would be inconsistent with the general framework or policy of Chapter 33, Family Code, or these rules, these rules control.

**1.2 Expedition required.**

**(a)** ***Proceedings.*** A court must give proceedings under these rules precedence over all other pending matters, regardless of whether the minor applied for a continuance, to the extent necessary to ~~assure~~ensure that applications and appeals are adjudicated as soon as possible and within the time required by Rules 2.4(a), 2.5(d), and 3.3(c).

**(b)** ***Prompt actual notice required.*** Without compromising the confidentiality ~~and anonymity~~ required by statute and these rules, courts and clerks must serve orders, decisions, findings, and notices required under these rules in a manner designed to give prompt actual notice in order that the deadlines imposed by Chapter 33, Family Code, can be met.

**(c)** ***Instanter.*** "Instanter" means immediately, without delay. An action required by these rules to be taken instanter should be done at the first possible time and with the most expeditious means available.

**1.3 ~~Anonymity~~Confidentiality of Identity of Minor Protected.**

**(a)** ***Generally.*** Proceedings under these rules must be conducted in a way that protects the ~~anonymity~~confidentiality of the identity of the minor.

**(b)** ***No reference to minor's identity in proceeding.*** With the exception of the verification page required under Rule 2.1(c)(2) and the communications required under Rule 2.2(e), no reference may be made in any order, decision, finding, or notice, or on the record, to the name of the minor, her address, or other information by which she might be identified by persons not participating in the proceedings. Instead, the minor must be referred to as "Jane Doe" in a numbered cause.

**(c)** ***Notice.*** With the exception of orders and rulings released under Rule 1.4(b), all service and communications from the court to the minor must be directed to the minor's attorney with a copy to the guardian ad litem. A minor's attorney must serve on the guardian ad litem instanter a copy of any document filed with the court. These requirements take effect when an attorney appears for the minor, or when the clerk has notified the minor of the appointment of an attorney or guardian ad litem.

**1.4 Confidentiality of Proceedings Required; Exceptions.**

**(a)** ***Generally.*** All officials and court personnel involved in the proceedings must ensure that the minor's contact with the clerk and court is confidential and expeditious. Except as permitted by law, no officials or court personnel involved in the proceedings may ever disclose to anyone outside the proceedings — including the minor's parent, managing conservator, or legal guardian — that the minor is or has ever been pregnant, or that she wants or has ever wanted an abortion.

**(b)** ***Documents and information pertaining to the proceeding.*** As required by Chapter 33, Family Code, the application and all other court documents and information pertaining to the proceedings are confidential and privileged and are not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. But documents and information may be disclosed when expressly authorized by these rules, and an order, ruling, opinion, or clerk's certificate may be released to:

(1) the minor;

(2) the minor's guardian ad litem;

(3) the minor's attorney;

(4) a person designated in writing by the minor to receive the order, ruling, opinion, or certificate, including her physician;

(5) a governmental agency or governmental attorney, in connection with a criminal or administrative action seeking to assert or protect the minor's interests; or

(6) another court, judge, or clerk in the same or related proceedings.

**(c)** ***Filing of court reporter's notes~~ permitted~~.*** To ~~assure~~ensure confidentiality, court reporter notes, in whatever form, ~~may~~must be filed

with other court documents in the proceeding.

**(d)** ***Duty to report possible ~~sexual~~ abuse.*** ~~A~~

(1) *Duty of the court*~~, guardian ad litem,~~. A judge or ~~attorney ad litem~~ justice who reasonably believes, based on information obtained in the proceeding, that a ~~violation of Section 22.011, 22.021,~~minor has been or ~~25.02, Penal Code, has occurred~~may be physically or sexually abused must report the information to the appropriate officials or agencies as required by Sections 33.0085 and 33.009, Family Code, and other law.

(2) *Duty of the attorney or guardian ad litem*. An attorney or a guardian ad litem must report possible physical or sexual abuse as required by Section 33.009, Family Code, and other law.

**(e)** ***Department of Protective and Regulatory Services to disclose certain information in proceeding.*** The Department of Protective and Regulatory Services or local law enforcement agency may disclose to the court, the attorney~~ ad litem~~, and the guardian ad litem any information obtained under Section 33.008, Family Code, without being ordered to do so. The trial court may order ~~the Department to disclose~~ such information be disclosed to such persons, and the Department or local law enforcement agency must comply.

## 1.5 Electronic Transmission of Documents; Hearings Conducted By Remote Electronic Means; Electronic Record Allowed When Necessary.

**(a)** ***No electronic filing.*** Documents must not be filed through the electronic filing manager established by the Office of Court Administration. Documents may be filed in paper form, by ~~facsimile~~fax, or ~~other electronic data transmission. If the sender communicates directly with~~by email. The clerk of a court must designate a fax number and an email address for the ~~time at which the transmission will occur, the clerk~~filing of documents in cases governed by these rules and must take all reasonable steps to ~~assure that~~maintain the confidentiality of the ~~received transmission will be maintained~~filings.

**(b)** ***Electronic transmission by court and clerk.*** The court and clerk may transmit orders, rulings, notices, and other documents ~~by facsimile or other electronic data transmission.~~electronically. But before the transmission is initiated, the sender must take all reasonable steps to ~~assure~~ensure that the

confidentiality of the received transmission will be maintained. The time and date of a transmission by the court is the time and date when it was initiated.

**(c)** ***Participation in hearings by electronic means.*** Consistent with the ~~anonymity and~~ confidentiality requirements of these rules, with the court's permission, the attorney ~~ad litem~~, the guardian ad litem, and any witnesses may participate in hearings under these rules by video conferencing, telephone, or other remote electronic means. The minor must appear before the court in person ~~unless the court determines that the minor's appearance by video conferencing will allow the court to view the minor during the hearing sufficiently well to assess her credibility and demeanor.~~.

**(d)** ***Record of hearing made by electronic means if necessary.*** If the court determines that a court reporter is unavailable for a hearing, the court may have a record of the hearing made by audio recording or other electronic means. If a notice of appeal is filed, the court must have the recording transcribed if possible. The person transcribing the recording must certify to the accuracy of the transcription. The court must transmit both the recording and the transcription to the court of appeals.

**1.6 Disqualification, Recusal, or Objection to a Judge.**

**(a)** ***Time for filing and ruling.*** An objection to a trial judge, or a motion to recuse or disqualify a trial judge, must be filed before 10:00 a.m. of the first business day after an application is filed or promptly after the assignment of a judge to hear the case is made known to the minor or her attorney, whichever is later. An objection to an appellate judge, or a motion to recuse or disqualify an appellate judge must be filed before 10 a.m. of the first business day after a notice of appeal is filed. A judge who chooses to recuse voluntarily must do so instanter. An objection to a judge or a motion to disqualify or recuse does not extend the deadline for ruling on the minor's application.

**(b)** ***Voluntary disqualification or recusal, or objection.*** A judge to whom objection is made under Chapter 74, Government Code, or a judge or justice who voluntarily does not sit, must notify instanter the appropriate authority for assigning another judge by local rules or by statute. That authority must instanter assign a judge or justice to the proceeding.

**(c)** ***Involuntary disqualification or recusal.*** A judge or justice who refuses to remove himself or herself voluntarily from a proceeding in response to a motion must instanter refer the motion to the appropriate judge or justice, pursuant to ~~local rule, rule, or statute, for determination. The~~other law,

including Tex. R. Civ. P. 18a, Tex. R. App. P. 16, and Tex. Gov't Code 25.00255. The presiding judge or justice to whom the motion is referred must rule on it as soon as possible and may do so with or without a hearing. If the motion is granted, the judge or justice to whom the motion was referred must instanter assign a judge or justice to the proceeding.

**(d)** ***Only one objection or motion to recuse permitted.*** A minor who objects to a judge assigned to the proceeding may not thereafter file a motion to recuse or disqualify, and a minor who files a motion to recuse or disqualify a judge may not thereafter object to a judge assigned to the proceeding.

**(e)** ***Issues on appeal.*** Any error in the denial of a motion to recuse or disqualify, or any error in the disallowance of an objection, or any challenge to a judge that a minor is precluded from making by subsections (a) or (d), may be raised only on appeal from the court's denial of the application.

**1.7 Rules and Forms to be Made Available.** A copy of these rules, and a copy of the attached forms in English and Spanish, must be made available to any person without charge in the clerk's offices of all courts in which applications or appeals may be filed under these rules, on the Texas Judiciary Internet site at www.courts.state.tx.us, and by the Office of Court Administration upon request. A copy of a court's local rules relating to proceedings under Chapter 33, Family Code, must be made available to any person without charge in the office of the clerk for that court where applications may be filed. Rules and forms may be copied.

**1.8 Duties of Attorneys ~~Ad Litem~~.** An attorney ~~ad litem~~ must represent the minor in the trial court in the proceeding in which the attorney is assigned, and in any appeal under these rules to the court of appeals or the Supreme Court~~.~~, but an attorney ~~ad litem~~ is not required to represent the minor in any other court or any other proceeding.

**1.9 Fees and Costs.**

**(a)** ***No fees or costs charged to minor.*** No filing fee or court cost may be assessed against a minor for any proceeding in a trial or appellate court.

**(b)** ***State ordered to pay fees and costs.***

(1) *Fees and costs that may be paid*. The State may be ordered to pay the reasonable and necessary fees and expenses of the attorney ~~ad litem~~, the reasonable and necessary fees and expenses of the guardian ad litem, the court reporter's fee as certified by the court

reporter, and trial court filing fees and costs as certified by the clerk. Court costs include the expenses of an interpreter (Form 2H) but do not include the fees or expenses of a witness. Court costs do not include fees which must be remitted to the state treasury.

(2) *To whom order directed and sent*. The order must be directed to the Comptroller of Public Accounts but should be sent by the clerk to the Director, Fiscal Division, of the Texas Department of Health.

(3) *Form and contents of the order*. The order must state the amounts to be awarded the attorney ~~ad litem~~ and the guardian ad litem. The order must be separate from any other order in the proceeding and must not address any subject other than the assessment of costs. The order must protect the confidentiality of the identity of the minor. A trial court may use Forms 2F and 2G, but it is not required to do so.

(4) *Time for signing and sending order*. ~~To be valid,~~ The order for fees must be signed by the judge and sent by the clerk to the Department of Health not later than the ninetieth day after the date of the final ruling in a proceeding, whether the application is granted, ~~deemed granted,~~ or denied, or the proceeding is dismissed or nonsuited.

**(c)** ***Motion to reconsider; time for filing.*** Within thirty days of actual receipt of the order, the Comptroller or any other person adversely affected by the order may file a motion in the trial court to reconsider the assessment of costs. The trial court retains jurisdiction of the case to hear and determine any timely filed motion to reconsider.

**(d)** ***Appeal.*** The Comptroller or any other person adversely affected by the order may appeal from the trial court's ruling on the motion to reconsider as from any other final judgment of the court.

**(e)** ***Report to the Office of Court Administration.*** The Department of Health must transmit to the Office of Court Administration a copy of every order assessing costs in a proceeding under Chapter 33, Family Code. Such orders are not subject to ~~the Amended Order~~any orders of the Supreme Court of Texas~~, dated September 21, 1994, in Misc. Docket No. 94-9143,~~ regarding mandatory reports of judicial appointments and fees. Pursuant to Government Code Section 36.003(2), such orders are not subject to reporting under Chapter 36 of the Government Code.

**(f)** ***Confidentiality.*** When transmitting an order awarding costs to the Department of Health, the clerk must take reasonable steps to preserve its confidentially. The confidentiality of an order awarding costs — as

prescribed by Chapter 33, Family Code — is not affected by its transmission to the Comptroller, Texas Department of Health, or the Office of Court Administration, nor is the order subject to public disclosure in response to a request under any statute, rule, or other law. But these rules do not preclude the Comptroller, Texas Department of Health, and the Office of Court Administration from disclosing summary information from orders assessing costs for statistical or other such purposes. Such reports shall not be by county, but shall be by court of appeals district. All transmissions of orders and reports of such orders must protect the confidentiality of all minors and judges that are the subject of the report.

**1.10 Amicus Briefs.** Amicus briefs may be submitted and received by a court – but not filed – under either of the following procedures.

**(a)** ***Confidential, Case-Specific Briefs.*** A non-party who is authorized to attend or participate in a particular proceeding under Chapter 33, Family Code may submit an amicus brief addressing matters, including confidential matters, specific to the proceeding. The brief and the manner in which it is submitted must comply with Rules 1.3 and 1.4 and be directed to the court in which the proceeding is pending. If the brief is filed in paper form, the person must submit the original brief and the same number of copies required for other paper submissions to the court~~, and~~. The person must serve a copy of the brief on the minor's attorney and guardian ad litem. The court to which the brief is submitted must maintain the brief as part of the confidential case file in accordance with Rule 1.4.

**(b)** ***Public or General Briefs.*** Any person may submit a brief addressing any matter relating to proceedings under Chapter 33, Family Code. ~~Such a~~The brief must not contain any information in violation of Rules 1.3 and 1.4. If the brief is filed in paper form, the person must submit the original brief and the same number of copies required for other paper submissions to the court. If the brief is submitted to a court of appeals, ~~the original and eleven copies of the brief, plus a computer disk containing an electronic~~one copy of the brief~~,~~ must ~~also~~ be submitted to the Supreme Court of Texas. When an appeal of a proceeding is filed, the clerk of the court of appeals or the Supreme Court must notify the minor's attorney and guardian ad litem of the existence of any brief submitted under this subsection and must make the brief available for inspection and copying. Upon receipt of an electronic copy of an amicus brief submitted under this subsection, the Clerk of the Supreme Court must, as soon as practicable, have the brief posted on the Texas Judiciary ~~Internet site~~website and make it available to the public for inspection and copying.

**Notes and Comments**

1. Rule 1.1 contemplates that other court rules of procedure and administration remain as a "default" governing matters not addressed in these rules. Thus, for example, these rules do not state a deadline for filing notices of appeal, so the ordinary 30-day deadline controls, *see* Tex. R. App. P. 26.1, but these rules control over inconsistent provisions in the appellate rules governing the docketing statement, the record, and briefing.

2. Rule 1.1 also contemplates that individual jurisdictions may enact local rules pursuant to Tex. R. Civ. P. 3a, Tex. R. App. P. 1.2, or Tex. R. Jud. Admin. 10, to the extent consistent with Chapter 33, Family Code, and with these rules, to tailor the implementation of the statute and these rules to local needs and preferences. Local rules may address, for example, the specific location or office where applications are to be filed, how applications are to be assigned for hearing, and whether an appellate court will permit or require briefing or oral argument. *See also* Rule 2, Comment 1.

3. Any judge involved in a proceeding, whether as the judge assigned to hear and decide the application, the judge assigned to hear and decide any disqualification, recusal or objection, a judge authorized to transfer the application or assign another judge to it, or an appellate judge, may have access to all information (including the verification page) in the proceeding or any related proceeding, such as a prior filing by the minor. Similarly, a minor's attorney and guardian ad litem must, of course, have access to the case file to the extent necessary to perform their respective duties.

4. Section 33.008, Family Code, requires a physician who suspects that a minor has been physically or sexually abused ~~by a person responsible for the minor's care~~ to report the matter to the Texas Department of Family and Protective ~~and Regulatory~~ Services. That section also requires the Department to investigate ~~and to assist the minor in making an application, if appropriate~~. Section 33.010 makes confidential — "[n]otwithstanding any other law" — all information obtained by the Department under Section 33.008 except to the extent necessary to prove certain criminal conduct. Rule 1.4(e) construes Section 33.010 in harmony with Section 33.008. ~~If Section 33.010 precluded the Department from disclosing information obtained under Section 33.008 to the court, the attorney ad litem, and the guardian ad litem in proceedings under section 33.003, the Department's statutorily mandated role in such proceedings would be seriously impaired. The Department could be required by Section 33.008 to assist a minor in filing an application but prohibited by Section 33.010 from providing the court with information supporting the application. The disclosure permitted and required by Rule 1.4(e) avoids this result~~.

~~5. Rule 1.5(a) constitutes the approval required by Section 51.803, Government Code, for electronic filing of documents in proceedings under these rules. To facilitate expedition of proceedings, restrictions imposed on electronic filing in other~~

~~cases are not imposed here. However, electronic filing is only permitted, not required, and Rule 1.5(a) does not necessitate the provision of means for electronic filing. A person filing by electronic means cannot, of course, expect that the document will be treated confidentiality upon receipt unless the recipient has been told the time the transmission will occur.~~

~~6~~5. Rule 1.6 controls to the extent that it conflicts with other provisions regarding the disqualification or recusal of judges, such as Tex. R. Civ. P. 18a, Tex. R. App. P. 16, and Tex. Gov't Code 25.00255. ~~But the rule incorporates the referral and reassignment processes otherwise applicable by local rule, rule, or statute.~~

~~7~~6. The archival requirements relating to proceedings under Chapter 33, Family Code, and these rules is governed by Sections 441.158 and 441.185, Government Code, and the schedules promulgated by the Texas State Library and Archives Commission pursuant to those authorities.

~~8~~7. Because orders awarding costs contain information made confidential by Chapter 33, Family Code, that confidentiality should not be affected by the transmission to the Texas Department of Health and the Comptroller, which is necessary to effectuate payment, or to the Office of Court Administration, which is necessary to oversee the costs associated with the proceedings. Rule 1.9(f) does not preclude either the Comptroller, Texas Department of Health, or the Office of Court Administration from disclosing total amounts paid for all proceedings, or average amount per proceeding, or other such statistical summaries or analyses which do not impair the confidentiality of the proceedings~~.~~ and comply with 33.003(l-2).

9. Rule 1.10 adds a procedure for filing amicus curiae briefs uniquely designed for the expedited and confidential nature of parental notification cases.

## RULE 2. PROCEEDINGS IN THE TRIAL COURT

### 2.1 Where to File an Application; Court Assignment and Transfer; Application Form.

**(a)** ~~**(a)**~~ ***Counties in which an application may be filed.*** An application for an order under Section 33.003, Family Code, ~~may~~must be filed in ~~any county, regardless of~~ the minor's county of residence ~~or where the abortion sought is to be performed.~~, except:

*(i) Counties with a population of less than 10,000*. If a minor resides in a county with a population of less than 10,000 residents according to the most recent U.S. Census, an application may be filed in the minor's county of residence, or a county contiguous to the minor's

county of residence, or the county in which the facility at which the minor intends to obtain the abortion is located.

(ii) *Minor's parent is a presiding judge.* If the minor's parent, managing conservator, or guardian is a presiding judge of a court described by subsection (b)(1), an application may be filed in the minor's county of residence, or a county contiguous to the minor's county of residence, or the county in which the facility at which the minor intends to obtain the abortion is located.

**(b)** ***Courts in which an application may be filed; assignment and transfer.***

(1) *Courts with jurisdiction.* An application may be filed in a district court (including a family district court), a county court-at-law, or a court having probate jurisdiction.

(2) *Application filed with district or county clerk.* An application must be filed with either the district clerk or the county clerk, who will assign the application to a court as provided by local rule or these rules. The clerk to whom the application is tendered cannot refuse to accept it because of any local rule or other rule or law that provides for filing and assignment application and transfer it instanter to the proper clerk, advising the person tendering the application where it is being transferred.

(3) *Court assignment and transfer by local rule.* The courts in a county that have jurisdiction to hear applications may determine by local rule how applications will be assigned between or among them. A local rule must be approved by the Supreme Court under Rule 3a, Texas Rules of Civil Procedure.

(4) *Initial court assignment if no local rule.* Absent a local rule, the clerk that files an application — whether the district clerk or the county clerk — must assign it as follows:

(i) to a district court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(ii) if the application cannot be assigned under (i), then to a statutory county or probate court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(iii) if the application cannot be assigned under (i) or (ii), then to the constitutional county court, if it has probate jurisdiction, and if the active judge of the court, or a judge assigned to it,

is then present in the county;

(iv) if the application cannot be assigned under (i), (ii), or (iii), then to the district court.

(5) *Judges who may hear and determine applications.* An application may be heard and determined (i) by the active judge of the court to which the application is assigned, or (ii) by any judge authorized to sit for the active judge, or (iii) by any judge who may be assigned to the court in which the application is pending. An application may not be heard or determined, or any proceedings under these rules conducted, by a master or magistrate.

**(c)** ***Application form.*** An application consists of two pages: a cover page and a separate verification page.

(1) *Cover page.* The cover page may be submitted on Form 2A, but use of the form is not required. The cover page must be styled "In re Jane Doe" and must not disclose the name of the minor or any information from which the minor's identity could be derived. The cover page must state:

(A) that the minor is pregnant;

(B) that the minor is unmarried, is under 18 years of age, and has not had her disabilities removed under Chapter 31, Family Code;

(C) that the minor wishes to have an abortion without notifying or obtaining consent from either of her parents or a managing conservator or guardian, and the statutory ground or grounds on which she relies;

~~(D~~
(D) that, concerning her current pregnancy, the minor has not previously filed an application that was denied, or if so, that the current application is filed with the court that previously denied the application and that there has been a material change in circumstances since the time the previous application was denied;

(E) that venue is proper in the county in which the application has been filed;

(F) whether the minor has retained an attorney, and if so, the attorney's name, address, and telephone number; and

(~~E~~G) whether the minor requests the court to appoint a particular person as her guardian ad litem; ~~and~~

~~(F) whether, concerning her current pregnancy, the minor has previously filed an application that was denied, and if so, where the application was filed.~~

(2) *Verification page.* The verification page may be submitted on Form 2B, but use of the form is not required. The verification page must be separate from the cover page, must be signed under oath or by unsworn declaration in compliance with Section 132.001 of the Texas Civil Practice & Remedies Code by the person completing the application, which may be the minor's attorney, and must state:

(A) the minor's ~~full name~~current residence, including the physical address, mailing address and ~~date of birth;~~telephone number;

(B) the name, address, telephone number, and relationship to the minor of any person the minor requests the court to appoint as her guardian ad litem;

(C) if the minor has not retained an attorney, a telephone or ~~pager~~mobile number — whether that of the minor or someone else (such as a physician, friend, or relative) — at which the minor may be contacted immediately and confidentially until an attorney is appointed to represent her; and

(D) that all information contained in the application, including both the cover page and the verification page, is true.

(3) *Declaration of attorney*. If any attorney assists the minor in filing the application, the attorney who represents the minor shall sign the verification page. An attorney's declaration shall be made to the best of the attorney's knowledge, information, and belief formed after reasonable inquiry.

**(d)** ***Time of filing.*** An application is filed when it is actually received by the district or county clerk.

**(e)** ***Non-suit***. A minor who has filed an application may not withdraw or otherwise non-suit her application without permission of the court.

**2.2 Clerk's Duties.**

**(a)** ***Assistance in filing.*** The clerk must give prompt assistance — in a manner designed to protect the minor's confidentiality ~~and anonymity~~ — to persons seeking to file an application. If requested, the clerk must administer the oath required for the verification page or provide a person authorized to do so. The clerk ~~should~~must also redact from the cover page any information identifying the minor. The clerk ~~should~~must ensure that both the cover page and the separate verification page are completed in full.

**(b)** ***Filing procedure.*** The clerk must assign the application a cause number and affix it to both the cover page and the verification page~~.~~, ensuring that the case number and style preserve the confidentiality of the minor, the court, and the assigned judge. The clerk must then provide a certified copy of the verification page to the person filing the application. The clerk must file the verification page under seal in a secure place where access is limited to essential court personnel.

**(c)** ***Distribution.*** When an application is filed, the clerk must distribute the cover page and verification page, or a copy of them, to the appropriate court instanter. If appointment of a specific person as guardian ad litem has been requested, the clerk must also communicate the information to the appropriate court instanter.

**(d)** ***If judge of assigned court not ~~present in county.~~available.*** The clerk must determine instanter whether the judge of the court to which the application is assigned is ~~present in~~available to hear the ~~county.~~application within the prescribed time period. If that judge is not ~~present in the county~~available, the clerk must instanter notify the local administrative judge ~~or judges~~ and the presiding judge of the administrative judicial region for assignment of a judge who is available and must send them any information requested, including the cover page and verification page.

**(e)** ***Notice of hearing and appointments.*** When the clerk is advised by the court of a time for hearing or an appointment of a guardian ad litem or attorney ad litem, if any, the clerk must instanter give notice — as directed in the verification page and to each appointee — of the hearing time or appointment. A court coordinator or other court personnel may give notice instead of the clerk.

**(f)** ***Orders.*** The clerk must provide the minor's attorney and the guardian ad litem with copies of all court orders, including findings of fact and conclusions of law.

~~**(g)** ***Certificate of court's failure to rule within time prescribed by statute.*** If~~

~~the court fails to rule on an application within the time required by Section 33.002(g) and (h), Family Code, upon the minor's request, the clerk must instanter issue a certificate to that effect, stating that the application is deemed by statute to be granted. The clerk may use Form 2E but is not required to do so.~~

**2.3 Court's Duties.** Upon receipt of an application from the clerk, the court must ~~promptly~~instanter:

**(a)** appoint a qualified person to serve as guardian ad litem for the minor applicant~~;~~

~~**(b)** appoint an attorney for the minor, ~~,~~ who may not be the same person appointed ~~guardian~~attorney ad litem ~~if that person is an attorney admitted to practice law in Texas and there is no conflict of interest in the same person serving as attorney ad litem and guardian ad litem;~~;

**(b)** appoint an attorney ad litem for the minor, unless she has stated on the cover page (Form 2A) that she has retained an attorney;

**(c)** set a hearing on the application in accordance with Rule 2.4(a); and

**(d)** advise the clerk of the appointment or appointments and the hearing time.

**2.4 Hearing.**

**(a)** ***Time.*** The court must conduct a hearing in time to rule on the application as required by Rule 2.5(d). But the minor may postpone the hearing by written request to the clerk when the application is filed or thereafter. The request may be submitted on Form 2C, but use of the form is not required. The request must either specify a date on which the minor will be ready for the hearing, or state that the minor will later provide a date on which she will be ready for the hearing. Once the minor determines when she will be ready for the hearing, she must notify the clerk of that time in writing. The postponed hearing must be conducted in time for the court to rule on the application as required by Rule 2.5(d).

**(b)** ***Place.*** The hearing should be held in a location, such as a judge's chambers, that will ~~assure~~ensure confidentiality. The hearing may be held away from the courthouse.

**(c)** ***Persons attending.*** Hearings must be closed to the public. Only the judge, the court reporter and any other essential court personnel, the minor, her attorney, her guardian ad litem, and witnesses on the minor's behalf may be

present.

**(d)** ***Record.*** The court, the minor, the minor's attorney, or the guardian ad litem may request that the record — the clerk's record and reporter's record — be prepared. A request by the minor, the minor's attorney, or guardian ad litem must be in writing and may be, but is not required to be, on Form 2I (if an appeal will be taken) or 2J (if an appeal will not be taken). The court reporter must provide an original and two copies of the reporter's record to the clerk. When the record has been prepared, the clerk must contact the minor's attorney and the guardian ad litem (and the minor if the minor requested the record) at the telephone numbers shown on Form 2I or 2J and make it available to them. The record must be prepared and made available instanter if it has been requested for appeal ~~of~~or if a belief that there is evidence of past or potential abuse of the minor is stated on the record or submitted to the court in writing. When a notice of appeal is filed, the clerk must forward the record to the court of appeals in accordance with Rule 3.2(b).

**(e)** ***Hearing to be informal.*** The court should attempt to rule on the application without regard to technical defects in the application or the evidence. Affidavits of persons other than applicants are admissible. Statements in the application cannot be offered as evidence to support the application. If necessary, the court may assist the minor in remedying technical defects in the application and in presenting relevant and material facts.

**2.5 Ruling.**

**(a)** ***Form of ruling.*** The court's ruling on the application must include a signed order and written findings of fact and conclusions of law. The findings and conclusions may be included in the order. The court may use Form 2D, but it is not required to do so.

**(b)** ***Grounds for granting application.*** The court must grant the application if the minor establishes, by ~~a preponderance of the~~clear and convincing evidence, that:

(1) the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be~~;~~, on which the court must consider the minor's experiences, perspective and judgment, and may consider factors listed in section 33.003(i-1)(1)-(3); or

(2) notifying and obtaining consent from either of the minor's parents,

the minor's managing conservator, or the minor's legal guardian, as the case may be, would not be in the minor's best interest~~; or~~, on which the court may consider the factors listed in section 33.003(i-2).

~~(3) notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, may lead to physical, sexual, or emotional abuse of the minor.~~

**(c)** ***Grounds for denying application.*** If the minor can establish ~~none~~neither of the grounds in Rule 2.5(b) by ~~a preponderance of the~~clear and convincing evidence, the court must deny the application. If the court, the guardian ad litem, or the attorney~~ ad litem~~ are unable to contact the minor before the hearing despite diligent attempts to do so, or if the minor does not attend the hearing, the court must deny the application without prejudice.

**(d)** ***Time for ruling.*** The court must rule on an application as soon as possible after it is filed, subject to any postponement requested by the minor~~, and immediately after the hearing is concluded. Section 33.003(h), Family Code, states that a~~. The court must rule on an application by 5:00 p.m. on the ~~second~~fifth business day after the day the application is filed, or if the minor requests a postponement, after the date the minor states she is ready for the hearing~~, and that if the court does not rule within this time, the application is deemed to be granted.~~.

**(e)** ***Notification of right to appeal.*** If the court denies the application, it must inform the minor of her right to appeal under Rule 3 and furnish her with the notice of appeal form, Form 3A.

## 2.6 Motion for Expedited Relief

**(a)** ***Motion.*** If the minor or her attorney determines that she cannot or will not obtain a ruling within the time required by statute due to any one or more of the grounds stated in subsection (b), she may file a motion for expedited relief with the Supreme Court of Texas. If the facts stated in the motion are within the personal knowledge of the attorney filing the motion, the motion need not be sworn. Otherwise, the facts set out in the motion must be supported by affidavit or unsworn declaration in compliance with Section 132.001 of the Texas Civil Practice & Remedies Code. The motion may be submitted on Form 2D, but use of the form is not required. A copy of the motion must be filed with the clerk of the court in which the application was filed.

**(b)** ***Grounds for granting motion.*** The minor is entitled to expedited relief by

appropriate writ if she establishes that:

(1) No judge is available to hold a hearing within five days of the date the application was filed and the court clerk has not arranged for another judge to hold a hearing, in violation of Rule 2.2(d);

(2) The assigned judge did not set a hearing instanter, in violation of 2.3(d);

(3) The assigned judge did not appoint a guardian ad litem instanter, in violation of Rule 2.3(a);

(4) The assigned judge did not appoint a guardian ad litem instanter, in violation of Rule 2.3(b);

(5) The assigned judge did not rule within the time required by statute, in violation of Rule 2.5(d);

(6) The application was denied, but the court reporter or clerk did not complete the appellate record instanter after notice, in violation of Rule 2.4(d).

**Notes and Comments**

1. Section 33.003(b), Family Code, permits an application to be filed in "~~any~~a county court at law, court having probate jurisdiction, or district court, including a family district court~~, in this state.~~" in the minor's county of residence" subject to the venue restriction. The initial assignment of an application to a specific court in a county is made by the clerk with whom the application is filed (not by the minor). Given the diversity of needs and circumstances among Texas courts, these rules allow the courts in each county to tailor the procedures for filing, handling, and assigning applications prescribed by these rules to best meet those needs and circumstances. Chapter 74, Subchapter C, Government Code, affords the presiding judge of an administrative judicial region broad discretion to assign active judges within the region, as well as visiting judges, to hear matters pending in courts within the region. *See* Tex. Govt. Code §§ 74.054, 74.056; *see also id.*, § 74.056(b) (presiding judges may request judges from other judicial regions for assignment); § 74.057 (Chief Justice may assign judges from one judicial region to another). Section 25.0022, Government Code, provides for assignment of probate judges. Furthermore, Chapter 74, Subchapter D, Government Code, authorizes district and statutory county court judges within a county to hear matters pending in any district or statutory county court in the county. *Id.*, § 74.094(a). Finally, Section 74.121, Government Code, permits courts within a county to transfer cases among courts having jurisdiction over the case. If no local rule governs assignments, then Rule 2.1(b)(4) controls. ~~**(2001 change)**~~

2. Because an application is considered filed when it is actually received by the clerk, the timing provisions relating to filing by mail of Tex. R. Civ. P. 21a are inapplicable.

3. Section 33.003(f), Family Code, provides that a guardian ad litem may be (1) a person who may consent to treatment for the minor under Sections 32.001(a)(1)-(3), Family Code; (2) a psychiatrist or an individual licensed or certified as a psychologist under ~~the Psychologist's Licensing Act, Article 4512c, Vernon's Texas Civil Statutes~~Chapter 501, Occupations Code; (3) an appropriate employee of the Department of Family and Protective ~~or Regulatory~~ Services; (4) a member of the clergy; or (5) another appropriate person selected by the court. The trial court may also consider appointing a qualified person requested by the minor. Although not directly applicable to these proceedings, the standards embodied in Chapter 107, Family Code, reflect legislative intent that competent and qualified persons be appointed to serve as ad litems and may provide general guidance concerning the nature of those qualifications~~.~~[check ch. 107 changes]. Appointment of an employee of the Department of Family and Protective ~~and Regulatory~~ Services to serve as guardian ad litem may give rise to a conflict of interest not immediately apparent at the time since the Department may be involved with the minor's family due to an abuse or neglect investigation, or may be party to a suit affecting the parent-child relationship, or may already be serving as the child's managing conservator.

4. The duties of guardians ad litem are not susceptible of precise definition. Generally, a guardian ad litem should interview the minor and conduct any investigation the guardian believes to be appropriate, without violating Rules 1.3 and 1.4, to assist the court in arriving at an opinion whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian~~,~~ or whether notification and obtaining consent would not be in the best interest of the minor, ~~or whether notification may lead to~~including any risk of physical, sexual, or emotional abuse of the minor. In making these determinations, the following factors have been considered in other jurisdictions with similar parental notification statutes:

- Whether the minor has been examined by a doctor of medicine, doctor of osteopathy, or registered nurse — who is licensed to practice in Texas — and has given that health care provider an accurate and complete statement of her medical history.

- Whether the minor has been provided with information or counseling bearing on her decision to have an abortion.

- Whether the minor desires further counseling.

- Whether, based on the information or counseling provided to the minor, she is able to give informed consent.

- Whether the minor is attending school, or is or has been employed.

- Whether the minor has previously filed an application that was denied.

- Whether the minor lives with her parents.

- Whether the minor desires an abortion or has been threatened, intimidated or coerced into having an abortion.

- Whether the pregnancy resulted from sexual assault, sexual abuse, or incest.

- Whether there is a history or pattern of family violence.

- Whether the minor fears for her safety.

These considerations may not be relevant in every case, are not exclusive, and may not be sufficient to discharge the guardian ad litem's responsibilities in every case. Use of these factors as a basis for civil liability or as a statement of the standard of care is contrary to their intended purpose. Nothing in this comment alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In addition to these general guidelines, Chapter 107, Family Code, sets forth duties of guardians and attorneys ad litem appointed in suits affecting the parent-child relationship. These duties are not directly applicable to proceedings under Chapter 33, Family Code, and may be incompatible with the confidential and expeditious nature of such proceedings, but they reflect general legislative intent concerning the responsibilities of ad litems.

5. Under Rule 2.5(b), once a court concludes that an application should be granted on a single ground, it need not address other grounds. But in addressing any ground, the court should attempt to ascertain, among other factors, whether the pregnancy resulted from sexual assault, sexual abuse, or incest. The legislative history of Chapter 33, Family Code, indicates that one of the principal purposes of the statute was to screen for sexual crimes and abuse of minors so as to protect them against further victimization.

## RULE 3. APPEAL FROM DENIAL OF APPLICATION

**3.1 How to Appeal.** To appeal the denial of an application, the minor must simultaneously file a notice of appeal with the clerk of the court that denied the application, file a copy of the notice of appeal with the clerk of the court of appeals to which an appeal is to be taken, and advise the clerk of the court of

appeals by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 3A but is not required to do so. The notice of appeal must:

**(a)** be styled "In re Jane Doe";

**(b)** state the number of the cause in the trial court;

**(c)** be addressed to a court of appeals with jurisdiction in the county in which the application was filed;

**(d)** state an intention to appeal; and

**(e)** be signed by the minor's attorney or attorney ad litem appointed by the trial court.

### 3.2 Clerk's Duties.

**(a)** ***Assistance in filing.*** The trial court clerk must give prompt assistance — in a manner designed to protect the minor's confidentiality — to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the proper court of appeals and that the minor's name and identifying information are not disclosed.

**(b)** ***Forwarding record to court of appeals.*** Upon receipt of a notice of appeal, the trial court clerk must instanter forward to the clerk of the court of appeals the notice of appeal, the clerk's record (original papers or copies) excluding the verification page, and the reporter's record. The trial court clerk must not send the record to the clerk of the court of appeals by mail but must, if feasible, deliver it by hand or transmit it by facsimile or other electronic means. If neither of these methods is feasible, then the record may be sent by overnight delivery.

~~**(c)** ***Certificate of court's failure to rule within time prescribed by statute.*** If the court of appeals fails to rule on an application within the time required by Section 33.004(b), Family Code, upon the minor's request, the clerk of the court of appeals must instanter issue a certificate to that effect, stating that the trial court's order is reversed and judgment is rendered that the application is deemed by statute to be granted. The clerk may use Form 3D but is not required to do so.~~

### 3.3 Proceedings in the Court of Appeals.

**(a)** ***Briefing and argument.*** A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument.

**(b)** ***Ruling.*** The court of appeals — sitting in a three- judge panel — must issue a judgment affirming or reversing the trial court's order denying the application. The court may use Form 3C but is not required to do so.

**(c)** ***Time for ruling.*** The court of appeals must rule on an appeal as soon as possible , subject to any postponement requested by the minor. Section 33.004(b), Family Code, states that a court must rule on an appeal by 5:00 p.m. on the ~~second~~fifth business day after the notice of appeal is filed with the court that denied the application, or if the minor requests a postponement, after the date the minor states she is ready to proceed~~, and that if the court does not rule within this time, the appeal is deemed to be granted~~.

**(d)** ***Postponement by minor.*** The minor may postpone the time of ruling by written request filed either with the trial court clerk at the time she files the notice of appeal or thereafter with the court of appeals clerk. The request may be submitted on Form 3B, but use of the form is not required. The request must either specify a date on which the minor will be ready to proceed to ruling, or state that the minor will later provide a date on which she will be ready to proceed to ruling. Once the minor determines when she will be ready to proceed to ruling, she must notify the court of appeals clerk of that date in writing.

**(e)** ***Motion for expedited relief upon court's failure to rule within time prescribed by statute.*** If the court of appeals fails to rule on an application within the time required by Section 33.004(b), Family Code, the minor may file a motion for expedited relief with the Supreme Court of Texas. If the facts stated in the motion are within the personal knowledge of the attorney filing the motion, the motion need not be sworn. Otherwise, the facts set out in the motion must be supported by affidavit or unsworn declaration in compliance with Section 132.001 of the Texas Civil Practice & Remedies Code. A copy of the motion must be filed with the clerk of the court of appeals.

**(e)** ***Opinion.***

(1) *Opinion optional.* A court of appeals may issue an opinion explaining its ruling, but it is not required to do so. Any published opinion must be written in a way to preserve the confidentiality of the identity of the minor.

(2) *Time.* Any opinion must issue not later than:

(A) ten business days after the day on which a notice of appeal is filed in the Supreme Court, if an appeal is taken to the Supreme Court; or

(B) sixty days after the day on which the court of appeals issued its judgment, if no appeal is taken to the Supreme Court.

(3) *Confidential transmission to Supreme Court.* When the court of appeals issues an opinion, the clerk must confidentially transmit it instanter to the Supreme Court and to the trial court.

**Notes and Comments**

1. Chapter 33, Family Code, provides for no appeal from an order granting an application.

2. A request to postpone the ruling of the court of appeals may be used in conjunction with a request for oral argument or to submit briefing.

3. Neither Chapter 33, Family Code, nor these rules prescribes the appellate standard of review.

~~4. Although publication of appellate court opinions is prohibited by statute, the Supreme Court may amend these rules to address issues arising from their application and interpretation.~~

4. Chapter 33, Family Code, allows publication of court of appeals opinions if written in a way to preserve confidentiality and identity of the pregnant minor. Doing so entails not just omitting the minor's name and other directly identifying information but also requires describing those facts necessary to the opinion's reasoning in a such a general way that those who know the minor and her family cannot recognize her.

## RULE 4. APPEAL TO THE SUPREME COURT

**4.1 How to Appeal to the Supreme Court.** To appeal from the court of appeals to the Supreme Court, the minor must simultaneously file a notice of appeal with the Clerk of the Supreme Court, file a copy of the notice of appeal with the clerk of the court of appeals, and advise the clerk of each court by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 4A but is not required to do so. The notice of appeal must:

**(a)** be styled "In re Jane Doe";

**(b)** state the number of the cause in the court of appeals;

**(c)** state an intention to appeal; and

**(d)** be signed by the minor's attorney or attorney ad litem appointed by the trial court.

**4.2 Clerk's Duties.**

**(a)** ***Assistance in filing.*** The Clerk of the Supreme Court must give prompt assistance — in a manner designed to protect the minor's confidentiality — to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the Supreme Court and that the minor's name and identifying information are not disclosed.

**(b)** ***Forwarding record to Supreme Court.*** Upon receipt of a notice of appeal to the Supreme Court, the clerks of the court of appeals and Supreme Court must instanter have forwarded to the Supreme Court the record that was before the court of appeals.

**4.3 Proceedings in the Supreme Court.** A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument. The Court must rule as soon as possible.

# TEXAS PARENTAL CONSENT JUDICIAL BYPASS RULES AND FORMS

*effective date January 1, 2016*

## EXPLANATORY STATEMENT

Chapter 33 of the Texas Family Code, adopted in 1999 and later amended in 2005 and 2015, provides for judicial authorization of an unemancipated minor to consent to an abortion in Texas without notification and consent of a parent, managing conservator, or guardian, under certain circumstances, as provided by Section 33.003 or 33.004, Family Code (a "judicial bypass"). Section 2 of the 1999 Act required the Supreme Court of Texas to "issue promptly such rules as may be necessary in order that the process established by Sections 33.003 and 33.004, Family Code, as added by this Act, may be conducted in a manner that will ensure confidentiality and sufficient precedence over all other pending matters to ensure promptness of disposition." *See also* Tex. Fam. Code §§ 33.003(l), 33.004(c). Section 6 of the 1999 Act adds: "The clerk of the Supreme Court of Texas shall adopt the application form and notice of appeal form to be used under Sections 33.003 and 33.004, Family Code, as added by this Act, not later than December 15, 1999." *See also* Tex. Fam. Code §§ 33.003(m), 33.004(d). The Texas Medical Board has adopted the forms necessary for physicians to obtain the consent required by law to perform an abortion upon an unemancipated minor. *See* Tex. Occ. Code §164.052(c). Those forms are published at 22 Tex. Admin. Code §165.6(f) and are available on the Texas Medical Board's website, at www.tmb.state.tx.us/page/board-rules.

These rules and forms were promulgated as directed by the Act in 1999, and amended in 2007 and 2015, and merely provide a process for the judicial bypass, tracking the statutory requirements. These rules and forms do not include any determination that the Act or any part of it comports with the United States Constitution or the Texas Constitution, because such issues should not be resolved outside an adversarial proceeding with full briefing and argument. These rules and forms do not, of course, imply that abortion is or is not permitted in any specific situation. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); Tex. Health & Safety Code § 170.002 (restrictions on third trimester abortions of viable fetuses).

The notes and comments appended to the rules are intended to inform their construction and application by courts and practitioners.

## RULE 1. GENERAL PROVISIONS

**1.1 Applicability of These Rules.** These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to or consent from either of her parents or a managing conservator or guardian under Chapter 33, Family Code. All references in these rules to "minor" refer to the minor applicant. Other Texas court rules — including the Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Judicial Administration, and local rules approved by the Supreme Court — also apply, but when the application of another rule would be inconsistent with the general framework or policy of Chapter 33, Family Code, or these rules, these rules control.

**1.2 Expedition required.**

**(a)** ***Proceedings.*** A court must give proceedings under these rules precedence over all other pending matters, regardless of whether the minor applied for a continuance, to the extent necessary to ensure that applications and appeals are adjudicated as soon as possible and within the time required by Rules 2.4(a), 2.5(d), and 3.3(c).

**(b)** ***Prompt actual notice required.*** Without compromising the confidentiality required by statute and these rules, courts and clerks must serve orders, decisions, findings, and notices required under these rules in a manner designed to give prompt actual notice in order that the deadlines imposed by Chapter 33, Family Code, can be met.

**(c)** ***Instanter.*** "Instanter" means immediately, without delay. An action required by these rules to be taken instanter should be done at the first possible time and with the most expeditious means available.

**1.3 Confidentiality of Identity of Minor Protected.**

**(a)** ***Generally.*** Proceedings under these rules must be conducted in a way that protects the confidentiality of the identity of the minor.

**(b)** ***No reference to minor's identity in proceeding.*** With the exception of the verification page required under Rule 2.1(c)(2) and the communications required under Rule 2.2(e), no reference may be made in any order, decision, finding, or notice, or on the record, to the name of the minor, her address, or other information by which she might be identified by persons not participating in the proceedings. Instead, the minor must be referred to as "Jane Doe" in a numbered cause.

**(c)** ***Notice.*** With the exception of orders and rulings released under Rule 1.4(b), all service and communications from the court to the minor must be directed to the minor's attorney with a copy to the guardian ad litem. A minor's attorney must serve on the guardian ad litem instanter a copy of any document filed with the court. These requirements take effect when an attorney appears for the minor, or when the clerk has notified the minor of the appointment of an attorney or guardian ad litem.

## 1.4 Confidentiality of Proceedings Required; Exceptions.

**(a)** ***Generally.*** All officials and court personnel involved in the proceedings must ensure that the minor's contact with the clerk and court is confidential and expeditious. Except as permitted by law, no officials or court personnel involved in the proceedings may ever disclose to anyone outside the proceedings — including the minor's parent, managing conservator, or legal guardian — that the minor is or has ever been pregnant, or that she wants or has ever wanted an abortion.

**(b)** ***Documents and information pertaining to the proceeding.*** As required by Chapter 33, Family Code, the application and all other court documents and information pertaining to the proceedings are confidential and privileged and are not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. But documents and information may be disclosed when expressly authorized by these rules, and an order, ruling, opinion, or clerk's certificate may be released to:

(1) the minor;

(2) the minor's guardian ad litem;

(3) the minor's attorney;

(4) a person designated in writing by the minor to receive the order, ruling, opinion, or certificate, including her physician;

(5) a governmental agency or governmental attorney, in connection with a criminal or administrative action seeking to assert or protect the minor's interests; or

(6) another court, judge, or clerk in the same or related proceedings.

**(c)** ***Filing of court reporter's notes.*** To ensure confidentiality, court reporter notes, in whatever form, must be filed with other court documents in the

proceeding.

**(d)** ***Duty to report possible abuse.***

(1) *Duty of the court.* A judge or justice who reasonably believes, based on information obtained in the proceeding, that a minor has been or may be physically or sexually abused must report the information to the appropriate officials or agencies as required by Sections 33.0085 and 33.009, Family Code, and other law.

(2) *Duty of the attorney or guardian ad litem*. An attorney or a guardian ad litem must report possible physical or sexual abuse as required by Section 33.009, Family Code, and other law.

**(e)** ***Department of Protective and Regulatory Services to disclose certain information in proceeding.*** The Department of Protective and Regulatory Services or local law enforcement agency may disclose to the court, the attorney, and the guardian ad litem any information obtained under Section 33.008, Family Code, without being ordered to do so. The trial court may order such information be disclosed to such persons, and the Department or local law enforcement agency must comply.

## 1.5 Electronic Transmission of Documents; Hearings Conducted By Remote Electronic Means; Electronic Record Allowed When Necessary.

**(a)** ***No electronic filing.*** Documents must not be filed through the electronic filing manager established by the Office of Court Administration. Documents may be filed in paper form, by fax, or by email. The clerk of a court must designate a fax number and an email address for the filing of documents in cases governed by these rules and must take all reasonable steps to maintain the confidentiality of the filings.

**(b)** ***Electronic transmission by court and clerk.*** The court and clerk may transmit orders, rulings, notices, and other documents electronically. But before the transmission is initiated, the sender must take all reasonable steps to ensure that the confidentiality of the received transmission will be maintained. The time and date of a transmission by the court is the time and date when it was initiated.

**(c)** ***Participation in hearings by electronic means.*** Consistent with the confidentiality requirements of these rules, with the court's permission, the attorney, the guardian ad litem, and any witnesses may participate in

hearings under these rules by video conferencing, telephone, or other remote electronic means. The minor must appear before the court in person.

**(d)** ***Record of hearing made by electronic means if necessary.*** If the court determines that a court reporter is unavailable for a hearing, the court may have a record of the hearing made by audio recording or other electronic means. If a notice of appeal is filed, the court must have the recording transcribed if possible. The person transcribing the recording must certify to the accuracy of the transcription. The court must transmit both the recording and the transcription to the court of appeals.

**1.6 Disqualification, Recusal, or Objection to a Judge.**

**(a)** ***Time for filing and ruling.*** An objection to a trial judge, or a motion to recuse or disqualify a trial judge, must be filed before 10:00 a.m. of the first business day after an application is filed or promptly after the assignment of a judge to hear the case is made known to the minor or her attorney, whichever is later. An objection to an appellate judge, or a motion to recuse or disqualify an appellate judge must be filed before 10 a.m. of the first business day after a notice of appeal is filed. A judge who chooses to recuse voluntarily must do so instanter. An objection to a judge or a motion to disqualify or recuse does not extend the deadline for ruling on the minor's application.

**(b)** ***Voluntary disqualification or recusal, or objection.*** A judge to whom objection is made under Chapter 74, Government Code, or a judge or justice who voluntarily does not sit, must notify instanter the appropriate authority for assigning another judge by local rules or by statute. That authority must instanter assign a judge or justice to the proceeding.

**(c)** ***Involuntary disqualification or recusal.*** A judge or justice who refuses to remove himself or herself voluntarily from a proceeding in response to a motion must instanter refer the motion to the appropriate judge or justice, pursuant to other law, including Tex. R. Civ. P. 18a, Tex. R. App. P. 16, and Tex. Gov't Code 25.00255. The presiding judge or justice to whom the motion is referred must rule on it as soon as possible and may do so with or without a hearing. If the motion is granted, the judge or justice to whom the motion was referred must instanter assign a judge or justice to the proceeding.

**(d)** ***Only one objection or motion to recuse permitted.*** A minor who objects to a judge assigned to the proceeding may not thereafter file a motion to recuse or disqualify, and a minor who files a motion to recuse or disqualify

a judge may not thereafter object to a judge assigned to the proceeding.

**(e)** ***Issues on appeal.*** Any error in the denial of a motion to recuse or disqualify, or any error in the disallowance of an objection, or any challenge to a judge that a minor is precluded from making by subsections (a) or (d), may be raised only on appeal from the court's denial of the application.

**1.7 Rules and Forms to be Made Available.** A copy of these rules, and a copy of the attached forms in English and Spanish, must be made available to any person without charge in the clerk's offices of all courts in which applications or appeals may be filed under these rules, on the Texas Judiciary Internet site at www.courts.state.tx.us, and by the Office of Court Administration upon request. A copy of a court's local rules relating to proceedings under Chapter 33, Family Code, must be made available to any person without charge in the office of the clerk for that court where applications may be filed. Rules and forms may be copied.

**1.8 Duties of Attorneys.** An attorney must represent the minor in the trial court in the proceeding in which the attorney is assigned, and in any appeal under these rules to the court of appeals or the Supreme Court, but an attorney is not required to represent the minor in any other court or any other proceeding.

**1.9 Fees and Costs.**

**(a)** ***No fees or costs charged to minor.*** No filing fee or court cost may be assessed against a minor for any proceeding in a trial or appellate court.

**(b)** ***State ordered to pay fees and costs.***

(1) *Fees and costs that may be paid*. The State may be ordered to pay the reasonable and necessary fees and expenses of the attorney, the reasonable and necessary fees and expenses of the guardian ad litem, the court reporter's fee as certified by the court reporter, and trial court filing fees and costs as certified by the clerk. Court costs include the expenses of an interpreter (Form 2H) but do not include the fees or expenses of a witness. Court costs do not include fees which must be remitted to the state treasury.

(2) *To whom order directed and sent*. The order must be directed to the Comptroller of Public Accounts but should be sent by the clerk to the Director, Fiscal Division, of the Texas Department of Health.

(3) *Form and contents of the order*. The order must state the amounts to be awarded the attorney and the guardian ad litem. The order must

be separate from any other order in the proceeding and must not address any subject other than the assessment of costs. The order must protect the confidentiality of the identity of the minor. A trial court may use Forms 2F and 2G, but it is not required to do so.

(4) *Time for signing and sending order*. The order for fees must be signed by the judge and sent by the clerk to the Department of Health not later than the ninetieth day after the date of the final ruling in a proceeding, whether the application is granted, or denied, or the proceeding is dismissed or nonsuited.

**(c)** ***Motion to reconsider; time for filing.*** Within thirty days of actual receipt of the order, the Comptroller or any other person adversely affected by the order may file a motion in the trial court to reconsider the assessment of costs. The trial court retains jurisdiction of the case to hear and determine any timely filed motion to reconsider.

**(d)** ***Appeal.*** The Comptroller or any other person adversely affected by the order may appeal from the trial court's ruling on the motion to reconsider as from any other final judgment of the court.

**(e)** ***Report to the Office of Court Administration.*** The Department of Health must transmit to the Office of Court Administration a copy of every order assessing costs in a proceeding under Chapter 33, Family Code. Such orders are not subject to any orders of the Supreme Court of Texas regarding mandatory reports of judicial appointments and fees. Pursuant to Government Code Section 36.003(2), such orders are not subject to reporting under Chapter 36 of the Government Code.

**(f)** ***Confidentiality.*** When transmitting an order awarding costs to the Department of Health, the clerk must take reasonable steps to preserve its confidentially. The confidentiality of an order awarding costs — as prescribed by Chapter 33, Family Code — is not affected by its transmission to the Comptroller, Texas Department of Health, or the Office of Court Administration, nor is the order subject to public disclosure in response to a request under any statute, rule, or other law. But these rules do not preclude the Comptroller, Texas Department of Health, and the Office of Court Administration from disclosing summary information from orders assessing costs for statistical or other such purposes. Such reports shall not be by county, but shall be by court of appeals district. All transmissions of orders and reports of such orders must protect the confidentiality of all minors and judges that are the subject of the report.

**1.10 Amicus Briefs.** Amicus briefs may be submitted and received by a court – but

not filed – under either of the following procedures.

**(a)** ***Confidential, Case-Specific Briefs.*** A non-party who is authorized to attend or participate in a particular proceeding under Chapter 33, Family Code may submit an amicus brief addressing matters, including confidential matters, specific to the proceeding. The brief and the manner in which it is submitted must comply with Rules 1.3 and 1.4 and be directed to the court in which the proceeding is pending. If the brief is filed in paper form, the person must submit the original brief and the same number of copies required for other paper submissions to the court. The person must serve a copy of the brief on the minor's attorney and guardian ad litem. The court to which the brief is submitted must maintain the brief as part of the confidential case file in accordance with Rule 1.4.

**(b)** ***Public or General Briefs.*** Any person may submit a brief addressing any matter relating to proceedings under Chapter 33, Family Code. The brief must not contain any information in violation of Rules 1.3 and 1.4. If the brief is filed in paper form, the person must submit the original brief and the same number of copies required for other paper submissions to the court. If the brief is submitted to a court of appeals, one copy of the brief must be submitted to the Supreme Court of Texas. When an appeal of a proceeding is filed, the clerk of the court of appeals or the Supreme Court must notify the minor's attorney and guardian ad litem of the existence of any brief submitted under this subsection and must make the brief available for inspection and copying. Upon receipt of an electronic copy of an amicus brief submitted under this subsection, the Clerk of the Supreme Court must, as soon as practicable, have the brief posted on the Texas Judiciary website and make it available to the public for inspection and copying.

**Notes and Comments**

1. Rule 1.1 contemplates that other court rules of procedure and administration remain as a "default" governing matters not addressed in these rules. Thus, for example, these rules do not state a deadline for filing notices of appeal, so the ordinary 30-day deadline controls, *see* Tex. R. App. P. 26.1, but these rules control over inconsistent provisions in the appellate rules governing the docketing statement, the record, and briefing.

2. Rule 1.1 also contemplates that individual jurisdictions may enact local rules pursuant to Tex. R. Civ. P. 3a, Tex. R. App. P. 1.2, or Tex. R. Jud. Admin. 10, to the extent consistent with Chapter 33, Family Code, and with these rules, to tailor the implementation of the statute and these rules to local needs and preferences. Local rules may address, for example, the specific location or office where applications are to be filed, how applications are to be assigned for hearing, and whether an appellate court will

permit or require briefing or oral argument. *See also* Rule 2, Comment 1.

3. Any judge involved in a proceeding, whether as the judge assigned to hear and decide the application, the judge assigned to hear and decide any disqualification, recusal or objection, a judge authorized to transfer the application or assign another judge to it, or an appellate judge, may have access to all information (including the verification page) in the proceeding or any related proceeding, such as a prior filing by the minor. Similarly, a minor's attorney and guardian ad litem must, of course, have access to the case file to the extent necessary to perform their respective duties.

4. Section 33.008, Family Code, requires a physician who suspects that a minor has been physically or sexually abused to report the matter to the Texas Department of Family and Protective Services. That section also requires the Department to investigate. Section 33.010 makes confidential — "[n]otwithstanding any other law" — all information obtained by the Department under Section 33.008 except to the extent necessary to prove certain criminal conduct. Rule 1.4(e) construes Section 33.010 in harmony with Section 33.008. .

5. Rule 1.6 controls to the extent that it conflicts with other provisions regarding the disqualification or recusal of judges, such as Tex. R. Civ. P. 18a, Tex. R. App. P. 16, and Tex. Gov't Code 25.00255.

6. The archival requirements relating to proceedings under Chapter 33, Family Code, and these rules is governed by Sections 441.158 and 441.185, Government Code, and the schedules promulgated by the Texas State Library and Archives Commission pursuant to those authorities.

7. Because orders awarding costs contain information made confidential by Chapter 33, Family Code, that confidentiality should not be affected by the transmission to the Texas Department of Health and the Comptroller, which is necessary to effectuate payment, or to the Office of Court Administration, which is necessary to oversee the costs associated with the proceedings. Rule 1.9(f) does not preclude either the Comptroller, Texas Department of Health, or the Office of Court Administration from disclosing total amounts paid for all proceedings, or average amount per proceeding, or other such statistical summaries or analyses which do not impair the confidentiality of the proceedings and comply with 33.003(l-2).

9. Rule 1.10 adds a procedure for filing amicus curiae briefs uniquely designed for the expedited and confidential nature of parental notification cases.

## RULE 2. PROCEEDINGS IN THE TRIAL COURT

### 2.1 Where to File an Application; Court Assignment and Transfer; Application

**Form.**

**(a)** ***Counties in which an application may be filed.*** An application for an order under Section 33.003, Family Code, must be filed in the minor's county of residence, except:

*(i) Counties with a population of less than 10,000*. If a minor resides in a county with a population of less than 10,000 residents according to the most recent U.S. Census, an application may be filed in the minor's county of residence, or a county contiguous to the minor's county of residence, or the county in which the facility at which the minor intends to obtain the abortion is located.

(ii) *Minor's parent is a presiding judge*. If the minor's parent, managing conservator, or guardian is a presiding judge of a court described by subsection (b)(1), an application may be filed in the minor's county of residence, or a county contiguous to the minor's county of residence, or the county in which the facility at which the minor intends to obtain the abortion is located.

**(b)** ***Courts in which an application may be filed; assignment and transfer.***

(1) *Courts with jurisdiction.* An application may be filed in a district court (including a family district court), a county court-at-law, or a court having probate jurisdiction.

(2) *Application filed with district or county clerk.* An application must be filed with either the district clerk or the county clerk, who will assign the application to a court as provided by local rule or these rules. The clerk to whom the application is tendered cannot refuse to accept it because of any local rule or other rule or law that provides for filing and assignment application and transfer it instanter to the proper clerk, advising the person tendering the application where it is being transferred.

(3) *Court assignment and transfer by local rule.* The courts in a county that have jurisdiction to hear applications may determine by local rule how applications will be assigned between or among them. A local rule must be approved by the Supreme Court under Rule 3a, Texas Rules of Civil Procedure.

(4) *Initial court assignment if no local rule.* Absent a local rule, the clerk that files an application — whether the district clerk or the county clerk — must assign it as follows:

(i) to a district court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(ii) if the application cannot be assigned under (i), then to a statutory county or probate court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(iii) if the application cannot be assigned under (i) or (ii), then to the constitutional county court, if it has probate jurisdiction, and if the active judge of the court, or a judge assigned to it, is then present in the county;

(iv) if the application cannot be assigned under (i), (ii), or (iii), then to the district court.

(5) *Judges who may hear and determine applications.* An application may be heard and determined (i) by the active judge of the court to which the application is assigned, or (ii) by any judge authorized to sit for the active judge, or (iii) by any judge who may be assigned to the court in which the application is pending. An application may not be heard or determined, or any proceedings under these rules conducted, by a master or magistrate.

**(c)** ***Application form.*** An application consists of two pages: a cover page and a separate verification page.

(1) *Cover page.* The cover page may be submitted on Form 2A, but use of the form is not required. The cover page must be styled "In re Jane Doe" and must not disclose the name of the minor or any information from which the minor's identity could be derived. The cover page must state:

(A) that the minor is pregnant;

(B) that the minor is unmarried, is under 18 years of age, and has not had her disabilities removed under Chapter 31, Family Code;

(C) that the minor wishes to have an abortion without notifying or obtaining consent from either of her parents or a managing conservator or guardian, and the statutory ground or grounds on which she relies;

(D) that, concerning her current pregnancy, the minor has not previously filed an application that was denied, or if so, that the current application is filed with the court that previously denied the application and that there has been a material change in circumstances since the time the previous application was denied;

(E) that venue is proper in the county in which the application has been filed;

(F) whether the minor has retained an attorney, and if so, the attorney's name, address, and telephone number; and

(G) whether the minor requests the court to appoint a particular person as her guardian ad litem;

(2) *Verification page.* The verification page may be submitted on Form 2B, but use of the form is not required. The verification page must be separate from the cover page, must be signed under oath or by unsworn declaration in compliance with Section 132.001 of the Texas Civil Practice & Remedies Code by the person completing the application, which may be the minor's attorney, and must state:

(A) the minor's current residence, including the physical address, mailing address and telephone number;

(B) the name, address, telephone number, and relationship to the minor of any person the minor requests the court to appoint as her guardian ad litem;

(C) if the minor has not retained an attorney, a telephone or mobile number — whether that of the minor or someone else (such as a physician, friend, or relative) — at which the minor may be contacted immediately and confidentially until an attorney is appointed to represent her; and

(D) that all information contained in the application, including both the cover page and the verification page, is true.

(3) *Declaration of attorney*. If any attorney assists the minor in filing the application, the attorney who represents the minor shall sign the verification page. An attorney's declaration shall be made to the best of the attorney's knowledge, information, and belief formed after reasonable inquiry.

**(d)** ***Time of filing.*** An application is filed when it is actually received by the district or county clerk.

**(e)** ***Non-suit***. A minor who has filed an application may not withdraw or otherwise non-suit her application without permission of the court.

**2.2 Clerk's Duties.**

**(a)** ***Assistance in filing.*** The clerk must give prompt assistance — in a manner designed to protect the minor's confidentiality— to persons seeking to file an application. If requested, the clerk must administer the oath required for the verification page or provide a person authorized to do so. The clerk must also redact from the cover page any information identifying the minor. The clerk must ensure that both the cover page and the separate verification page are completed in full.

**(b)** ***Filing procedure.*** The clerk must assign the application a cause number and affix it to both the cover page and the verification page, ensuring that the case number and style preserve the confidentiality of the minor, the court, and the assigned judge. The clerk must then provide a certified copy of the verification page to the person filing the application. The clerk must file the verification page under seal in a secure place where access is limited to essential court personnel.

**(c)** ***Distribution.*** When an application is filed, the clerk must distribute the cover page and verification page, or a copy of them, to the appropriate court instanter. If appointment of a specific person as guardian ad litem has been requested, the clerk must also communicate the information to the appropriate court instanter.

**(d)** ***If judge of assigned court not available.*** The clerk must determine instanter whether the judge of the court to which the application is assigned is available to hear the application within the prescribed time period. If that judge is not available, the clerk must instanter notify the local administrative judge and the presiding judge of the administrative judicial region for assignment of a judge who is available and must send them any information requested, including the cover page and verification page.

**(e)** ***Notice of hearing and appointments.*** When the clerk is advised by the court of a time for hearing or an appointment of a guardian ad litem or attorney ad litem, if any, the clerk must instanter give notice — as directed in the verification page and to each appointee — of the hearing time or appointment. A court coordinator or other court personnel may give notice instead of the clerk.

**(f)** ***Orders.*** The clerk must provide the minor's attorney and the guardian ad litem with copies of all court orders, including findings of fact and conclusions of law.

**2.3 Court's Duties.** Upon receipt of an application from the clerk, the court must instanter:

**(a)** appoint a qualified person to serve as guardian ad litem for the minor applicant, who may not be the same person appointed attorney ad litem;

**(b)** appoint an attorney ad litem for the minor, unless she has stated on the cover page (Form 2A) that she has retained an attorney;

**(c)** set a hearing on the application in accordance with Rule 2.4(a); and

**(d)** advise the clerk of the appointment or appointments and the hearing time.

**2.4 Hearing.**

**(a)** ***Time.*** The court must conduct a hearing in time to rule on the application as required by Rule 2.5(d). But the minor may postpone the hearing by written request to the clerk when the application is filed or thereafter. The request may be submitted on Form 2C, but use of the form is not required. The request must either specify a date on which the minor will be ready for the hearing, or state that the minor will later provide a date on which she will be ready for the hearing. Once the minor determines when she will be ready for the hearing, she must notify the clerk of that time in writing. The postponed hearing must be conducted in time for the court to rule on the application as required by Rule 2.5(d).

**(b)** ***Place.*** The hearing should be held in a location, such as a judge's chambers, that will ensure confidentiality. The hearing may be held away from the courthouse.

**(c)** ***Persons attending.*** Hearings must be closed to the public. Only the judge, the court reporter and any other essential court personnel, the minor, her attorney, her guardian ad litem, and witnesses on the minor's behalf may be present.

**(d)** ***Record.*** The court, the minor, the minor's attorney, or the guardian ad litem

may request that the record — the clerk's record and reporter's record — be prepared. A request by the minor, the minor's attorney, or guardian ad litem must be in writing and may be, but is not required to be, on Form 2I (if an appeal will be taken) or 2J (if an appeal will not be taken). The court reporter must provide an original and two copies of the reporter's record to the clerk. When the record has been prepared, the clerk must contact the minor's attorney and the guardian ad litem (and the minor if the minor requested the record) at the telephone numbers shown on Form 2I or 2J and make it available to them. The record must be prepared and made available instanter if it has been requested for appeal or if a belief that there is evidence of past or potential abuse of the minor is stated on the record or submitted to the court in writing. When a notice of appeal is filed, the clerk must forward the record to the court of appeals in accordance with Rule 3.2(b).

**(e)** ***Hearing to be informal.*** The court should attempt to rule on the application without regard to technical defects in the application or the evidence. Affidavits of persons other than applicants are admissible. Statements in the application cannot be offered as evidence to support the application. If necessary, the court may assist the minor in remedying technical defects in the application and in presenting relevant and material facts.

**2.5 Ruling.**

**(a)** ***Form of ruling.*** The court's ruling on the application must include a signed order and written findings of fact and conclusions of law. The findings and conclusions may be included in the order. The court may use Form 2D, but it is not required to do so.

**(b)** ***Grounds for granting application.*** The court must grant the application if the minor establishes, by clear and convincing evidence, that:

(1) the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, on which the court must consider the minor's experiences, perspective and judgment, and may consider factors listed in section 33.003(i-1)(1)-(3); or

(2) notifying and obtaining consent from either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, would not be in the minor's best interest, on which the court may consider the factors listed in section 33.003(i-2).

**(c)** ***Grounds for denying application.*** If the minor can establish neither of the grounds in Rule 2.5(b) by clear and convincing evidence, the court must deny the application. If the court, the guardian ad litem, or the attorney are unable to contact the minor before the hearing despite diligent attempts to do so, or if the minor does not attend the hearing, the court must deny the application without prejudice.

**(d)** ***Time for ruling.*** The court must rule on an application as soon as possible after it is filed, subject to any postponement requested by the minor. The court must rule on an application by 5:00 p.m. on the fifth business day after the day the application is filed, or if the minor requests a postponement, after the date the minor states she is ready for the hearing.

**(e)** ***Notification of right to appeal.*** If the court denies the application, it must inform the minor of her right to appeal under Rule 3 and furnish her with the notice of appeal form, Form 3A.

## 2.6 Motion for Expedited Relief

**(a)** ***Motion.*** If the minor or her attorney determines that she cannot or will not obtain a ruling within the time required by statute due to any one or more of the grounds stated in subsection (b), she may file a motion for expedited relief with the Supreme Court of Texas. If the facts stated in the motion are within the personal knowledge of the attorney filing the motion, the motion need not be sworn. Otherwise, the facts set out in the motion must be supported by affidavit or unsworn declaration in compliance with Section 132.001 of the Texas Civil Practice & Remedies Code. The motion may be submitted on Form 2D, but use of the form is not required. A copy of the motion must be filed with the clerk of the court in which the application was filed.

**(b)** ***Grounds for granting motion.*** The minor is entitled to expedited relief by appropriate writ if she establishes that:

(1) No judge is available to hold a hearing within five days of the date the application was filed and the court clerk has not arranged for another judge to hold a hearing, in violation of Rule 2.2(d);

(2) The assigned judge did not set a hearing instanter, in violation of 2.3(d);

(3) The assigned judge did not appoint a guardian ad litem instanter, in violation of Rule 2.3(a);

(4) The assigned judge did not appoint a guardian ad litem instanter, in violation of Rule 2.3(b);

(5) The assigned judge did not rule within the time required by statute, in violation of Rule 2.5(d);

(6) The application was denied, but the court reporter or clerk did not complete the appellate record instanter after notice, in violation of Rule 2.4(d).

**Notes and Comments**

1. Section 33.003(b), Family Code, permits an application to be filed in "a county court at law, court having probate jurisdiction, or district court, including a family district court in the minor's county of residence" subject to the venue restriction. The initial assignment of an application to a specific court in a county is made by the clerk with whom the application is filed (not by the minor). Given the diversity of needs and circumstances among Texas courts, these rules allow the courts in each county to tailor the procedures for filing, handling, and assigning applications prescribed by these rules to best meet those needs and circumstances. Chapter 74, Subchapter C, Government Code, affords the presiding judge of an administrative judicial region broad discretion to assign active judges within the region, as well as visiting judges, to hear matters pending in courts within the region. *See* Tex. Govt. Code §§ 74.054, 74.056; *see also id.*, § 74.056(b) (presiding judges may request judges from other judicial regions for assignment); § 74.057 (Chief Justice may assign judges from one judicial region to another). Section 25.0022, Government Code, provides for assignment of probate judges. Furthermore, Chapter 74, Subchapter D, Government Code, authorizes district and statutory county court judges within a county to hear matters pending in any district or statutory county court in the county. *Id.*, § 74.094(a). Finally, Section 74.121, Government Code, permits courts within a county to transfer cases among courts having jurisdiction over the case. If no local rule governs assignments, then Rule 2.1(b)(4) controls.

2. Because an application is considered filed when it is actually received by the clerk, the timing provisions relating to filing by mail of Tex. R. Civ. P. 21a are inapplicable.

3. Section 33.003(f), Family Code, provides that a guardian ad litem may be (1) a person who may consent to treatment for the minor under Sections 32.001(a)(1)-(3), Family Code; (2) a psychiatrist or an individual licensed or certified as a psychologist under Chapter 501, Occupations Code; (3) an appropriate employee of the Department of Family and Protective Services; (4) a member of the clergy; or (5) another appropriate person selected by the court. The trial court may also consider appointing a qualified

person requested by the minor. Although not directly applicable to these proceedings, the standards embodied in Chapter 107, Family Code, reflect legislative intent that competent and qualified persons be appointed to serve as ad litems and may provide general guidance concerning the nature of those qualifications[check ch. 107 changes]. Appointment of an employee of the Department of Family and Protective Services to serve as guardian ad litem may give rise to a conflict of interest not immediately apparent at the time since the Department may be involved with the minor's family due to an abuse or neglect investigation, or may be party to a suit affecting the parent-child relationship, or may already be serving as the child's managing conservator.

4. The duties of guardians ad litem are not susceptible of precise definition. Generally, a guardian ad litem should interview the minor and conduct any investigation the guardian believes to be appropriate, without violating Rules 1.3 and 1.4, to assist the court in arriving at an opinion whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian or whether notification and obtaining consent would not be in the best interest of the minor, including any risk of physical, sexual, or emotional abuse of the minor. In making these determinations, the following factors have been considered in other jurisdictions with similar parental notification statutes:

- Whether the minor has been examined by a doctor of medicine, doctor of osteopathy, or registered nurse — who is licensed to practice in Texas — and has given that health care provider an accurate and complete statement of her medical history.

- Whether the minor has been provided with information or counseling bearing on her decision to have an abortion.

- Whether the minor desires further counseling.

- Whether, based on the information or counseling provided to the minor, she is able to give informed consent.

- Whether the minor is attending school, or is or has been employed.

- Whether the minor has previously filed an application that was denied.

- Whether the minor lives with her parents.

- Whether the minor desires an abortion or has been threatened, intimidated or coerced into having an abortion.

- Whether the pregnancy resulted from sexual assault, sexual abuse, or incest.

- Whether there is a history or pattern of family violence.

- Whether the minor fears for her safety.

These considerations may not be relevant in every case, are not exclusive, and may not be sufficient to discharge the guardian ad litem's responsibilities in every case. Use of these factors as a basis for civil liability or as a statement of the standard of care is contrary to their intended purpose. Nothing in this comment alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In addition to these general guidelines, Chapter 107, Family Code, sets forth duties of guardians and attorneys ad litem appointed in suits affecting the parent-child relationship. These duties are not directly applicable to proceedings under Chapter 33, Family Code, and may be incompatible with the confidential and expeditious nature of such proceedings, but they reflect general legislative intent concerning the responsibilities of ad litems.

5. Under Rule 2.5(b), once a court concludes that an application should be granted on a single ground, it need not address other grounds. But in addressing any ground, the court should attempt to ascertain, among other factors, whether the pregnancy resulted from sexual assault, sexual abuse, or incest. The legislative history of Chapter 33, Family Code, indicates that one of the principal purposes of the statute was to screen for sexual crimes and abuse of minors so as to protect them against further victimization.

## RULE 3. APPEAL FROM DENIAL OF APPLICATION

**3.1 How to Appeal.** To appeal the denial of an application, the minor must simultaneously file a notice of appeal with the clerk of the court that denied the application, file a copy of the notice of appeal with the clerk of the court of appeals to which an appeal is to be taken, and advise the clerk of the court of appeals by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 3A but is not required to do so. The notice of appeal must:

**(a)** be styled "In re Jane Doe";

**(b)** state the number of the cause in the trial court;

**(c)** be addressed to a court of appeals with jurisdiction in the county in which the application was filed;

**(d)** state an intention to appeal; and

**(e)** be signed by the minor's attorney or attorney ad litem appointed by the trial

court.

### 3.2 Clerk's Duties.

**(a)** ***Assistance in filing.*** The trial court clerk must give prompt assistance — in a manner designed to protect the minor's confidentiality — to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the proper court of appeals and that the minor's name and identifying information are not disclosed.

**(b)** ***Forwarding record to court of appeals.*** Upon receipt of a notice of appeal, the trial court clerk must instanter forward to the clerk of the court of appeals the notice of appeal, the clerk's record (original papers or copies) excluding the verification page, and the reporter's record. The trial court clerk must not send the record to the clerk of the court of appeals by mail but must, if feasible, deliver it by hand or transmit it by facsimile or other electronic means. If neither of these methods is feasible, then the record may be sent by overnight delivery.

### 3.3 Proceedings in the Court of Appeals.

**(a)** ***Briefing and argument.*** A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument.

**(b)** ***Ruling.*** The court of appeals — sitting in a three- judge panel — must issue a judgment affirming or reversing the trial court's order denying the application. The court may use Form 3C but is not required to do so.

**(c)** ***Time for ruling.*** The court of appeals must rule on an appeal as soon as possible , subject to any postponement requested by the minor. Section 33.004(b), Family Code, states that a court must rule on an appeal by 5:00 p.m. on the fifth business day after the notice of appeal is filed with the court that denied the application, or if the minor requests a postponement, after the date the minor states she is ready to proceed.

**(d)** ***Postponement by minor.*** The minor may postpone the time of ruling by written request filed either with the trial court clerk at the time she files the notice of appeal or thereafter with the court of appeals clerk. The request may be submitted on Form 3B, but use of the form is not required. The request must either specify a date on which the minor will be ready to proceed to ruling, or state that the minor will later provide a date on which she will be ready to proceed to ruling. Once the minor determines when she will be ready to proceed to ruling, she must notify the court of appeals clerk

of that date in writing.

**(e)** ***Motion for expedited relief upon court's failure to rule within time prescribed by statute.*** If the court of appeals fails to rule on an application within the time required by Section 33.004(b), Family Code, the minor may file a motion for expedited relief with the Supreme Court of Texas. If the facts stated in the motion are within the personal knowledge of the attorney filing the motion, the motion need not be sworn. Otherwise, the facts set out in the motion must be supported by affidavit or unsworn declaration in compliance with Section 132.001 of the Texas Civil Practice & Remedies Code. A copy of the motion must be filed with the clerk of the court of appeals.

**(e)** ***Opinion.***

(1) *Opinion optional.* A court of appeals may issue an opinion explaining its ruling, but it is not required to do so. Any published opinion must be written in a way to preserve the confidentiality of the identity of the minor.

(2) *Time.* Any opinion must issue not later than:

(A) ten business days after the day on which a notice of appeal is filed in the Supreme Court, if an appeal is taken to the Supreme Court; or

(B) sixty days after the day on which the court of appeals issued its judgment, if no appeal is taken to the Supreme Court.

(3) *Confidential transmission to Supreme Court.* When the court of appeals issues an opinion, the clerk must confidentially transmit it instanter to the Supreme Court and to the trial court.

**Notes and Comments**

1. Chapter 33, Family Code, provides for no appeal from an order granting an application.

2. A request to postpone the ruling of the court of appeals may be used in conjunction with a request for oral argument or to submit briefing.

3. Neither Chapter 33, Family Code, nor these rules prescribes the appellate standard of review.

4. Chapter 33, Family Code, allows publication of court of appeals opinions if written in a way to preserve confidentiality and identity of the pregnant minor. Doing so entails not just omitting the minor's name and other directly identifying information but also requires describing those facts necessary to the opinion's reasoning in a such a general way that those who know the minor and her family cannot recognize her.

## RULE 4. APPEAL TO THE SUPREME COURT

**4.1 How to Appeal to the Supreme Court.** To appeal from the court of appeals to the Supreme Court, the minor must simultaneously file a notice of appeal with the Clerk of the Supreme Court, file a copy of the notice of appeal with the clerk of the court of appeals, and advise the clerk of each court by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 4A but is not required to do so. The notice of appeal must:

**(a)** be styled "In re Jane Doe";

**(b)** state the number of the cause in the court of appeals;

**(c)** state an intention to appeal; and

**(d)** be signed by the minor's attorney or attorney ad litem appointed by the trial court.

**4.2 Clerk's Duties.**

**(a)** ***Assistance in filing.*** The Clerk of the Supreme Court must give prompt assistance — in a manner designed to protect the minor's confidentiality — to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the Supreme Court and that the minor's name and identifying information are not disclosed.

**(b)** ***Forwarding record to Supreme Court.*** Upon receipt of a notice of appeal to the Supreme Court, the clerks of the court of appeals and Supreme Court must instanter have forwarded to the Supreme Court the record that was before the court of appeals.

**4.3 Proceedings in the Supreme Court.** A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument. The Court must rule as soon as possible.

Texas Parental Notification Rules and Forms
*effective date January 1, 2015 [~~March 1, 2007~~]*

Explanatory Statement

Chapter 33 of the Texas Family Code, adopted by Act of May 25, 1999, 76th Leg., R.S., ch. 395, 1999 Tex. Gen. Laws 2466 (S.B. 30), provides for judicial authorization of an unemancipated minor to consent to an abortion in Texas without notice to her parents, managing conservator, or guardian. Section 2 of the Act states: "The Supreme Court of Texas shall issue promptly such rules as may be necessary in order that the process established by Sections 33.003 and 33.004, Family Code, as added by this Act, may be conducted in a manner that will ensure confidentiality and sufficient precedence over all other pending matters to ensure promptness of disposition." *See also* Tex. Fam. Code §§ 33.003(l), 33.004(c). Section 6 of the Act adds: "The clerk of the Supreme Court of Texas shall adopt the application form and notice of appeal form to be used under Sections 33.003 and 33.004, Family Code, as added by this Act, not later than December 15, 1999." *See also* Tex. Fam. Code §§ 33.003(m), 33.004(d).

The following rules and forms are promulgated as directed by the Act without any determination that the Act or any part of it comports with the United States Constitution or the Texas Constitution. During the public hearings and debates on the rules and forms, questions were raised concerning the constitutionality of Chapter 33, among which were whether the statute can make court rulings secret, and whether the statute can require courts to act within the specified, short deadlines it imposes. Because such issues should not be resolved outside an adversarial proceeding with full briefing and argument, the rules and forms merely track statutory requirements of the Legislature. Adoption of these rules does not, of course, imply that abortion is or is not permitted in any specific situation. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); Tex. Rev. Civ. Stat. Ann. art. 4495b, § 4.011 (restrictions on third trimester abortions of viable fetuses).

In 2005, and again in 2015, the Legislature amended the Texas Occupations Code to prohibit a physician from performing an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided by Section 33.003 or 33.004, Family Code, authorizing the minor to consent to the abortion, unless there exists a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by the physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed [~~the physician concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the child's parent, managing conservator, or legal guardian~~].

Act of May 27, 2005, 79th Leg., R.S., ch. 269, §1.42, 2005 Tex. Gen. Laws 734 (S.B. 419) (codified at Tex. Occ. Code §164.052(a)(19)). Act of June 1, 2015, 84th Leg., R.S., ch. 463 (H.B. 3994)(amending the definition of medical emergency). The parental consent law does not direct the Supreme Court to provide procedural rules implementing its provisions but instead

expressly references the judicial bypass provisions in the parental notification law as providing an exception to the parental consent requirement. The procedures governing application for a judicial bypass to the parental notification requirement are set forth in the existing Parental Notification Rules. In addition, the parental consent law requires the Texas Medical Board to adopt the forms necessary for physicians to obtain the consent required by law to perform an abortion upon an unemancipated minor. *See id.* (codified at Tex. Occ. Code §164.052(c)). Those forms are published at 22 Tex. Admin. Code §165.6(f) and are available on the Texas Medical Board's website, at www.tmb.state.tx.us/rules/docs/Current%20Rules%20-%20%201-4-07.doc.

In 2015, the Legislature made substantive amendments to Chapter 33, Family Code. These changes include venue restrictions, a heightened burden of proof, an expanded list of considerations for the court, extended deadlines, as well as other changes, both procedural and substantive. These rules required substantial amendments to the rules and forms which had been promulgated by the Supreme Court. Act of June 1, 2015, 84th Leg., R.S., ch. 463 (HB 3994).

The notes and comments appended to the rules are intended to inform their construction and application by courts and practitioners.

RULE 1. GENERAL PROVISIONS

1.1 Applicability of These Rules. These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to either of her parents or a managing conservator or guardian under Chapter 33, Family Code (or as amended). All references in these rules to "minor" refer to the minor applicant. Other Texas court rules -- including the Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Judicial Administration, and local rules approved by the Supreme Court – also apply, but when the application of another rule would be inconsistent with the general framework or policy of Chapter 33, Family Code, or these rules, these rules control.

1.2 Expedition Required.

(a) *Proceedings.* A court must give proceedings under these rules precedence over all other pending matters to the extent necessary to assure that applications and appeals are adjudicated as soon as possible and within the time required by Rules 2.4(a), 2.5(d), and 3.3(c).

(b) *Prompt actual notice required.* Without compromising the confidentiality [~~and anonymity~~] required by statute and these rules, courts and clerks must serve orders, decisions, findings, and notices required under these rules in a manner designed to give prompt actual notice in order that the deadlines imposed by Chapter 33, Family Code, can be met.

(c) *Instanter.* "Instanter" means immediately, without delay. An action required by these rules to be taken instanter should be done at the first possible time and with the most expeditious means available.

1.3 Confidentiality [~~Anonymity~~] of Minor Protected.

(a) *Generally.* Proceedings under these rules must be conducted in a way that protects the confidentiality of the identity [~~anonymity~~] of the minor.

(b) *No reference to minor's identity in proceeding.* With the exception of the verification page required under Rule 2.1(c)(2) and the communications required under Rule 2.2(e), no reference may be made in any order, decision, finding, or notice, or on the record, to the name of the minor, her address, or other information by which she might be identified by persons not participating in the proceedings. Instead, the minor must be referred to as "Jane Doe" in a numbered cause.

(c) *Notice.* With the exception of orders and rulings released under Rule 1.4(b), all service and communications from the court to the minor must be directed to the minor's attorney with a copy to the guardian ad litem. A minor's attorney must serve on the guardian ad litem instanter a copy of any document filed with the court. These requirements take effect when an attorney appears for the minor, or when the clerk has notified the minor of the appointment of an attorney or guardian ad litem.

1.4 Confidentiality of Proceedings Required; Exceptions.

(a) *Generally.* All officials and court personnel involved in the proceedings must ensure that the minor's contact with the clerk and court is confidential and expeditious. Except as permitted by law, no officials or court personnel involved in the proceedings may ever disclose to anyone outside the proceedings -- including the minor's parent, managing conservator, or legal guardian -- that the minor is or has ever been pregnant, or that she wants or has ever wanted an abortion.

(b) *Documents and information pertaining to the proceeding.* As required by Chapter 33, Family Code, the application and all other court documents and information pertaining to the proceedings are confidential and privileged and are not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. But documents and information may be disclosed when expressly authorized by these rules, and an order, ruling, opinion, or clerk's certificate may be released to:

(1) the minor;
(2) the minor's guardian ad litem;
(3) the minor's attorney;
(4) a person designated in writing by the minor to receive the order, ruling, opinion, or certificate;
(5) a governmental agency or governmental attorney, in connection with a criminal or administrative action seeking to assert or protect the minor's interests; or
(6) another court, judge, or clerk in the same or related proceedings.

(c) *Minor's access to records.* The record for the minor's case, including confidential and privileged documents pertaining to Section 33.003, Family Code, may be disclosed to the minor.

(d) *Physician who is to perform the abortion.* An order of the court may be released to the physician who is to perform the abortion.

(e[~~c~~]) *Filing of court reporter's notes permitted.* To assure confidentiality, court reporter notes, in whatever form, may be filed with other court documents in the proceeding.

(f[~~d~~]) *Duty to report possible sexual abuse.* A court, guardian ad litem, or attorney ad litem who reasonably believes, based on information obtained in the proceeding, that a violation of Section 22.011, 22.021, or 25.02, Penal Code, has occurred must report the information to the appropriate officials or agencies as required by Section 33.009, Family Code. A judge or justice who, as a result of court proceedings conducted under Section 33.003 or 33.004, has reason to believe that a minor has been or may be physically or sexually abused shall immediately report the suspected abuse and the name of the abuser to the Department of Family and Protective Services and to a local law enforcement agency and refer the minor to the department for services or intervention that may be in the best interest of the minor.

(g[~~e~~]) *Department of Protective and Regulatory Services and Law Enforcement to disclose certain information in proceeding.* The Department of Protective and Regulatory Services or local law enforcement agency may disclose to the court, the attorney ad litem, and the guardian ad litem any information obtained under Section 33.008, Family Code, without being ordered to do so. The trial court may order the Department to disclose such information to such persons, and the Department must comply.

1.5 Electronic Filing Prohibited; Electronic Transmission of Documents; [~~Hearings Conducted By Remote Electronic Means;~~] Electronic Record Allowed When Necessary.

(a) *Electronic filing.* Documents may not be filed by facsimile or other electronic data transmission [~~If the sender communicates directly with the clerk the time at which the transmission will occur, the clerk must take all reasonable steps to assure that the confidentiality of the received transmission will be maintained~~].

(b) *Electronic transmission by court and clerk.* The court and clerk may transmit orders, rulings, notices, and other documents by facsimile or other electronic data transmission. But before the transmission is initiated, the sender must take all reasonable steps to assure that the confidentiality of the received transmission will be maintained. The time and date of a transmission by the court is the time and date when it was initiated.

(c) *Participation in [~~H~~]hearings by electronic means.* Consistent with the [~~anonymity and~~] confidentiality requirements of these rules, with the court's permission, the attorney ad litem, the guardian ad litem, and any witnesses may participate in hearings under these rules by video conferencing, telephone, or other remote electronic means. The minor must appear before the court in person [~~unless the court determines that the minor's~~

~~appearance by video conferencing will allow the court to view the minor during the hearing sufficiently well to assess her credibility and demeanor~~].

(d) *Record of hearing made by electronic means if necessary.* If the court determines that a court reporter is unavailable for a hearing, the court may have a record of the hearing made by audio recording or other electronic means. If a notice of appeal is filed, the court must have the recording transcribed if possible. The person transcribing the recording must certify to the accuracy of the transcription. The court must transmit both the recording and the transcription to the court of appeals.

1.6 Disqualification, Recusal, or Objection to a Judge.

(a) *Time for filing and ruling.* An objection to a trial judge, or a motion to recuse or disqualify a trial judge, must be filed before 10:00 a.m. of the first business day after an application is filed or promptly after the assignment of a judge to hear the case is made known to the minor or her attorney, whichever is later. An objection to an appellate judge, or a motion to recuse or disqualify an appellate judge must be filed before 10 a.m. of the first business day after a notice of appeal is filed. A judge who chooses to recuse voluntarily must do so instanter. An objection to a judge or a motion to disqualify or recuse does not extend the deadline for ruling on the minor's application.

(b) *Voluntary disqualification or recusal, or objection.* A judge to whom objection is made under Chapter 74, Government Code, or a judge or justice who voluntarily does not sit, must notify instanter the appropriate authority for assigning another judge by local rules or by statute. That authority must instanter assign a judge or justice to the proceeding.

(c) *Involuntary disqualification or recusal.* A judge or justice who refuses to remove himself or herself voluntarily from a proceeding in response to a motion must instanter refer the motion to the appropriate judge or justice, pursuant to local rule, rule, or statute, for determination. The judge or justice to whom the motion is referred must rule on it as soon as possible and may do so with or without a hearing. If the motion is granted, the judge or justice to whom the motion was referred must instanter assign a judge or justice to the proceeding.

(d) *Only one objection or motion to recuse permitted.* A minor who objects to a judge assigned to the proceeding may not thereafter file a motion to recuse or disqualify, and a minor who files a motion to recuse or disqualify a judge may not thereafter object to a judge assigned to the proceeding.

(e) *Issues on appeal.* Any error in the denial of a motion to recuse or disqualify, or any error in the disallowance of an objection, or any challenge to a judge that a minor is precluded from making by subsections (a) or (d), may be raised only on appeal from the court's denial of the application.

1.7 Rules and Forms to be Made Available. A copy of these rules, and a copy of the attached forms in English and Spanish, must be made available to any person without charge in the clerk's offices of all courts in which applications or appeals may be filed under these rules, on the Texas Judiciary Internet site at www.courts.state.tx.us, and by the Office of Court Administration upon request. A copy of a court's local rules relating to proceedings under Chapter 33, Family Code, must be made available to any person without charge in the office of the clerk for that court where applications may be filed. Rules and forms may be copied.

1.8 Duties of Attorneys Ad Litem. An attorney ad litem must represent the minor in the trial court in the proceeding in which the attorney is assigned, and in any appeal under these rules to the court of appeals or the Supreme Court. But an attorney ad litem is not required to represent the minor in any other court or any other proceeding. The minor's attorney ad litem may not serve as the minor's guardian ad litem.

(a) An attorney retained by the minor to assist her in filing an application under this section shall fully inform himself or herself of the minor's prior application history, including the representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated.

(b) If an attorney assists the minor in the application process in any way, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement.

(c) An attorney has a duty to disclose to the tribunal any unprivileged facts which the lawyer reasonably believes should be known by that entity for it to make an informed decision.

1.9 Fees and Costs.

(a) *No fees or costs charged to minor.* No filing fee or court cost may be assessed against a minor for any proceeding in a trial or appellate court.

(b) *State ordered to pay fees and costs.*

(1) Fees and costs that may be paid. The State may be ordered to pay the reasonable and necessary fees and expenses of the attorney ad litem, the reasonable and necessary fees and expenses of the guardian ad litem, the court reporter's fee as certified by the court reporter, and trial court filing fees and costs as certified by the clerk. Court costs include the expenses of an interpreter (Form 2H) or an evaluation by a licensed mental health counselor but do not include the fees or expenses of a witness. Court costs do not include fees which must be remitted to the state treasury.

(2) To whom order directed and sent. The order must be directed to the Comptroller of Public Accounts but should be sent by the clerk to the Director, Fiscal Division, of the Texas Department of Health.

(3) Form and contents of the order. The order must state the amounts to be awarded the attorney ad litem and the guardian ad litem. The order must be separate from any other order in the proceeding and must not address any subject other than the assessment of costs. A trial court may use Forms 2F and 2G, but it is not required to do so.

(4) Time for signing and sending order. To be valid, the order must be signed by the judge and sent by the clerk to the Department of Health not later than the ninetieth day after the date of the final ruling in a proceeding, whether the application is granted, deemed granted, or denied, or the proceeding is dismissed or nonsuited.

(c) *Motion to reconsider; time for filing.* Within thirty days of actual receipt of the order, the Comptroller or any other person adversely affected by the order may file a motion in the trial court to reconsider the assessment of costs. The trial court retains jurisdiction of the case to hear and determine any timely filed motion to reconsider.

(d) *Appeal.* The Comptroller or any other person adversely affected by the order may appeal from the trial court's ruling on the motion to reconsider as from any other final judgment of the court.

(e) *Report to the Office of Court Administration.* The Department of Health must transmit to the Office of Court Administration a copy of every order assessing costs in a proceeding under Chapter 33, Family Code. Such orders are not subject to the Amended Order of the Supreme Court of Texas, dated September 21, 1994, in Misc. Docket No. 94-9143, regarding mandatory reports of judicial appointments and fees.

(f) *Confidentiality.* When transmitting an order awarding costs to the Department of Health, the clerk must take reasonable steps to preserve its confidentially. The confidentiality of an order awarding costs -- as prescribed by Chapter 33, Family Code -- is not affected by its transmission to the Comptroller, Texas Department of Health, or the Office of Court Administration, nor is the order subject to public disclosure in response to a request under any statute, rule, or other law. But these rules do not preclude the Comptroller, Texas Department of Health, and the Office of Court Administration from disclosing summary information from orders assessing costs for statistical or other such purposes.

1.10 Amicus Briefs. Amicus briefs may be submitted and received by a court - but not filed - under either of the following procedures.

(a) *Confidential, Case-Specific Briefs.* A non-party who is authorized to attend or participate in a particular proceeding under Chapter 33, Family Code may submit an

amicus brief addressing matters, including confidential matters, specific to the proceeding. The brief and the manner in which it is submitted must comply with Rules 1.3 and 1.4 and be directed to the court in which the proceeding is pending. The person must submit the original brief and the same number of copies required for other submissions to the court, and must serve a copy of the brief on the minor's attorney and guardian ad litem. The court to which the brief is submitted must maintain the brief as part of the confidential case file in accordance with Rule 1.4.

(b) *Public or General Briefs.* Any person may submit a brief addressing any matter relating to proceedings under Chapter 33, Family Code. Such a brief must not contain any information in violation of Rules 1.3 and 1.4. The person must submit the original brief and the same number of copies required for other submissions to the court. If the brief is submitted to a court of appeals, the original and eleven copies of the brief, plus a computer disk containing an electronic copy of the brief, must also be submitted to the Supreme Court of Texas. When an appeal of a proceeding is filed, the clerk of the court of appeals or the Supreme Court must notify the minor's attorney and guardian ad litem of the existence of any brief submitted under this subsection and must make the brief available for inspection and copying. Upon receipt of an electronic copy of an amicus brief submitted under this subsection, the Clerk of the Supreme Court must, as soon as practicable, have the brief posted on the Texas Judiciary Internet site and make it available to the public for inspection and copying.

Notes and Comments

1. Rule 1.1 contemplates that other court rules of procedure and administration remain as a "default" governing matters not addressed in these rules. Thus, for example, these rules do not state a deadline for filing notices of appeal, so the ordinary 30-day deadline controls, *see* Tex. R. App. P. 26.1, but these filing notices of appeal, so the ordinary 30-day deadline controls, *see* Tex. R. App. P. 26.1, but these rules control over inconsistent provisions in the appellate rules governing the docketing statement, the record, and briefing.

2. Rule 1.1 also contemplates that individual jurisdictions may enact local rules pursuant to Tex. R. Civ. P. 3a, Tex. R. App. P. 1.2, or Tex. R. Jud. Admin. 10, to the extent consistent with Chapter 33, Family Code, and with these rules, to tailor the implementation of the statute and these rules to local needs and preferences. Local rules may address, for example, the specific location or office where applications are to be filed, how applications are to be assigned for hearing, and whether an appellate court will permit or require briefing or oral argument. *See also* Rule 2, Comment 1.

3. Any judge involved in a proceeding, whether as the judge assigned to hear and decide the application, the judge assigned to hear and decide any disqualification, recusal or objection, a judge authorized to transfer the application or assign another judge to it, or an appellate judge, may have access to all information (including the verification page) in the proceeding or any related proceeding, such as a prior filing by the minor. Similarly, a

minor's attorney and guardian ad litem must, of course, have access to the case file to the extent necessary to perform their respective duties.

4. Section 33.008, Family Code, requires a physician or a physician's agent who suspects that a minor has been physically or sexually abused [~~by a person responsible for the minor's care~~] to immediately report the matter to the Texas Department of Protective and Regulatory Services and to a local law enforcement agency. [~~That section also requires the Department to investigate and to assist the minor in making an application, if appropriate.~~] Section 33.010 makes confidential -- "[n]otwithstanding any other law" -- all information obtained by the Department under Section 33.008 except to the extent necessary to prove certain criminal conduct. Rule 1.4(e) construes Section 33.010 in harmony with Section 33.008. [~~If Section 33.010 precluded the Department from disclosing information obtained under Section 33.008 to the court, the attorney ad litem, and the guardian ad litem in proceedings under section 33.003, the Department's statutorily mandated role in such proceedings would be seriously impaired. The Department could be required by Section 33.008 to assist a minor in filing an application but prohibited by Section 33.010 from providing the court with information supporting the application. The disclosure permitted and required by Rule 1.4(e) avoids this result.~~]

5. Rule 1.5(a) constitutes the approval required by Section 51.803, Government Code, for electronic filing of documents in proceedings under these rules. To facilitate expedition of proceedings, restrictions imposed on electronic filing in other cases are not imposed here. However, electronic filing is only permitted, not required, and Rule 1.5(a) does not necessitate the provision of means for electronic filing. A person filing by electronic means cannot, of course, expect that the document will be treated confidentiality upon receipt unless the recipient has been told the time the transmission will occur.

6. Rule 1.6 controls to the extent that it conflicts with other provisions regarding the disqualification or recusal of judges, such as Tex. R. Civ. P. 18a, Tex. R. App. P. 16, and Tex. Gov't Code 25.00255. But the rule incorporates the referral and reassignment processes otherwise applicable by local rule, rule, or statute.

7. The archival requirements relating to proceedings under Chapter 33, Family Code, and these rules is governed by Sections 441.158 and 441.185, Government Code, and the schedules promulgated by the Texas State Library and Archives Commission pursuant to those authorities.

8. Rule 1.8(b) requires an attorney to "attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement." In doing so, an attorney must use due diligence to apprise himself of the veracity of the minor's claims as to her residence and application history. If an attorney at any point learns or has reason to believe that the minor has falsified her application or otherwise misrepresented her circumstances, the attorney must promptly notify the court.

9[~~8~~].Because orders awarding costs contain information made confidential by Chapter 33, Family Code, that confidentiality should not be affected by the transmission to the Texas

Department of Health and the Comptroller, which is necessary to effectuate payment, or to the Office of Court Administration, which is necessary to oversee the costs associated with the proceedings. Rule 1.9(f) does not preclude either the Comptroller, Texas Department of Health, or the Office of Court Administration from disclosing total amounts paid for all proceedings, or average amount per proceeding, or other such statistical summaries or analyses which do not impair the confidentiality of the proceedings.

10[~~9~~]. Rule 1.10 adds a procedure for filing amicus curiae briefs uniquely designed for the expedited and confidential nature of parental notification cases.

RULE 2. PROCEEDINGS IN THE TRIAL COURT

2.1 Where to File an Application; Court Assignment and Transfer; Application Form; Exceptions.

(a) *Counties in which an application may be filed.* An application for an order under Section 33.003, Family Code, must be filed in the minor's county of residence [~~may be filed in any county, regardless of the minor's residence or where the abortion sought is to be performed~~].

(1) *Exceptions:*

*(i) Counties with a population of less than 10,000*. If a minor resides in a county with a population of less than 10,000 residents according to the most recent U.S. Census, an application may be filed in the minor's county of residence, or a county contiguous to the minor's county of residence, or the county in which the facility at which the minor intends to obtain the abortion is located.

(ii) *Minor's parent is a presiding judge*. If the minor's parent, managing conservator, or guardian is a presiding judge of a court described by subsection (a), an application may be filed in the minor's county of residence, or a county contiguous to the minor's county of residence, or the county in which the facility at which the minor intends to obtain the abortion is located.

(b) *Courts in which an application may be filed; assignment and transfer*.

(1) *Courts with jurisdiction.* An application may be filed in a district court (including a family district court), a county court-at-law, or a court having probate jurisdiction.

(2) *Application filed with district or county clerk.* An application must be filed with either the district clerk or the county clerk, who will assign the application to a court as provided by local rule or these rules. The clerk to whom the application

is tendered cannot refuse to accept it because of any local rule or other rule or law that provides for filing and assignment of such applications but must accept the application and transfer it instanter to the proper clerk, advising the person tendering the application where it is being transferred.

(3) *Court assignment and transfer by local rule.* The courts in a county that have jurisdiction to hear applications may determine by local rule how applications will be assigned between or among them. A local rule must be approved by the Supreme Court under Rule 3a, Texas Rules of Civil Procedure.

(4) *Initial court assignment if no local rule.* Absent a local rule, the clerk that files an application -- whether the district clerk or the county clerk -- must assign it as follows:

(i) to a district court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(ii) if the application cannot be assigned under (i), then to a statutory county or probate court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(iii) if the application cannot be assigned under (i) or (ii), then to the constitutional county court, if it has probate jurisdiction, and if the active judge of the court, or a judge assigned to it, is then present in the county;

(iv) if the application cannot be assigned under (i), (ii), or (iii), then to the district court.

(5) *Judges who may hear and determine applications.* An application may be heard and determined (i) by the active judge of the court to which the application is assigned, or (ii) by any judge authorized to sit for the active judge, or (iii) by any judge who may be assigned to the court in which the application is pending. An application may not be heard or determined, or any proceedings under these rules conducted, by a master or magistrate.

(c) *Application form.* An application consists of two pages: a cover page and a separate verification page.

(1) *Cover page.* The cover page may be submitted on Form 2A, but use of the form is not required. The cover page must be styled "In re Jane Doe" and must not disclose the name of the minor or any information from which the minor's identity could be derived. The cover page must state:

(A) that the minor is pregnant;

(B) that the minor is unmarried, is under 18 years of age, and has not had her disabilities removed under Chapter 31, Family Code;

(C) that the minor wishes to have an abortion without notifying either of her parents or a managing conservator or guardian, and the statutory ground or grounds on which she relies;

(D) whether the minor has retained an attorney, and if so, the attorney's name, address, and telephone number;

(E) whether the minor requests the court to appoint a particular person as her guardian ad litem; and

(F) whether, concerning her current pregnancy, the minor has previously filed an application that was denied, and if so, where the application was filed.

(2) *Verification page.* The verification page may be submitted on Form 2B, but use of the form is not required. The verification page must be separate from the cover page, must be signed under oath by the person completing the application, and must state:

(A) the minor's full name and date of birth;

(B) the name, address, telephone number, and relationship to the minor of any person the minor requests the court to appoint as her guardian ad litem;

(C) the minor's current residence, including the minor's physical address, mailing address, and telephone number;

(D)[~~(C)~~] a telephone or pager number -- whether that of the minor or someone else (such as a physician, friend, or relative) -- at which the minor may be contacted immediately and confidentially until an attorney is appointed to represent her; and

(E)[~~(D)~~] that all information contained in the application, including both the cover page and the verification page, is true.

(d) *Time of filing.* An application is filed when it is actually received by the district or county clerk.

(e) *Non-suiting by Minor.* A minor who has filed an application under this section may not withdraw or otherwise non-suit her application without the permission of the court.

(f) *Prior determination considered res judicata.* A minor who has filed an application and has obtained a determination by the court as described by Sec. 33.003(i), Family Code, may not initiate a new application proceeding, and the prior proceeding is res

judicata of the issue relating to the determination of whether the minor may or may not be authorized to consent to the performance of an abortion without notification to and consent of a parent, managing conservator, or guardian. Except that a minor whose application is denied may subsequently submit an application to the court that denied the application if the minor shows that there has been a material change in circumstances since the time the court denied the application.

2.2 Clerk's Duties.

*(a) Assistance in filing.* The clerk must give prompt assistance -- in a manner designed to protect the minor's confidentiality [~~and anonymity~~] -- to persons seeking to file an application. If requested, the clerk must administer the oath required for the verification page or provide a person authorized to do so. The clerk should also redact from the cover page any information identifying the minor. The clerk should ensure that both the cover page and the separate verification page are completed in full.

*(b) Filing procedure.* The clerk must assign the application a cause number and affix it to both the cover page and the verification page. The clerk must then provide a certified copy of the verification page to the person filing the application. The clerk must file the verification page under seal in a secure place where access is limited to essential court personnel.

*(c) Distribution.* When an application is filed, the clerk must distribute the cover page and verification page, or a copy of them, to the appropriate court instanter. If appointment of a specific person as guardian ad litem has been requested, the clerk must also communicate the information to the appropriate court instanter.

*(d) If judge of assigned court not present in county.* The clerk must determine instanter whether the judge of the court to which the application is assigned is present in the county. If that judge is not present in the county, the clerk must instanter notify the local administrative judge or judges and the presiding judge of the administrative judicial region and must send them any information requested, including the cover page and verification page.

(e) *Notice of hearing and appointments.* When the clerk is advised by the court of a time for hearing or an appointment of a guardian ad litem or at ad litem, the clerk must instanter give notice – as directed in the verification page and to each appointee -- of the hearing time or appointment. A court coordinator or other court personnel may give notice instead of the clerk.

(f) *Orders.* The clerk must provide the minor's attorney and the guardian ad litem with copies of all court orders, including findings of fact and conclusions of law.

[~~(g) *Certificate of court's failure to rule within time prescribed by statute*. If the court fails to rule on an application within the time required by Section 33.002(g) and (h), Family Code, upon the minor's request, the clerk must instanter issue a certificate to that~~

~~effect, stating that the application is deemed by statute to be granted. The clerk may use Form 2E but is not required to do so.~~]

2.3 Court's Duties. Upon receipt of an application from the clerk, the court must promptly:

(a) appoint a qualified person to serve as guardian ad litem for the minor applicant;

(b) appoint an attorney for the minor, who may not be the same person appointed guardian ad litem [~~if that person is an attorney admitted to practice law in Texas and there is no conflict of interest in the same person serving as attorney ad litem and guardian ad litem~~];

(c) set a hearing on the application in accordance with Rule 2.4(a); and

(d) advise the clerk of the [~~appointment or~~] appointments and the hearing time.

2.4 Hearing.

(a) *Time.* The court must conduct a hearing in time to rule on the application as required by Rule 2.5(d). But the minor may postpone the hearing by written request to the clerk when the application is filed or thereafter. The request may be submitted on Form 2C, but use of the form is not required. The request must either specify a date on which the minor will be ready for the hearing, or state that the minor will later provide a date on which she will be ready for the hearing. Once the minor determines when she will be ready for the hearing, she must notify the clerk of that time in writing. The postponed hearing must be conducted in time for the court to rule on the application as required by Rule 2.5(d).

(b) *Place.* The hearing should be held in a location, such as a judge's chambers, that will assure confidentiality. The hearing may be held away from the courthouse.

(c) *Persons attending.* Hearings must be closed to the public. Only the judge, the court reporter and any other essential court personnel, the minor, her attorney, her guardian ad litem, and witnesses on the minor's behalf may be present.

(d) *Record.* The court, the minor's attorney, or the guardian ad litem may request that the record – the clerk's record and reporter's record -- be prepared. A request by the minor's attorney or guardian ad litem must be in writing and may be, but is not required to be, on Form 2I (if an appeal will be taken) or 2J (if an appeal will not be taken). The court reporter must provide an original and two copies of the reporter's record to the clerk. When the record has been prepared, the clerk must contact the minor's attorney and the guardian ad litem at the telephone numbers shown on Form 2I or 2J and make it available to them. The record must be prepared and made available instanter if it has been requested for appeal or if a belief that there is evidence of past or potential abuse of the minor is stated on the record or submitted to the court in writing. When a notice of appeal is filed, the clerk must forward the record to the court of appeals in accordance with Rule 3.2(b).

(e) *Hearing to be informal.* The court should attempt to rule on the application without regard to technical defects in the application or the evidence. Affidavits of persons other than applicants are admissible. Statements in the application cannot be offered as evidence to support the application. If necessary, the court may assist the minor in remedying technical defects in the application and in presenting relevant and material facts.

2.5 Ruling.

(a) *Form of ruling.* The court's ruling on the application must include a signed order and written findings of fact and conclusions of law. The findings and conclusions may be included in the order. The court may use Form 2D, but it is not required to do so.

(b) *Grounds for granting application.* The court must grant the application if the minor establishes, by clear and convincing [~~a preponderance of the~~] evidence, that:

(1) the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be; or

(2) notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, would not be in the minor's best interest; [~~or~~]

[~~(3) notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, may lead to physical, sexual, or emotional abuse of the minor.~~]

(c) *Court inquiries as to the whether the minor is mature and sufficiently well informed*. In determining whether the minor is mature and sufficiently well-informed, the court shall consider the experience, perspective, and judgment of the minor. In doing so, the court may inquire about and consider all relevant factors, including:

(1) the minor's age,

(2) the minor's life experiences, such as working, traveling independently, or managing her own financial affairs,

(3) steps taken by the minor to explore her options and the consequences of those options.

(4) the minor's reasons for seeking an abortion,

(5) the degree to which the minor is informed about the state-published informational materials described by Chapter 171, Health and Safety Code.

(d) *Mental health evaluation.* In making a determination as to whether the minor is mature and sufficiently well-informed, the court may require the minor to be evaluated by a licensed mental health counselor. The counselor's evaluation shall become a part of the court record.

(e) *Court inquiries as to the best interest of the minor*. In determining whether the notification and the attempt to obtain consent would not be in the best interest of the minor, the court may make relevant inquiries, including the following:

(1) the minor's reasons for not wanting to notify and obtain consent from a parent, managing conservator, or guardian;

(2) whether notification or the attempt to obtain consent may lead to physical or sexual abuse;

(3) whether the pregnancy was the result of sexual abuse by a parent, managing conservator, or guardian; and

(4) any history of physical or sexual abuse from a parent, managing conservator, or guardian.

(f[~~e~~]) *Grounds for denying application.* If the minor can establish neither [~~none~~] of the grounds in Rule 2.5(b) by clear and convincing [~~a preponderance of the~~] evidence the court must deny the application. If the court, the guardian ad litem, or the attorney ad litem are unable to contact the minor before the hearing despite diligent attempts to do so, or if the minor does not attend the hearing, the court must deny the application [~~without prejudice~~].

(g[~~d~~]) *Time for ruling.* The court must rule on an application [~~as soon as possible after it is filed~~], subject to any postponement requested by the minor[~~, and immediately after the hearing is concluded~~]. Section 33.003(h), Family Code, states that a court must rule on an application by 5:00 p.m. on the fifth [~~second~~] business day after the day the application is filed, or if the minor requests a postponement, after the date the minor states she is ready for the hearing[~~, and that if the court does not rule within this time, the application is deemed to be granted~~].

(h[~~g~~]) *Notification of right to appeal.* If the court denies the application, it must inform the minor of her right to appeal under Rule 3 and furnish her with the notice of appeal form, Form 3A.

Notes and Comments

1. Section 33.003(b), Family Code, permits an application to be filed in "a county court at law, court having probate jurisdiction, or district court, including a family district court in

the minor's county of residence [~~any county court at law, court having probate jurisdiction, or district court, including a family district court, in this state~~]." The initial assignment of an application to a specific court in a county is made by the clerk with whom the application is filed (not by the minor). Given the diversity of needs and circumstances among Texas courts, these rules allow the courts in each county to tailor the procedures for filing, handling, and assigning applications prescribed by these rules to best meet those needs and circumstances. Chapter 74, Subchapter C, Government Code, affords the presiding judge of an administrative judicial region broad discretion to assign active judges within the region, as well as visiting judges, to hear matters pending in courts within the region. *See* Tex. Govt. Code §§ 74.054, 74.056; *see also id.*, § 74.056(b) (presiding judges may request judges from other judicial regions for assignment); § 74.057 (Chief Justice may assign judges from one judicial region to another). Section 25.0022, Government Code, provides for assignment of probate judges. Furthermore, Chapter 74, Subchapter D, Government Code, authorizes district and statutory county court judges within a county to hear matters pending in any district or statutory county court in the county. *Id*., § 74.094(a). Finally, Section 74.121, Government Code, permits courts within a county to transfer cases among courts having jurisdiction over the case. If no local rule governs assignments, then Rule 2.1(b)(4) controls. (2001 change)

2. Because an application is considered filed when it is actually received by the clerk, the timing provisions relating to filing by mail of Tex. R. Civ. P. 21a are inapplicable.

3. Section 33.003(f), Family Code, provides that a guardian ad litem may be (1) a person who may consent to treatment for the minor under Sections 32.001(a)(1)-(3), Family Code; (2) a psychiatrist or an individual licensed or certified as a psychologist under the Psychologist's Licensing Act, Article 4512c, Vernon's Texas Civil Statutes; (3) an appropriate employee of the Department of Protective or Regulatory Services; (4) a member of the clergy; or (5) another appropriate person selected by the court. The trial Services; (4) a member of the clergy; or (5) another appropriate person selected by the court. The trial court may also consider appointing a qualified person requested by the minor. Although not directly applicable to these proceedings, the standards embodied in Chapter 107, Family Code, reflect legislative intent that competent and qualified persons be appointed to serve as ad litems and may provide general guidance concerning the nature of those qualifications. Appointment of an employee of the Department of Protective and Regulatory Services to serve as guardian ad litem may give rise to a conflict of interest not immediately apparent at the time since the Department may be involved with the minor's family due to an abuse or neglect investigation, or may be party to a suit affecting the parent-child relationship, or may already be serving as the child's managing conservator.

4. The duties of guardians ad litem are not susceptible of precise definition. Generally, a guardian ad litem should interview the minor and conduct any investigation the guardian believes to be appropriate, without violating Rules 1.3 and 1.4, to assist the court in arriving at an opinion whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian, whether notification would not be in the best interest

of the minor, or whether notification may lead to physical, sexual, or emotional abuse of the minor. In making these determinations, the following factors have been considered in other jurisdictions with similar parental notification statutes:

- Whether the minor has been examined by a doctor of medicine, doctor of osteopathy, or registered nurse -- who is licensed to practice in Texas -- and has given that health care provider an accurate and complete statement of her medical history.
- Whether the minor has been provided with information or counseling bearing on her decision to have an abortion.
- Whether the minor desires further counseling.
- Whether, based on the information or counseling provided to the minor, she is able to give informed consent.
- Whether the minor is attending school, or is or has been employed.
- Whether the minor has previously filed an application that was denied.
- Whether the minor lives with her parents.
- Whether the minor desires an abortion or has been threatened, intimidated or coerced into having an abortion.
- Whether the pregnancy resulted from sexual assault, sexual abuse, or incest.
- Whether there is a history or pattern of family violence.
- Whether the minor fears for her safety.

These considerations may not be relevant in every case, are not exclusive, and may not be sufficient to discharge the guardian ad litem's responsibilities in every case. Use of these factors as a basis for civil liability or as a statement of the standard of care is contrary to their intended purpose. Nothing in this comment alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In addition to these general guidelines, Chapter 107, Family Code, sets forth duties of guardians and attorneys ad litem appointed in suits affecting the parent-child relationship. These duties are not directly applicable to proceedings under Chapter 33, Family Code, and may be incompatible with the nature of such proceedings, but they reflect general legislative intent concerning the responsibilities of ad litems.

5. Under Rule 2.5(b), once a court concludes that an application should be granted on a single ground, it need not address other grounds. But in addressing any ground, the court should attempt to ascertain, among other factors, whether the pregnancy resulted from sexual assault, sexual abuse, or incest. The legislative history of Chapter 33, Family Code, indicates that one of the principal purposes of the statute was to screen for sexual crimes and abuse of minors so as to protect them against further victimization.

6. Section 33.003(i), Family Code, sets forth a list of considerations a judge must make in determining whether a minor is mature and sufficiently well informed enough. The judge must consider the minor's life experience, perspective and judgement. In doing so, the judge may consider all relevant factors. Rules 2.5(c) and (d) provide a list of factors which may be considered, but this is not an exhaustive list. If a court is to require a

mental health evaluation, it must not prevent the court from complying with Section 33.004(b), which requires the court to make a ruling by 5 p.m. on the fifth business day after the application is received.

7. Section 33.003(i), Family Code, sets forth a list of inquiries the judge may make in determining whether the notification and the attempt to obtain consent would not be in the best interest of the minor. Rule 2.5(e) is intended to give the judge guidance, but is not intended to be an exhaustive list of inquiries.

Rule 3. THE COURT CLERK AND OFFICE OF COURT ADMINISTRATION.

3.1 Duties of the court clerk. At intervals prescribed by the Office of Court Administration of the Texas Judicial System, but at least quarterly, the clerk of the court shall submit a report to the office.

(a) *Contents of the Report*. The report sent by the clerk of the court must include the following information for each case filed:

(1) the case number and style;

(2) the applicant's county of residence;

(3) the court of appeals district in which the proceeding occurred;

(4) the date of the filing;

(5) the date of disposition; and

(6) the disposition of the case.

(b) *Report to be confidential.* The report sent from the court clerk to the Office of Court Administration is confidential and privileged and is not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process

3.2 Duties of the Office of Court Administration. The Office of Court Administration shall annually compile and publish a report.

(a) *Content of the Report.* The report of the Office of Court Administration must include data on the court of appeals district in which the proceeding occurred and the disposition of the case.

(b) *Confidentiality of Report.* The report of the Office of Court Administration must protect the confidentiality of the identity of all minors and judges who are the subject of the report as well as the case numbers and styles.

RULE 4[~~3~~]. APPEAL FROM DENIAL OF APPLICATION

4[~~3~~].1 How to Appeal. To appeal the denial of an application, the minor must simultaneously file a notice of appeal with the clerk of the court that denied the application, file a copy of the notice of appeal with the clerk of the court of appeals to which an appeal is to be taken, and advise the clerk of the court of appeals by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 3A but is not required to do so. The notice of appeal must:

(a) be styled "In re Jane Doe";

(b) state the number of the cause in the trial court;
(c) be addressed to a court of appeals with jurisdiction in the county in which the application was filed;

(d) state an intention to appeal; and

(e) be signed by the minor's attorney or attorney ad litem appointed by the trial court.

4[~~3~~].2 Clerk's Duties.

(a) *Assistance in filing.* The trial court clerk must give prompt assistance -- in a manner designed to protect the minor's confidentiality -- to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the proper court of appeals and that the minor's name and identifying information are not disclosed.

(b) *Forwarding record to court of appeals.* Upon receipt of a notice of appeal, the trial court clerk must instanter forward to the clerk of the court of appeals the notice of appeal, the clerk's record (original papers or copies) excluding the verification page, and the reporter's record. The trial court clerk must not send the record to the clerk of the court of appeals by mail but must, if feasible, deliver it by hand or transmit it by facsimile or other electronic means. If neither of these methods is feasible, then the record may be sent by overnight delivery.

(b) *Certificate of court's failure to rule within time prescribed by statute.* If the court of appeals fails to rule on an application within the time required by Section 33.004(b), Family Code, upon the minor's request, the clerk of the court of appeals must instanter issue a certificate to that effect, stating that the trial court's order is reversed and judgment is rendered that the application is deemed by statute to be granted. The clerk may use Form 3D but is not required to do so.

4[~~3~~].3 Proceedings in the Court of Appeals.

(a) *Briefing and argument.* A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument.

(b) *Ruling.* The court of appeals -- sitting in a three-judge panel -- must issue a judgment affirming or reversing the trial court's order denying the application. The court may use Form 3C but is not required to do so.

(c) *Time for ruling.* The court of appeals must rule on an appeal [~~as soon as possible~~], subject to any postponement requested by the minor. Section 33.004(b), Family Code, states that a court must rule on an appeal by 5:00 p.m. on the fifth [~~second~~] business day after the notice of appeal is filed with the court that denied the application, or if the minor requests a postponement, after the date the minor states she is ready to proceed[~~, and that if the court does not rule within this time, the appeal is deemed to be granted~~].

(d) *Postponement by minor.* The minor may postpone the time of ruling by written request filed either with the trial court clerk at the time she files the notice of appeal or thereafter with the court of appeals clerk. The request may be submitted on Form 3B, but use of the form is not required. The request must either specify a date on which the minor will be ready to proceed to ruling, or state that the minor will later provide a date on which she will be ready to proceed to ruling. Once the minor determines when she will be ready to proceed to ruling, she must notify the court of appeals clerk of that date in writing.

(e) *Opinion.*

(1) *Opinion optional.* A court of appeals may issue and/or publish an opinion explaining its ruling, but it is not required to do so.

(2) *Time.* Any opinion must issue not later than:

(A) ten business days after the day on which a notice of appeal is filed in the Supreme Court, if an appeal is taken to the Supreme Court; or

(B) sixty days after the day on which the court of appeals issued its judgment, if no appeal is taken to the Supreme Court.

(3) *Confidentiality of minor.* Any opinion published must be written in a way to preserve the confidentiality of the identity of the pregnant minor [~~*Confidential transmission to Supreme Court.* When the court of appeals issues an opinion, the clerk must confidentially transmit it instanter to the Supreme Court and to the trial court~~].

Notes and Comments

1. Chapter 33, Family Code, provides for no appeal from an order granting an application.

2. A request to postpone the ruling of the court of appeals may be used in conjunction with a request for oral argument or to submit briefing.

3. Neither Chapter 33, Family Code, nor these rules prescribes the appellate standard of review.

4. Although publication of appellate court opinions is prohibited by statute, the Supreme Court may amend these rules to address issues arising from their application and interpretation.

RULE 5[4]. APPEAL TO THE SUPREME COURT

5[4].1 How to Appeal to the Supreme Court. To appeal from the court of appeals to the Supreme Court, the minor must simultaneously file a notice of appeal with the Clerk of the Supreme Court, file a copy of the notice of appeal with the clerk of the court of appeals, and advise the clerk of each court by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 4A but is not required to do so. The notice of appeal must:

(a) be styled "In re Jane Doe";

(b) state the number of the cause in the court of appeals;

(c) state an intention to appeal; and

(d) be signed by the minor's attorney or attorney ad litem appointed by the trial court.

5[4].2 Clerk's Duties.

(a) *Assistance in filing.* The Clerk of the Supreme Court must give prompt assistance -- in a manner designed to protect the minor's confidentiality -- to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the Supreme Court and that the minor's name and identifying information are not disclosed.

(b) *Forwarding record to Supreme Court.* Upon receipt of a notice of appeal to the Supreme Court, the clerks of the court of appeals and Supreme Court must instanter have forwarded to the Supreme Court the record that was before the court of appeals.

5[4].3 Proceedings in the Supreme Court. A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument. The Court must rule as soon as possible.

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September 21, 2015

Mr. Frank Gilstrap
via email: fgilstrap@hillgilstrap.com

Dear Mr. Gilstrap,

I reviewed the new statutes again in Chapter 33 of the T.F.C. after we spoke. Although there are many questions about the new provisions and burden of proof, there appear to be two main areas of concern for practitioners. It also appears that most likely there is only one issue that the Supreme Court might address so I will discuss it first.

§33.003 (E) (3) states that the minor's application under this chapter must

> Be accompanied by the sworn statement of the minor's attorney under Subsection ( r), if the minor has retained an attorney to assist the minor with filing the application under this section.

§33.003, Subsection ( r) states:

> An attorney retained by the minor to assist her in filing an application under this section shall fully inform himself or herself of the minor's prior application history, including the representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated. If any attorney assists the minor in the application process in any way, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement.

This sworn statement appears to require the attorney to somehow verify the information given by the applicant with regard to prior application history, address, proper venue and any prior applications filed and initiated or face a civil penalty. The biggest practical problem is how is the attorney supposed to do this?

With respect to application history and any currently-filed and initiated applications, there is no avenue for the attorney to verify that information. §33.0065 states that the clerk of the court shall retain the records for each case before the court under this chapter in accordance with rules for civil cases and grant access to the records to the minor who is the subject of the proceeding. It does not grant access to an attorney attempting to verify representations of the applicant under §33.003, Subsection ( r).

In Tarrant County, for example, the files are not accessible on the local system nor are they e-filed. They are not kept in the same location as other civil or family law pending files. They are physically sealed with a laminating machine when the case is closed. How is an attorney going to verify that there is no other filed and initiated application, or a previously filed application that was denied, without being granted access to these files?

Another question is where should the attorney look for prior or pending applications? Venue is proper in multiple possible counties including the county in which the facility at which the minor intends to obtain the abortion is located. How many counties might be possibilities? What is a reasonable number of counties to check for the attorney? Given the desire to protect the identity of both the applicant and the Judge hearing the application, it can easily be presumed that there are local procedures in all counties which would prevent the attorney from accessing prior or pending applications. And yet, the attorney is required to sign a sworn statement about the truth of the assertions made by the applicant.

With respect to attesting to the applicant's address and the proper venue for the action, what exactly is expected of the attorney? Even if the attorney were to follow the applicant to the address she has given, it would merely allow the attorney to verify that the address exists, but not that the applicant actually resides there. What about the applicant who uses the parent's address for school enrollment, which would ostensibly be her residence, but actually resides with an extended family member? Also, this is a mobile society and if the applicant did reside at the address given which would be proper for venue, and then moves before the hearing, has the attorney left him or herself open to the civil penalty of §33.012? Individual attempts by the attorney representing the applicant to verify an address could quite possibly lead to the discovery of the applicant's pregnancy by the very family members whom the applicant seeks to avoid and then the attorney may be liable to his or her client for breach of confidential representation. It is a no-win situation for the attorney.

Overall, the requirement that the attorney "must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement" is a high bar for the attorney; especially given that there is almost no way for the attorney to independently verify either one. Typically in family law proceedings, it is the client, and not the attorney, who is attesting to the truth of the information or allegations. Tarrant County local rules require an attorney to verify the attorney's attempts to resolve the issue prior to requesting a hearing in a Certificate of Conference. Under the TFC, the attorney must verify a request for a continuance. But neither one requires the attorney to attest to the truth of his or her client's statements. But in no other section of the family code is the attorney required to verify the truth of his or her *client's claims*. The truth of those claims is determined by the trier of fact.

The civil penalty as it relates to the attorney's sworn statement, is problematic as well. Under §33.012, a significant civil penalty may be assessed against a person who is found to have intentionally, knowingly, recklessly, or with gross negligence, violated Chapter 33. The Attorney General is the agency with the ability to bring an action for the civil penalty and is charged with enforcing the chapter. The minor applicant and the Judges or Justices hearing the application are immune from the civil penalty. That only leaves the attorney and the physician open to suit. While the intent of this section may have been to subject the physician to additional fines, it also leaves the attorney vulnerable. If an attorney does not attempt independent verification, is he or she recklessly or intentionally violating the chapter provisions? Additionally, the wording of this section leads to concerns that malpractice insurance would not cover this type of suit. That type of personal, financial vulnerability based on representations made by a teen-aged applicant that the attorney has no way of verifying, is frightening for the practitioner. Possible personal exposure of this magnitude is already causing concern for practitioners who have been willing to assist these applicants in the past. The effect of practitioners withdrawing their assistance to these applicants will most certainly have a negative effect on those who are in need of legal representation for access to our courts.

Is it possible for the Supreme Court to clarify the expectations regarding the sworn statement? Perhaps some language that clarifies that the attorney attesting to the truth of the minor's information is in some way limited? Maybe language that says the attorney attestation of the minor's claims is "limited to the best of his or her ability, without undertaking any actions or independent investigation that may violate the confidentiality of the attorney-client relationship." Without any guidance as to what the duties are of the attorney for determining the truth of the minor's claims, it is an open door to finding out after the fact, and during the AG's civil case, what was expected of you.

The second are of concern is the removal of the deemed granted provision in the event the court fails to rule within the prescribed time frame. In this legislative session, Section (h) states, "the court shall rule on an application submitted under this section and shall issue written findings of fact and conclusions of law not later than 5 p.m. on the fifth business day after the date the application is filed with the court." The concerns are two fold. First, subsection (g) states, "the court shall fix a time for a hearing on an application filed under Subsection (a) and shall keep a record of all testimony and other oral proceedings in the action." It does not prescribe a time frame in which to set the hearing. Ostensibly it should occur within five business days after the application is filed as that is when the court is to rule, but nothing specifically says so.

Second, and more problematic, is what is the practitioner to do if the court does not rule by 5 p.m. on the fifth business day after the day the application is filed? Appeal is not available as there has been no ruling. A writ of mandamus is a possibility but with what outcome? If the writ of mandamus is filed, the action would be based on the trial court's failure to issue a ruling within the prescribed time period. The nature of the relief sought would be a request for the Court of Appeals to order the trial court to issue a ruling. So, after the practitioner complies with all the requirement of the Texas Rules of Appellate Procedure for the writ of mandamus, which are not quick or easy for anyone not well-versed in appellate procedure, the Court of Appeals

could issue a ruling ordering the trial court to issue a ruling on the application. So what? There is no way the ruling could be within the prescribed time of Subsection (h) as that is the basis for the writ of mandamus. The time frame on the process of filing the writ of mandamus is anyone's guess but most likely somewhere between 3 and 5 working days. The time it will take for the appellate court to rule on the Mandamus is again up for debate. There is also no procedure for an expedited writ of mandamus for a Chapter 33 case like there is for an appeal in a Chapter 33 matter. So, if you add the time table up, it could very easily look like this: file petition and have hearing but receive no ruling (5days), file writ of mandamus(3-5 days), get appellate court ruling on Mandamus (3-5 days), then go back to waiting for a ruling from the trial court. Somewhere between 11 and 15 days after the petition was filed, the applicant is right back to square one waiting for the trial court to issue a ruling. This could be an endless loop with the Court of Appeals telling the trial court to issue a ruling and the trial court failing to do so.

In an appeal from the trial court's decision on a Chapter 33 matter, the Court of Appeals issues an actual ruling on the merits of the application and a ruling on the application has then been received. In a writ of mandamus situation, the consensus is that it would be inappropriate for the Court of Appeals to rule on the application itself at that point and that the response would be limited to whether or not the trial court abused its discretion by not issuing a timely ruling on the application for a judicial bypass and direction from the Court of Appeals for the trial court to issue a ruling. That is a lot of activity to still end up with no ruling from the trial court. Meanwhile, the days are adding up and the applicant may or may not have enough time to wait out a recalcitrant Judge. Also, the appeal in a Chapter 33 matter has specific protections for confidential and privileged pleadings while a mandamus action in a Chapter 33 case does not. How can the practitioner in good conscience file a writ of mandamus knowing both the applicant's name and the Judge's name must be clearly identified and the pleading is not confidential?

Is there a possibility that the Supreme Court Rules could expedite the process for a writ of mandamus in a Chapter 33 case? No requirement of record, for example. Since the granting of the writ requesting the trial court issue a ruling has no bearing on the merits of the underlying matter, why would a record be necessary for the Court of Appeals? It is the failure to rule that is being complained of; not the ruling itself. One would think a copy of the application showing the file-marked date and noting the date of the request for the writ would be sufficient to establish a prima facia case that the trial court failed to rule in accordance with the statute. Additionally, the Supreme Court Rules could extend to a writ for mandamus, the time tables and the confidentiality afforded to an appeal under §33.004. At least the attorney could file for the mandamus without making the client's name, or the Judge's name, public record.

If any of us considering the effects of the new statutes come up with any brainstorm thoughts between now and when the committee meets, I will send them your way. Thank you for taking the time to review these issues and working with the Rules Committee to attempt to get the Supreme Court of Texas to smooth out the rough spots.

Sincerely,

Barbara A. Armstrong

# Item 6 – Ex Parte Communications

## ~~Current Version of Canon~~PROPOSED REVISIONS TO CANON 3.B~~(8)~~.[1]

## ~~Of the Code of Judicial Conduct~~

**Revisions to Subsection (8):**

(8) A judge shall[2] accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ~~*ex parte* communications or other~~ communications made to the judge outside the presence of ~~the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee~~all parties concerning the merits of a pending or impending judicial proceeding. This prohibition applies to any communication perceived by the judge to be an attempt to influence the judge[3] in a pending or impending judicial proceeding.[4] A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

[1] The subcommittee was asked to suggest revisions to address communications to courts transmitted by e-mail and social media. This draft reflects the subcommittee's current thinking, but the subcommittee expects to continue working on the proposal based on input received from the full Advisory Committee.

[2] The subcommittee raises the question whether to modernize the language and use "must" or "should" instead of "shall."

[3] The subcommittee questions whether the standard used should be subjective (as in the proposed text), objective (e.g., "appears to be intended to influence the judge"), or more restrictively subjective (e.g., "whether the judge believes there is any possibility that the communication could influence her").

[4] This sentence is intended to broaden the Canon to include e-mails and social media.

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering ~~an *ex parte*~~a communication expressly authorized by law.[5]

**Proposed new Section (8A):**

(8A) If a judge receives a communication that is prohibited by Canon 3.B.(8), the judge or the clerk of the court shall:[6]

(a) reduce the communication to writing, if not already in written form;[7]

(b) preserve the writing among the documents in the proceeding to which the communication is related, or in a general file in the court's records;

(c) send a copy of the writing to all parties to the proceeding;

(d) notify the sender (if known) of the communication that:

1. the communication as made is prohibited by Canon 3.B.(8) of the Code of Judicial Conduct;

2. the communication will be sent to all parties to the proceeding; and

[5] Issue raised by the Subcommittee: whether to add an exception for hearings when a party, after notice and opportunity to be heard, does not appear at the hearing.

[6] See note 2.

[7] **Proposed Comment**: The reduction to writing need not be a verbatim recitation of the communication. A summary that captures the general nature of the comment is adequate. If known, the writing should identify the author, date, and time of the communication. If multiple communications are received of a similar nature, a single written summary is adequate if it summarizes the communications, estimates the number of communications and, if practicable, makes the individual communications available for inspection by the parties.

3. other communications by the sender may be considered by the court if the sender complies with the rules of procedure and Canons of Judicial Conduct; and

(e) take such other action as the court deems appropriate.[8]

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[8] Examples of actions the court might consider: (1) request the parties to respond, (2) address the communication by court order, or (3) inform the sender that the court is prohibited by the rule of law from considering the communication.

Document comparison by Workshare Compare on Wednesday, October 14, 2015 12:10:28 PM

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| Insertion | |
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| Style change | |
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| Inserted cell | |
| Deleted cell | |
| Moved cell | |
| Split/Merged cell | |
| Padding cell | |

| Statistics: | |
|---|---|
| | Count |
| Insertions | 38 |
| Deletions | 6 |
| Moved from | 1 |
| Moved to | 1 |
| Style change | 0 |
| Format changed | 0 |
| Total changes | 46 |

## PROPOSED REVISIONS TO CANON 3.B.[1]

**Revisions to Subsection (8):**

(8) A judge shall[2] accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider communications made to the judge outside the presence of all parties concerning the merits of a pending or impending judicial proceeding. This prohibition applies to any communication perceived by the judge to be an attempt to influence the judge[3] in a pending or impending judicial proceeding.[4] A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

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[1] The subcommittee was asked to suggest revisions to address communications to courts transmitted by e-mail and social media. This draft reflects the subcommittee's current thinking, but the subcommittee expects to continue working on the proposal based on input received from the full Advisory Committee.

[2] The subcommittee raises the question whether to modernize the language and use "must" or "should" instead of "shall."

[3] The subcommittee questions whether the standard used should be subjective (as in the proposed text), objective (e.g., "appears to be intended to influence the judge"), or more restrictively subjective (e.g., "whether the judge believes there is any possibility that the communication could influence her").

[4] This sentence is intended to broaden the Canon to include e-mails and social media.

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering a communication expressly authorized by law.[5]

**Proposed new Section (8A):**

(8A) If a judge receives a communication that is prohibited by Canon 3.B.(8), the judge or the clerk of the court shall:[6]

(a) reduce the communication to writing, if not already in written form;[7]

(b) preserve the writing among the documents in the proceeding to which the communication is related, or in a general file in the court's records;

(c) send a copy of the writing to all parties to the proceeding;

(d) notify the sender (if known) of the communication that:

1. the communication as made is prohibited by Canon 3.B.(8) of the Code of Judicial Conduct;
2. the communication will be sent to all parties to the proceeding; and

[5] Issue raised by the Subcommittee: whether to add an exception for hearings when a party, after notice and opportunity to be heard, does not appear at the hearing.

[6] See note 2.

[7] **Proposed Comment**: The reduction to writing need not be a verbatim recitation of the communication. A summary that captures the general nature of the comment is adequate. If known, the writing should identify the author, date, and time of the communication. If multiple communications are received of a similar nature, a single written summary is adequate if it summarizes the communications, estimates the number of communications and, if practicable, makes the individual communications available for inspection by the parties.

3. other communications by the sender may be considered by the court if the sender complies with the rules of procedure and Canons of Judicial Conduct; and

(e) take such other action as the court deems appropriate.[8]

15408239_2

[8] Examples of actions the court might consider: (1) request the parties to respond, (2) address the communication by court order, or (3) inform the sender that the court is prohibited by the rule of law from considering the communication.

**Current Version of Canon 3.B(8)**
**Of the Code of Judicial Conduct**

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

# Item 7 – Three-Judge District Court; and ADR and Constitutional County Court Judges

AN ACT

relating to special three-judge district courts convened to hear certain cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle A, Title 2, Government Code, is amended by adding Chapter 22A to read as follows:

CHAPTER 22A. SPECIAL THREE-JUDGE DISTRICT COURT

Sec. 22A.001. ELIGIBLE PROCEEDINGS. (a) The attorney general may petition the chief justice of the supreme court to convene a special three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts.

(b) A petition filed by the attorney general under this section stays all proceedings in the district court in which the original case was filed until the chief justice of the supreme court acts on the petition.

(c) Within a reasonable time after receipt of a petition from the attorney general under Subsection (a), the chief justice of the supreme court shall grant the petition and issue an order

transferring the case to a special three-judge district court convened as provided by Section 22A.002.

Sec. 22A.002. SPECIAL THREE-JUDGE DISTRICT COURT. (a) On receipt of a petition under Section 22A.001, the chief justice shall order a special three-judge district court to convene and shall appoint three persons to serve on the court as follows:

(1) the district judge of the judicial district to which the original case was assigned;

(2) one district judge of a judicial district other than a judicial district in the same county as the judicial district to which the original case was assigned; and

(3) one justice of a court of appeals other than:

(A) the court of appeals in the court of appeals district in which the original case was assigned; or

(B) a court of appeals district in which the district judge appointed under Subdivision (2) sits.

(b) A judge or justice appointed under Subsection (a)(2) or (3) must have been elected to that office and may not be serving an appointed term of office.

(c) A special three-judge district court convened under this section shall conduct all hearings in the district court to which the original case was assigned and may use the courtroom, other facilities, and administrative support of the district court.

(d) The Office of Court Administration of the Texas Judicial System shall pay the travel expenses and other incidental costs related to convening a special three-judge district court under this chapter.

Sec. 22A.003. CONSOLIDATION OF RELATED ACTIONS. (a) In this section, "related case" means any case in which this state or a state officer or agency is a defendant that arises from the same nucleus of operative facts as the claim before a special three-judge district court under this chapter, regardless of the legal claims or causes of action asserted in the related case.

(b) On the motion of any party to a case assigned to a special three-judge district court under Section 22A.002, the court by order shall consolidate with the cause of action before the court any related case pending in any district court or other court in this state.

(c) A case consolidated under Subsection (b) must be transferred to the special three-judge district court if the court finds that transfer is necessary. The transfer may occur without the consent of the parties to the related case or of the court in which the related case is pending.

Sec. 22A.004. APPLICATION OF TEXAS RULES OF CIVIL PROCEDURE. (a) Except as provided by this section, the Texas Rules of Civil Procedure and all other statutes and rules applicable to civil litigation in a district court in this state apply to proceedings before a special three-judge district court.

(b) The supreme court may adopt rules for the operation of a special three-judge district court convened under this chapter and for the procedures of the court.

Sec. 22A.005. ACTIONS BY JUDGE OR JUSTICE. (a) With the unanimous consent of the three judges sitting on a special three-judge district court, a judge or justice of the court may:

(1) independently conduct pretrial proceedings; and

(2) enter interlocutory orders before trial.

(b) A judge or justice of a special three-judge district court may not independently enter a temporary restraining order, temporary injunction, or any order that finally disposes of a claim before the court.

(c) Any independent action taken by one judge or justice of a special three-judge district court related to a claim before the court may be reviewed by the entire court at any time before final judgment.

Sec. 22A.006. APPEAL. (a) An appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the supreme court.

(b) The supreme court may adopt rules for appeals from a special three-judge district court.

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 455 passed the Senate on May 4, 2015, by the following vote: Yeas 20, Nays 11.

Secretary of the Senate

I hereby certify that S.B. No. 455 passed the House on May 19, 2015, by the following vote: Yeas 95, Nays 50, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

# BILL ANALYSIS

Senate Research Center
84R23230 YDB-F

C.S.S.B. 455
By: Creighton
State Affairs
4/24/2015
Committee Report (Substituted)

## AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Under current Texas law, legal cases against the state that are of significant statewide importance are tried like other cases, in a county district court of original jurisdiction. The problem with this system for these select kinds of cases is that review on appeal is bound by the findings and scope of the trial court. One county district court is able to set the tone for an entire case with statewide impact.

S.B. 455 addresses this issue by creating a three-judge district court for certain cases if requested by the attorney general. One judge on the panel would automatically be the district court judge from the court where the case was originally filed, ensuring that the original court's jurisdiction is protected. The other two judges would be appointed by the chief justice of the Texas Supreme Court and would consist of another district court judge from elsewhere in the state and an appellate court judge from an appellate district not represented by either of the first two judges. By creating these courts, Texas would give much greater representation to opinions and concerns from around the entire state when deciding a case of large statewide impact.

S.B. 455 requires the chief justice to empanel the three-judge district court in cases related to school finance and redistricting. In cases involving other state finances, impacting state policies or operations, or consisting of matters involving exceptional statewide importance, the chief justice would have discretion whether to empanel a three-judge district court. All appeals from decisions of a three-judge district court would be directly to the Texas Supreme Court.

As Texas continues to grow, all constituencies from around the state should have representation and a voice in cases of such a large magnitude. To do otherwise is an effective disenfranchisement of Texans who live in every other county of the state outside the county where the case was filed. (Original Author's/Sponsor's Statement of Intent)

C.S.S.B. 455 amends current law relating to special three-judge district courts convened to hear certain cases.

## RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Supreme Court of the State of Texas in SECTION 1 (Sections 22A.004 and 22A.006, Government Code) of this bill.

## SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle A, Title 2, Government Code, by adding Chapter 22A, as follows:

CHAPTER 22A. SPECIAL THREE-JUDGE DISTRICT COURT

Sec. 22A.001. ELIGIBLE PROCEEDINGS. (a) Authorizes the attorney general of the State of Texas (attorney general) to petition the chief justice of the Supreme Court of the State of Texas (chief justice) to convene a special three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education (SBOE), or the United States Congress, or state judicial districts.

(b) Provides that a petition filed by the attorney general under this section stays all proceedings in the district court in which the original case was filed until the chief justice acts on the petition.

(c) Requires the chief justice, within a reasonable time after receipt of a petition from the attorney general under Subsection (a), to grant the petition and issue an order transferring the case to a special three-judge district court convened as provided by Section 22A.002.

Sec. 22A.002. SPECIAL THREE-JUDGE DISTRICT COURT. (a) Requires the chief justice, on receipt of a petition under Section 22A.001, to order a special three-judge district court to convene and to appoint three persons to serve on the court as follows:

(1) the district judge of the judicial district to which the original case was assigned;

(2) one district judge of a judicial district other than a judicial district in the same county as the judicial district to which the original case was assigned; and

(3) one justice of a court of appeals other than:

(A) the court of appeals in the court of appeals district in which the original case was assigned; or

(B) a court of appeals district in which the district judge appointed under Subdivision (2) sits.

(b) Requires a judge or justice appointed under Subsection (a)(2) or (3) to have been elected to that office and not be serving an appointed term of office.

(c) Requires a special three-judge district court convened under this section to conduct all hearing in the district court to which the original case was assigned and to use the courtroom, other facilities, and administrative support of the district court.

(d) Requires the Office of Court Administration of the Texas Judicial System to pay the travel expenses and other incidental costs related to convening a special three-judge district court under this chapter.

Sec. 22A.003. CONSOLIDATION OF RELATED ACTIONS. (a) Defines "related case" for

purposes of this section.

(b) Requires the court, on the motion of any party to a case assigned to a special three-judge district court under Section 22A.002, to consolidate with the cause of action before the court any related case pending in any district court or other court in this state.

(c) Requires that a case consolidated under Subsection (b) be transferred to the special three-judge district court if the court finds that transfer is necessary. Authorizes the transfer to occur without the consent of the parties to the related case or of the court in which the related case is pending.

Sec. 22A.004. APPLICATIONS OF TEXAS RULES OF CIVIL PROCEDURES. (a) Provides that, except as provided by this section, the Texas Rules of Civil Procedure and all other statutes and rules applicable to civil litigation in a district court in this state apply to proceedings before a special three-judge district court.

(b) Authorizes the supreme court of the State of Texas (supreme court) to adopt rules for the operation of special three-judge district court convened under this chapter and for the procedures of the court.

Sec. 22A.005. ACTION BY JUDGE OR JUSTICE. (a) Authorizes a judge or justice of the court, with the unanimous consent of the three judges sitting on a special three-judge district court, to:

(1) independently conduct pretrial proceedings; and

(2) enter interlocutory orders before trial.

(b) Prohibits a judge or justice of a special three-judge district court from independently entering a temporary restraining order, temporary injunction, or any order that finally disposes of a claim before the court.

(c) Authorizes any independent action taken by one judge or justice of a special three-judge district court related to a claim before the court to be reviewed by the entire court at any time before final judgment.

Sec. 22A.006. APPEAL. (a) Provides that an appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the supreme court.

(b) Authorizes the supreme court to adopt rules for appeals from a special three-judge district court.

SECTION 2. Effective date: upon passage or September 1, 2015.

**Proposed Texas Rule of Judicial Administration, Rule 14**

[Rule 14 is currently blank, as it was repealed by Tex. Sup. Ct. Misc. Docket No. 14-9168)

**14.1 Applicability**

This rule applies to cases filed in a district court in this state in which the State of Texas or a Texas state officer or agency is a defendant in a claim that:

(a) challenges the finances or operations of this state's public school system; or

(b) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts.

**14.2 Procedure for Petition to Convene a Special Three-Judge District Court in Applicable Cases**

(a) The attorney general may petition the chief justice of the Supreme Court to convene a special three-judge district court in any case to which Rule 14.1 applies.

(b) A petition under this rule shall be filed with the Supreme Court clerk within 60 days after the State of Texas or a Texas state officer or agency is first served with a petition or intervenes as a defendant in a case alleging a claim to which Rule 14.1 applies. A copy of the Petition to Convene shall be filed with the district court in which the original case is pending and service of the Petition to Convene shall be made on all parties in the original case

(c) Upon the filing of the petition under this rule, all proceedings in the original district court are stayed until the chief justice acts on the petition.

**14.3 Form of Petition to Convene**

(a) Notwithstanding other rules governing original proceedings in the Supreme Court, the attorney general may file with the Supreme Court clerk a "Petition to Convene a Special Three-Judge District Court."

(b) The Petition to Convene shall contain:

(1) the cause number, style, district court, name of the judge, and name of the clerk of the court in which the original case is pending;

(2) the names of the parties to the original case, together with the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel;

(3) the date the State of Texas or a Texas state officer or agency was first served with a petition alleging a claim to which this rule applies;

(4) a summary of the dispute and the claims made against the State of Texas or a Texas state officer or agency in the original case; and

(5) any argument that a claim made in the original case qualifies under Rule 14.1.

(c) The attorney general shall attach as exhibits to the Petition to Convene all pleadings on file in the original case and the docket sheet. The attorney general may attach to the Petition to Convene such other exhibits as are relevant under the standards of this rule.

(d) The Petition to Convene shall include a certificate of service on the district court in which the original case is pending and all parties to the original case.

**14.4 Response to Petition to Convene**

Any party to the original case wishing to respond to a Petition to Convene filed by the attorney general under this rule may file a Response with the Supreme Court clerk within 10 days of the filing of the Petition to Convene.

**14.5 Creation of Special Three-Judge District Court**

(a) Within a reasonable time after receipt of a Petition to Convene and any responses filed under this Rule, the chief justice shall consider the filings. If the Petition to Convene establishes the applicability of this rule, the chief justice shall grant the petition.

(b) The order granting a Petition to Convene under this rule shall include:

(1) an order transferring the original case to a special three-judge district court; and

(2) the appointment of three persons to serve on the court:

(A) the district judge of the judicial district to which the original case was assigned;

(B) one district judge who serves a judicial district in a different county from the judicial district to which the original case was assigned; and

(C) one justice of a court of appeals who serves a court of appeals district:

(1) different from the one in which the original case was assigned; and

(2) different from the one in which the district judge appointed under Rule 14.5(b)(2)(B) sits.

(c) A judge or justice appointed under Rule 14.5(b)(2)(B) or (C) must have been elected to that office and may not be serving an appointed term of office.

**Rule 14.6 Rules Governing Proceedings in a Special Three-Judge District Court**

(a) Except as provided by this rule, the Texas Rules of Civil Procedure and all other statutes and rules applicable to civil litigation in a district court in this state apply to proceedings before a special three-judge district court.

(b) A special three-judge district court convened under this rule shall conduct all hearings and trial in the original district court and may use the courtroom, other facilities, and administrative support of the district court.

(c) The Office of Court Administration of the Texas Judicial System shall pay the travel expenses and other incidental costs related to convening a special three-judge district court under this rule.

**14.7 Actions by Judge or Justice Serving on a Special Three-Judge District Court**

(a) With the unanimous consent of the three judges sitting on a special three-judge district court, a judge or justice of the court may:

(1) independently conduct pretrial proceedings; and

(2) sign interlocutory orders before trial.

(b) A judge or justice of a special three-judge district court may not independently order a temporary restraining order, temporary injunction, or an order that finally disposes of a claim before the court.

(c) Any independent action taken by one judge or justice of a special three-judge district court related to a claim before the court may be reconsidered by the entire court at any time before final judgment.

(d) The judges and justice of a special three-judge district court shall decide among them who shall serve as a presiding judge over trial or over contested hearings not conducted by a single judge or justice under Rule 14.7(a). A presiding judge shall be named by a special three-judge district court before the commencement of a trial or hearing in the matter and shall not be changed during the trial or hearing.

**14.8 Transfer and Consolidation of Related Cases**

(a) "Related case" means any case in which the State of Texas or a Texas state officer or agency is a defendant that is pending in any district court or other court in this state and arises from the same nucleus of operative facts as the claim before a special three-judge district court convened under this Rule, regardless of the legal claims or causes of action asserted in the related case.

(b) Any party to a case assigned to a special three-judge district court under Rule 14.5 may file a "Motion to Transfer Related Case" with the special three-judge district court within 45 days after (1) the State of Texas or a Texas state officer or agency is first served with a petition in a related case, or (2) the order granting a petition to convene a special three-judge district court.

(c) Upon the filing of a Motion to Transfer Related Case under this rule, the special three-judge district court or the district court in which the allegedly related case is pending may stay all or part of any court proceedings pending a ruling on the motion by the special three-judge district court.

(d) A Motion to Transfer Related Case must be in writing and shall contain:

(1) the cause number, style, court, name of the judge, and name of the clerk of the court in which the allegedly related case is pending;

(2) the names of the parties to the allegedly related case, together with the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel;

(3) a statement of the operative facts involved in the case before the special three-judge district court and the allegedly related case;

(4) an explanation of how the nucleus of operative facts is the same in those cases;

(5) a clear and concise explanation of the reasons that transfer is appropriate under this rule;

(6) a clear and concise statement of the reasons that consolidation is appropriate under this rule; and

(6) a statement whether all parties in the case before the special three-judge district court and the allegedly related case agree to the motion.

(e) The movant shall attach as an exhibit to the motion the operative petition on file in the allegedly related case. The movant may attach to the motion such other exhibits as are relevant under the standards of this rule.

(f) Any party to the case assigned to the special three-judge district court or the allegedly related case may file a Response in Opposition to the Motion to Transfer Related Case with the special three-judge district court. Any response must:

(1) be filed within 20 days after the party filing a Response is served with a Motion to Transfer; and

(2) be filed in writing and address directly why the allegedly related case does not meet the definition of "related case" under this rule.

(g) After consideration of a Motion to Transfer Related Case, Response, if any, and oral hearing, if any, the special three-judge district court by written order shall grant the motion if it concludes that the case is related. If the court grants the motion, it shall consolidate the related case with the case before the court.

(h) A case consolidated under Rule 14.8(g) must be transferred to the special three-judge district court if the court finds that transfer is necessary. The transfer may occur without the consent of the parties to the related case or of the court in which the related case is pending.

**Rule 14.9 Appeals**

An appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the Texas Supreme Court under Texas Rule of Appellate Procedure 57.

**Corresponding amendment to Texas Rule of Appellate Procedure**

**Rule 57. Direct Appeals to the Supreme Court**

**57.2. Jurisdiction**

The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court, a special three-judge district court, or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

**[Note: The revisions suggested below are not required by the three-judge district court bill but are based on common problems with the operation of Rule 57 identified by the Supreme Court Clerk, Blake Hawthorne. One problem is that parties are uncertain whether the rules regarding notices of appeal and docketing statements apply in addition to the requirement that a statement of jurisdiction be filed. Another problem is that waiting to determine the court's jurisdiction until the record is received often slows down the progress of the case, especially given that the record often is not necessary to the jurisdictional determination.]**

**57.1. Application**

This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court, including the rules regarding notices of appeal, docketing statements, and briefing. The appellate record need not be prepared unless the Supreme Court requests the record.

**57.3. Statement of Jurisdiction**

Appellant must file with the ~~record a~~ docketing statement an additional statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed. The Supreme Court may determine whether it has jurisdiction without first requesting the record. If the Supreme Court determines that it has jurisdiction, it will request the record and specify the time in which it will be filed.

**57.4. Preliminary Ruling on Jurisdiction**

If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

**Rule 13. Multidistrict Litigation**
Vernon's Texas Statutes and Codes Annotated | Government Code *(Approx. 6 pages)*

Vernon's Texas Statutes and **Codes** Annotated
Government (Refs & Annos)
Title _. Judicial Branch (Refs & Annos)
Subtitle F. Court Administration
Title _, Subtitle F--Appendix
Rules of Judicial Administration

V.T.C.A., **Govt. Code** T. **2**, **Subt.** F **App.**, **Jud.Admin.**, **Rule 13**

# **Rule 13.** Multidistrict Litigation

Currentness

**13.1 Authority and Applicability.**

(a) *Authority*. This rule is promulgated under sections 74.161-.164 of the Texas Government **Code** and chapter 90 of the Texas Civil Practices[1] and Remedies **Code**.

(b) *Applicability*. This rule applies to:

(1) civil actions that involve one or more common questions of fact and that were filed in a constitutional county court, county court at law, probate court, or district court on or after September 1, 2003;

(2) civil actions filed before September 1, 2003, that involve claims for asbestos- or silica-related injuries, to the extent permitted by chapter 90 of the Texas Civil Practice and Remedies **Code**.

(c) *Other Cases*. Cases to which this rule does not apply are governed by Rule 11 of these rules.

**13.2 Definitions.** As used in this rule:

(a) *MDL Panel* means the judicial panel on multidistrict litigation designated pursuant to section 74.161 of the Texas Government **Code**, including any temporary members designated by the Chief Justice of the Supreme Court of Texas in his or her discretion when regular members are unable to sit for any reason.

(b) *Chair* means the chair of the MDL Panel, who is designated by the Chief Justice of the Supreme Court of Texas.

(c) *MDL Panel Clerk* means the Clerk of the Supreme Court of Texas.

(d) *Trial court* means the court in which a case is filed.

(e) *Pretrial court* means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under this rule.

(f) *Related* means that cases involve one or more common questions of fact.

(g) *Tag-along case* means a case related to cases in an MDL transfer order but not itself the subject of an initial MDL motion or order.

**13.3 Procedure for Requesting Transfer.**

(a) *Motion for Transfer; Who May File; Contents*. A party in a case may move for transfer of the case and related cases to a pretrial court. The motion must be in writing and must:

(1) state the common question or questions of fact involved in the cases;

(2) contain a clear and concise explanation of the reasons that transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases;

(3) state whether all parties in those cases for which transfer is sought agree to the

**NOTES OF DECISIONS** (42)

motion; and

(4) contain an appendix that lists:

(A) the cause number, style, and trial court of the related cases for which transfer is sought; and

(B) all parties in those cases and the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel.

(b) *Request for Transfer by Judges*. A trial court or a presiding judge of an administrative judicial region may request a transfer of related cases to a pretrial court. The request must be in writing and must list the cases to be transferred.

(c) *Transfer on the MDL Panel's Own Initiative*. The MDL Panel may, on its own initiative, issue an order to show cause why related cases should not be transferred to a pretrial court.

(d) *Response; Reply; Who May File; When to File*. Any party in a related case may file:

(1) a response to a motion or request for transfer within twenty days after service of such motion or request;

(2) a response to an order to show cause issued under subparagraph (c) within the time provided in the order; and

(3) a reply to a response within ten days after service of such response.

(e) *Form of Motion, Response, Reply, and Other Documents*. A motion for transfer, response, reply, or other document addressed to the MDL Panel must conform to the requirements of Rule 9.4 of the Texas Rules of Appellate Procedure. Without leave of the MDL Panel, the following must not exceed 20 pages: the portions of a motion to transfer required by subparagraphs (a)(1)-(**2**); a response; and a reply. The MDL Panel may request additional briefing from any party.

(f) *Filing*. A motion, request, response, reply, or other document addressed to the MDL Panel must be filed with the MDL Panel Clerk. The MDL Panel Clerk may require that all documents also be transmitted to the clerk electronically. In addition, a party must send a copy of the motion, response, reply, or other document to each member of the MDL Panel.

(g) *Filing Fees*. The MDL Panel Clerk may set reasonable fees approved by the Supreme Court of Texas for filing and other services provided by the clerk.

(h) *Service*. A party must serve a motion, response, reply, or other document on all parties in related cases in which transfer is sought. The MDL Panel Clerk may designate a party or parties to serve a request for transfer on all other parties. Service is governed by Rule 9.5 of the Texas Rules of Appellate Procedure.

(i) *Notice to Trial Court*. A party must file in the trial court a notice -- in the form prescribed by the MDL Panel -- that a motion for transfer has been filed. The MDL Panel Clerk must cause such notice to be filed when a request for transfer by a judge has been filed.

(j) *Evidence*. The MDL Panel will accept as true facts stated in a motion, response, or reply unless another party contradicts them. A party may file evidence with the MDL Panel Clerk only with leave of the MDL Panel. The MDL Panel may order parties to submit evidence by affidavit or deposition and to file documents, discovery, or stipulations from related cases.

(k) *Hearing*. The MDL Panel may decide any matter on written submission or after an oral hearing before one or more of its members at a time and place of its choosing. Notice of the date of submission or the time and place of oral hearing must be given to all parties in all related cases.

(l) *Decision*. The MDL Panel may order transfer if three members concur in a written order finding that related cases involve one or more common questions of fact, and that transfer to a specified district court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the related cases.

(m) *Orders Signed by Chair or Clerk; Members Identified*. Every order of the MDL Panel

must be signed by either the chair or by the MDL Panel Clerk, and must identify the members of the MDL Panel who concurred in the ruling.

(n) *Notice of Actions by MDL Panel*. The MDL Panel Clerk must give notice to all parties in all related cases of all actions of the MDL Panel, including orders to show cause, settings of submissions and oral arguments, and decisions. The MDL Panel Clerk may direct a party or parties to give such notice. The clerk may determine the manner in which notice is to be given, including that notice should be given only by email or fax.

(o) *Retransfer*. On its own initiative, on a party's motion, or at the request of the pretrial court, the MDL Panel may order cases transferred from one pretrial court to another pretrial court when the pretrial judge has died, resigned, been replaced at an election, requested retransfer, recused, or been disqualified, or in other circumstances when retransfer will promote the just and efficient conduct of the cases.

**13.4 Effect on the Trial Court of the Filing of a Motion for Transfer.**

(a) *No Automatic Stay*. The filing of a motion under this rule does not limit the jurisdiction of the trial court or suspend proceedings or orders in that court.

(b) *Stay of Proceedings*. The trial court or the MDL Panel may stay all or part of any trial court proceedings until a ruling by the MDL Panel.

**13.5 Transfer to a Pretrial Court.**

(a) *Transfer Effective upon Notice*. A case is deemed transferred from the trial court to the pretrial court when a notice of transfer is filed with the trial court and the pretrial court. The notice must:

(1) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address, and phone number;

(2) list those parties who have not yet appeared in the case; and

(3) attach a copy of the MDL transfer order.

(b) *No Further Action in Trial Court*. After notice of transfer is filed in the trial court, the trial court must take no further action in the case except for good cause stated in the order in which such action is taken and after conferring with the pretrial court. But service of any process already issued by the trial court may be completed and the return filed in the pretrial court.

(c) *Transfer of Files; Master File and New Files in the Pretrial Court*. If the trial court and pretrial court are in the same county, the trial court must transfer the case file to the pretrial court in accordance with local rules governing the courts of that county. If the trial court and pretrial court are not in the same county, the trial court clerk must transmit the case file to the pretrial court clerk. The pretrial court clerk, after consultation with the judge of the pretrial court, must establish a master file and open new files for each case transferred using the information provided in the notice of transfer. The pretrial court may direct the manner in which pretrial documents are filed, including electronic filing.

(d) *Filing Fees and Costs*. Unless the MDL Panel assesses costs otherwise, the party moving for transfer must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs.

(e) *Transfer of Tag-along Cases*. A tag-along case is deemed transferred to the pretrial court when a notice of transfer -- in the form described in **Rule 13**.5(a) -- is filed in both the trial court and the pretrial court. Within 30 days after service of the notice, a party to the case or to any of the related cases already transferred to the pretrial court may move the pretrial court to remand the case to the trial court on the ground that it is not a tag-along case. If the motion to remand is granted, the case must be returned to the trial court, and costs including attorney fees may be assessed by the pretrial court in its remand order. The order of the pretrial court may be appealed to the MDL Panel by a motion for rehearing filed with the MDL Panel Clerk.

**13.6 Proceedings in Pretrial Court.**

(a) *Judges Who May Preside*. The MDL Panel may assign as judge of the pretrial court any active district judge, or any former or retired district or appellate judge who is

approved by the Chief Justice of the Supreme Court of Texas. An assignment under this rule is not subject to objection under chapter 74 of the Government **Code**. The judge assigned as judge of the pretrial court has exclusive jurisdiction over each related case transferred pursuant to this rule unless a case is retransferred by the MDL Panel or is finally resolved or remanded to the trial court for trial.

(b) *Authority of Pretrial Court*. The pretrial court has the authority to decide, in place of the trial court, all pretrial matters in all related cases transferred to the court Those matters include, for example, jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement). The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer over which the trial court's plenary power would not have expired had the case not been transferred.

(c) *Case Management*. The pretrial court should apply sound judicial management methods early, continuously, and actively, based on its knowledge of each individual case and the entire litigation, in order to set fair and firm time limits tailored to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole. After a case is transferred, the pretrial court should, at the earliest practical date, conduct a hearing and enter a case management order. The pretrial court should consider at the hearing, and its order should address, all matters pertinent to the conduct of the litigation, including:

(1) settling the pleadings;

(2) determining whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable;

(3) scheduling preliminary motions;

(4) scheduling discovery proceedings and setting appropriate limitations on discovery, including the establishment and timing of discovery procedures;

(5) issuing protective orders;

(6) scheduling alternative dispute resolution conferences;

(7) appointing organizing or liaison counsel;

(8) scheduling dispositive motions;

(9) providing for an exchange of documents, including adopting a uniform numbering system for documents, establishing a document depository, and determining whether electronic service of discovery materials and pleadings is warranted;

(10) determining if the use of technology, videoconferencing, or teleconferencing is appropriate;

(11) considering such other matters the court or the parties deem appropriate for the just and efficient resolution of the cases; and

(12) scheduling further conferences as necessary.

(d) *Trial Settings*. The pretrial court, in conjunction with the trial court, may set a transferred case for trial at such a time and on such a date as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings. The pretrial court must confer, or order the parties to confer, with the trial court regarding potential trial settings or other matters regarding remand. The trial court must cooperate reasonably with the pretrial court, and the pretrial court must defer appropriately to the trial court's docket. The trial court must not continue or postpone a trial setting without the concurrence of the pretrial court.

**13.7 Remand to Trial Court.**

(a) *No Remand If Final Disposition by Pretrial Court*. A case in which the pretrial court has rendered a final and appealable judgment will not be remanded to the trial court.

(b) *Remand*. The pretrial court may order remand of one or more cases, or separable triable portions of cases, when pretrial proceedings have been completed to such a

degree that the purposes of the transfer have been fulfilled or no longer apply.

(c) *Transfer of Files*. When a case is remanded to the trial court, the clerk of the pretrial court will send the case file to the trial court without retaining a copy unless otherwise ordered. The parties may file in the remanded case copies of any pleadings or orders from the pretrial court's master file. The clerk of the trial court will reopen the trial court file under the cause number of the trial court, without a new filing fee.

**13.8 Pretrial court orders binding in the trial court after remand.**

(a) *Generally*. The trial court should recognize that to alter a pretrial court order without a compelling justification would frustrate the purpose of consolidated and coordinated pretrial proceedings. The pretrial court should recognize that its rulings should not unwisely restrict a trial court from responding to circumstances that arise following remand.

(b) *Concurrence of the Pretrial Court Required to Change Its Orders*. Without the written concurrence of the pretrial court, the trial court cannot, over objection, vacate, set aside, or modify pretrial court orders, including orders related to summary judgment, jurisdiction, venue, joinder, special exceptions, discovery, sanctions related to pretrial proceedings, privileges, the admissibility of expert testimony, and scheduling.

(c) *Exceptions*. The trial court need not obtain the written concurrence of the pretrial court to vacate, set aside, or modify pretrial court orders regarding the admissibility of evidence at trial (other than expert evidence) when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice. But the trial court must support its action with specific findings and conclusions in a written order or stated on the record.

(d) *Unavailability of Pretrial Court*. If the pretrial court is unavailable to rule, for whatever reason, the concurrence of the MDL Panel Chair must be obtained.

**13.9 Review.**

(a) *MDL Panel Decision*. An order of the MDL Panel, including one granting or denying a motion for transfer, may be reviewed only by the Supreme Court in an original proceeding.

(b) *Orders by the Trial Court and Pretrial Court*. An order or judgment of the trial court or pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending at the time review is sought, irrespective of whether that court issued the order or judgment to be reviewed. A case involving such review may not be transferred for purposes of docket equalization among appellate courts.

(c) *Review Expedited.* An appellate court must expedite review of an order or judgment in a case pending in a pretrial court.

**13.10 MDL Panel Rules.**

The MDL Panel will operate at the direction of its Chair in accordance with rules prescribed by the panel and approved by the Supreme Court of Texas.

**13.11 Civil Actions Filed Before September 1, 2003, Involving Claims for Asbestos- and Silica-Related Injuries.**

(a) *Applicability*. To the extent permitted by chapter 90 of the Texas Civil Practice and Remedies **Code**, **Rule 13**.11 applies to civil actions filed before September 1, 2003, that involve claims for asbestos- or silica-related injuries.

(b) *Statutory References; Definitions*. Statutory references in **Rule 13**.11 are to chapter 90 of the Texas Civil Practice and Remedies **Code**. “Claimant” has the meaning assigned in section 90.001(6). “Report” has the meaning assigned in section 90.001(24).

(c) *Notice of Transfer Under Section 90.010(b)*. A notice of transfer under section 90.010(b) must be filed in the trial court and the pretrial court and must:

(1) be titled “Notice of Transfer Under Section 90.010(b)”;

(2) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number;

(3) state the name of each claimant transferred;

(4) attach to the notice filed in the pretrial court a copy of the claimant's live petition; and

(5) if filed by a defendant, contain a certificate stating that the filing party conferred, or at least made a reasonable attempt to confer, with opposing counsel about whether the notice of transfer is appropriate as to each individual claimant transferred.

(d) *Effect on Pending Motion for Severance*. If, when a notice of transfer is filed in the trial court, a motion for severance has been filed but the trial court has not ruled, the trial court must rule on the motion within 14 days of the date the notice of transfer is filed, or the motion is deemed granted by operation of law.

(e) *When Transfer Effective*. A case is deemed transferred from the trial court to the pretrial court when a notice of transfer is filed with the trial court unless a motion for severance is pending. If a motion for severance is pending when a notice of transfer is filed with the trial court, a case is deemed transferred when the trial court rules on the motion or the motion is deemed granted by operation of law.

(f) *Further Action in Trial Court Limited*. After a notice of transfer is filed, the trial court must take no further action in the case except:

(1) to rule on a motion for severance pending when the notice of transfer was filed, or

(2) for good cause stated in the order in which such action is taken and after conferring with the pretrial court.

But service of any process already issued by the trial court may be completed and the return filed in the pretrial court.

(g) *Severed Case File*. If a claim is severed from a case that includes one or more claimants covered by section 90.010(a), the file for the severed claims in the trial court should be numerically linked to the original case file and should contain only the live petition containing the severed claim. The severed case file is deemed to include all papers in the original case file. The pretrial court may require a different procedure in the interests of justice and efficiency.

(h) *Transfer of Files*. The pretrial court may order the trial court clerk to transfer a case file to the pretrial court. A case file must not be transferred to the pretrial court except as ordered by that court.

(i) *Filing Fees and Costs*. A defendant who files a notice of transfer must pay the cost of filing the case in the pretrial court, including filing fees and other reasonable costs. If the pretrial court remands the case to the trial court, the pretrial court may order that costs be allocated between the parties in a way that encourages just and efficient compliance with this rule, and may award appropriate and reasonable attorney fees.

### Credits

Adopted by order of Aug. 29, 2003, eff. Sept. 1, 2003; **rule 13**.9 amended by order of Jan. 27, 2005, eff. March 1, 2005; **rule 13**.1 amended and **rule 13**.11 adopted by order of Nov. 29, 2005, eff. Nov. 29, 2005.

<Effective February 4, 1987>
<These rules were adopted by order of the Supreme Court February 4, 1987>

### Editors' Notes

**COMMENT--2005**

**2013 Main Volume**

Subsections [13.1](a) and (b) are amended and subsection (c) is added to provide procedures for cases covered by chapter 90 of the Texas Civil Practices and Remedies **Code**, enacted effective September 1, 2005.

**COMMENT--2005**

**2013 Main Volume**

Subsection [13.9](b) is amended and subsection (c) is added to clarify the handling of appeals by appellate courts. Subsection (b) forbids transfer for

docket equalization but not for other purposes that might arise. Subsection (c) does not require that an appeal from an order or judgment of a case pending in a pretrial court be treated as an accelerated appeal under the Texas Rules of Appellate Procedure if it would otherwise not be accelerated. Rather, subsection (c) requires expedited consideration by the appellate court regardless of whether review is sought by an appeal that is or is not accelerated, or by mandamus.

**COMMENT--2005**

**2013 Main Volume**

1. **Rule 13**.11 is added to provide procedures for cases covered by chapter 90 of the Texas Civil Practice and Remedies **Code**, enacted effective September 1, 2005.

2. The rule does not require a statement in the notice of transfer that no report has been served under chapter 90, or that a report has been served but does not comply with the provisions of that statute. The omission of such a requirement in the notice of transfer is not intended to limit the pretrial court's authority under Rule 166 of the Texas Rules of Civil Procedure to employ appropriate procedures to ascertain a party's position on the issue.

3. It is anticipated that the party filing a notice of transfer will usually be a defendant, and that the party filing a motion for severance will usually be a claimant. Ordinarily, a party filing the notice of transfer is responsible for filing fees and costs in the pretrial court, although there may be exceptions. See **Rule 13**.5(d). Also, a party who successfully moves to sever a claim into a separate proceeding in the trial court is customarily responsible for filing fees and costs, although severance is “on such terms as are just”, Tex. R. Civ. P. 41, and again, there may be exceptions. The intent of this rule is that severance and transfer procedures minimize costs and burdens on parties and the courts.

4. A pretrial court has discretion under **Rule 13**.11(g)-(i) to order the maintenance and transfer of physical case files and to allocate costs and fees so as to minimize costs and burdens on parties and the courts.

# Redistricting Litigation

## *An Overview of Legal, Statistical, and Case-Management Issues*

Bruce M. Clarke & Robert Timothy Reagan

Federal Judicial Center
2002

# III. Case-Management Issues in Redistricting Litigation

This chapter focuses on case-management issues in redistricting cases, including cases in which 28 U.S.C. § 2284 (1994) requires a three-judge district court.

Redistricting litigation is complex and time-consuming, and thus many of the case-management techniques used by judges in handling complex civil cases are applicable in the redistricting context. *See Manual for Complex Litigation, Third* (Federal Judicial Center 1995). But redistricting cases also are characterized by unique features that require appropriate management responses. The suggestions presented in this chapter are based on Center staff's conversations with a sampling of district and appellate judges who have recent experience handling redistricting cases.

## *A. Managing Voting Rights Act and Equal Protection Clause Cases*

### 1. Schedule the case with pending election dates in mind

In most cases plaintiffs will be asking the court to remedy an alleged violation before the next election in the challenged district. If the case is filed shortly before an election, plaintiffs may ask the court to enjoin the election until a new redistricting plan is developed. One of the first things the court must do upon receiving the case is find out when the next election will be held. It should then work back in time from that date, identifying earlier dates that establish deadlines for other significant aspects of the election process, such as the date by which candidates are required to file and the date when ballots must be ready. The court should then work back in time from the earliest relevant date in the election process to establish a final date by which the case must be resolved in order to permit the election to proceed. Although the election at issue may seem far away at the time the case is filed, the time frame for deciding the case may actually be much shorter, because there may be a need to develop and order implementation of a new districting plan months in advance of the election.

Given that election-related dates drive redistricting litigation, the court should meet with attorneys in the case early on, in order to become aware of all dates relevant to the pending election. It may also be helpful to meet with other stakeholders in the election process, such as election

officials and other representatives of the state, in order to obtain information about election dates and procedures.

### 2. Manage the case aggressively

Several judges expressed the opinion that redistricting cases need aggressive case management. One reason for this is that these cases are likely to involve multiple parties and many lawyers. Indeed, because it takes a good deal of resources to litigate a redistricting case, plaintiffs sometimes bring in large law firms on a pro bono basis to help them with the discovery and expert costs involved in the litigation. Moreover, the number of parties and lawyers may increase as the case proceeds. For example, a case that starts out as a vote dilution case may later become a racial gerrymandering case as well, increasing the number of parties to the point where ten or more attorneys may be present at routine status hearings.

Redistricting cases also generate a substantial amount of paperwork, including lengthy expert reports based on statistical evidence. Thus, the court should oversee the case carefully, making sure to meet with the parties regularly and review the case file frequently. As a practical, time-saving matter, the court should consider requiring executive summaries of all expert reports.

### 3. Consider using special masters or court-appointed experts

Some judges have used special masters or court-appointed experts under Federal Rule of Evidence 706 to assist them with particularly complex aspects of redistricting cases. In *Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997), the court appointed a special master to draft a remedial redistricting plan and provided the special master "with explicit instructions on the legal standards and criteria to be used in drawing up a redistricting plan and directed the special master to adhere closely to those instructions." *Id.* at 1577.

Similarly, in *Anthony v. Michigan*, 35 F. Supp. 2d 989 (E.D. Mich. 1999), the court appointed a law professor pursuant to Federal Rule of Evidence 706 to serve as an independent expert and directed the professor to evaluate the statistical evidence on racial bloc voting proffered by the parties in the reports of their experts. The court's expert was directed to "express an opinion in the form of a written report as to whether there is a genuine issue as to any material fact with respect to plaintiffs' claim[ed section 2 violation.]" *Id.* at 1000.

### 4. Make detailed findings of fact and fully explain conclusions of law

Appellate courts have required detailed findings of fact in redistricting cases. As the Fifth Circuit stated with respect to vote dilution cases in *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989):

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts.

*Id.* at 1203 (quotation marks and quotation history omitted).

Thus, courts of appeals have remanded vote dilution cases when they were dismissed by the district court without written findings of fact or conclusions of law, *Westwego Citizens*, 872 F.2d at 1204, and when the district court failed to take note of substantial evidence contrary to the evidence supporting its conclusions, *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984). *See also Overton v. City of Austin*, 871 F.2d 529, 530–31 (5th Cir. 1989) (district court must perform a "searching and practical evaluation of past and present reality.")

## *B. Managing Three-Judge District Courts Convened Pursuant to 28 U.S.C. § 2284*

Title 28, section 2284(a) of the United States Code requires that a three-judge district court be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" (1994).

### 1. Statutory requirements

The initial responsibilities of the district judge receiving a request for a three-judge court, as well as those of the chief judge of the circuit, are stated in 28 U.S.C. § 2284(b):

> In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composi-

tion . . . of the court shall be as follows:

> (1) Upon filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

As the statute makes clear, the district judge initially receiving the case should determine whether a three-judge court is required, and upon deciding that one is required, must "immediately" notify the chief judge of the circuit. This can be done by personal notice and by forwarding a copy of the complaint to the chief judge. Given that three-judge court cases are relatively rare, and that one of the purposes of the legislation creating such courts was to expedite important litigation, *see Swift v. Wickham*, 382 U.S. 111, 119–20 (1965) (direct review by the Supreme Court accelerates final determination on the merits), procedures should be in place to flag these cases in the district court clerk's office so that they are not given routine treatment.

**2. Compose the three-judge court with the partisan nature of redistricting cases in mind**

The statute assigns the chief judge of the circuit the duty of selecting the circuit judge and the third judge who will sit on the panel in a redistricting case, but does not place any restrictions on the chief judge's discretion in this regard. That discretion may be exercised with a view toward limiting the forum shopping that often occurs in redistricting cases. The parties are often political partisans, representatives of political parties or candidates for office, and their efforts to gain what they perceive as an advantage in the litigation may result in multiple filings on the federal level in addition to competing state court filings. Thus, for example, if Party A files a case in a given district on the assumption that there is a strong chance of obtaining a judge who is considered to be sympathetic to the Republican Party, Party B may well file a case in a district in which there is deemed to be a strong chance of obtaining a judge considered to be sympathetic to the Democratic Party. Rules designating the district that receives the first filing as the forum may solve the forum-

shopping problem, but if they do not, the chief circuit judge can also resolve it in the way he or she composes the three-judge court. For example, forum-shopping incentives may be reduced if the chief judge in the above example assigns the same two judges to both panels.

In composing three-judge panels, chief judges also have opportunities to insulate assigned judges from the politics of the state in which they are sitting. Thus, a district judge assigned to the case need not be from the same district as the judge who initially received it, and a circuit judge assigned to the case need not be from the same state as the district court in which the case was originally filed.

### 3. Schedule the case with the requirements of parallel state court proceedings in mind

Title 28, section 2284(a) of the United States Code requires the convening of a three-judge court when "the constitutionality of the apportionment of congressional districts or the apportionment of any statewide body" is challenged. Thus, a request for a three-judge district court often occurs when there is litigation in the state court on the same subject. In addition, the state legislature may be involved in the process of the redistricting plan at issue. Three-judge district courts should therefore manage their cases with federalism and comity concerns in mind.

In scheduling the case, for example, three-judge courts should be mindful of the teaching of *Growe v. Emison,* 507 U.S. 25, 32–34 (1993), that when parallel redistricting litigation is under way in both state and federal courts, the federal court must defer to the timely efforts of the state, including its courts, to redraw legislative districts. In *Growe,* the three-judge district court stayed all proceedings in a parallel Minnesota state court proceeding shortly before the state court issued its own redistricting plan. *Id.* at 30. The district court later issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with implementation of those plans. *Id.* at 31. Its justification for doing so was that, in its view, the state court's modification of the state legislature's plan failed to cure an alleged violation of the VRA. *Id.* On appeal, the Supreme Court held that the district court had erred in not deferring to the state court proceedings. *Id.* at 32. Citing *Scott v. Germano,* 381 U.S. 407 (1965), the Supreme Court reiterated that "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that

highly political task itself." *Growe*, 507 U.S. at 33. The *Growe* Court noted that the principles expressed in *Germano* derive from a recognition that the Constitution gives the states primary responsibility for apportionment of their federal congressional and state legislative districts. "[T]he doctrine of *Germano* prefers ***both*** state branches [legislative and judicial] to federal courts as agents of apportionment." *Growe*, 507 U.S. at 34.

In *Germano,* the Supreme Court had remanded the case with directions that the district court enter an order fixing a reasonable time within which the appropriate agencies of the state, including its highest court, might validly accomplish the redistricting and still leave ample time to permit the redistricting plan to be used in the next election. 381 U.S. at 409. The *Growe* Court quoted these directions with approval, 507 U.S. at 35, and thus the implications for scheduling three-judge court cases are clear.

When there is parallel state litigation, at the first pretrial conference, the district court should arrive at a date by which the matter must be resolved in the state in order to allow for potential litigation in federal court if the state does not successfully resolve the matter. The court should, without dismissing the case, defer to the state during this period of time. Since the possibility remains that the state will not be able to resolve the matter, scheduling should also allow time for the three-judge court to recommence active consideration of the case and resolve any federal questions, and permit state officials to implement the federal court decision and begin the election process in a timely fashion. The notion is to find and set workable final dates for conclusion of state activity in the case and ultimate resolution of the case in federal court if need be. This should be done early in the case, in order to avoid having to postpone the election. The court might also consider requiring the parties to file a copy of every pleading filed in state court during the period in which it is deferring to state court proceedings, so that it remains aware of developments in the case.

**4. Decide which judge will take the lead in managing the case**

Once the three judges are selected, they—not the chief circuit judge—should decide who will take the lead in managing the case. One judge experienced in these matters suggests that the district judge initially assigned the case should take the lead. The judge who takes the lead should handle routine pretrial matters; the three judges should con-

vene only for such matters as dispositive motions and the final pretrial conference. Nevertheless, coordination among the three judges on the panel will be important, and thus the lead judge should require the parties to file their pleadings with all judges on the court. Work schedules of circuit and district court judges are different, and coordination will require ongoing communication between members of the court.

**5. Require judges and parties to use the same computer program**

The parties in redistricting cases ordinarily make use of computer programs in drawing district lines and gathering demographic data, and those programs and data are likely to be admitted as evidence and reviewed by the court. *See, e.g., Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (discussing REDAPPL software). It is therefore important to agree on a common computer program early in the case—perhaps at the first pretrial conference. Of course, if questions about the reliability and admissibility of competing computer programs are involved in the litigation, this may not be possible.

It also is important to ensure that the court has access to the computer program when it needs it. Access to the program must be secure, so that the data are confidential and so that the parties or other interested persons cannot alter the data. To avoid the appearance of impropriety, the program used by the court and the parties should, if at all possible, not be the same as that used by any state politicians likely to be affected by the outcome of the case.

**6. Decide which judge will preside at trial**

Members of the three-judge court should also decide early on who will preside at trial in the case. If the judge initially assigned to the case takes the lead in managing it, it may make sense for that judge to handle the trial as well. Redistricting cases are bench trials replete with data and expert witnesses. One appellate judge observed that although such cases are somewhat more informal than jury trials, they are best handled by an experienced trial judge.

There is no statutory presumption that a circuit judge will preside at trial in a three-judge redistricting case. Although there is nothing wrong with having a circuit judge preside over the trial, is it not uncommon for a circuit judge to defer to an experienced trial judge on the panel.

**About the Federal Judicial Center**

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special-focus workshops. The Interjudicial Affairs Office provides information about judicial improvement to judges and others of foreign countries, and identifies international legal developments of importance to personnel of the federal courts.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

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**Memorandum**

To: SCAC
From: Jim M. Perdue,Jr.
Date: October 8, 2015
Re: Report to Supreme Court Advisory Committee re Deliberations of Subcommittee re: Decision on Judge Tom Pollard's Request Concerning Compensated ADR for Constitutional and County Court Judges

This report is an outline of the information to help the committee prepare for the analysis of issue number 4 in the "Referral of Rules Issues" letter. Issue 4 is entitled "ADR and the Constitutional County Judges." There is no conclusion section as this is a conglomeration of research to help best prepare the SCAC in arriving at their own independent opinion and conclusion concerning these issues. The subcommittee did not vote on the issue and does not bring any recommendation forth. It appears there are potential stake holders in the issue that may merit input into the consideration by the entire committee.

**Issue #4 for 10/16/15 Meeting: ADR and Constitutional County Court Judges**

The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code of Judicial Conduct to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

**Judge Pollard's Specific Request**

**Judge Pollard requests an update to canon 4F by adding: "Constitutional County Judges may be mediators and/or arbitrators for compensation SO LONG AS the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court."**

**Discussion on the Relevant Code of Judicial Conduct Sections and any other applicable and relevant legal research**

Canon 4(F) states the following: "An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties." TEX.CODE JUD. CONDUCT, CANON 4(F). Canon 4(G) states: "A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family." *Id.* at 4(G)

Canon 6(B)(3) lays out an exception for county judges concerning Canon 4(G), and states the following:

> A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:
> . . .
> (3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.
> *Id.* at 6(B)(3).

Judge Pollard is asking the advisory committee to take note of Canon 4(G) and the exception given to county judges outlined in Canon 6(B)(3), and then try to apply a similar sort of exception to Canon 4(F) to allow judges to also mediate and arbitrate for compensation.

In brief, Canon 4F prohibits a judge from acting as an arbitrator or mediator. However, it contains qualifications not in Canon 4F of the Model Code. Texas Canon 4F begins by including only active full-time judges (which seems like overkill, since Canon 6 specifies the applicability of all of the Canons), while the Model Code does not (apparently relying on its Canon 6 to address the applicability of various sections to retired judges). The Texas version specifies that the judge is not to act as an arbitrator or mediator for compensation outside the judicial system, while the

Model Code version does not (its reference to "private capacity" seems a synonym for "outside the judicial system"). Texas' Canon 4F provides that a judge may encourage settlement in the performance of official duties; the Model Code says that in commentary.

Texas Judicial Ethics Advisory Opinions make clear that the permission to encourage settlement does not include the judge actually mediating cases in order to expedite the settlement process or conducting settlement conferences for cases filed in his court or in other courts in which he conveys settlement offers and asks questions. Op. No. 120 (1988); *Compare* Op. No. 62 (1982) (serving as consultant for compensation for private nonprofit corporation probably would not contravene Canon 4F); Op. No. 212 (1988), http://www.txcourts.gov/media/678096/JudicialEthicsOpinions.pdf. These advisory opinions tend to allude to the idea focused around compensation for such mediation or arbitration as being at the forefront of the disallowance. However, Judge Pollard did specifically request that part of the amendment read "*so long as* the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court " (emphasis added).

In deciding in an early opinion that a trial judge may not appoint another sitting judge to serve pro bono as a mediator of a dispute that is the subject of a pending case, the Judicial Ethics Committee looked to the language of the 1990 Model Code:

> Texas Canon 5E [now Canon 4F], which prohibits an active full-time judge from acting as a mediator for compensation outside the judicial system but permits a judge to encourage settlement in the performance of official duties, should be construed to have the meaning stated by the corresponding ABA Code provision, which provides that a judge shall not act as a mediator in a private capacity. ABA Canon 4F. Texas Canon 5E [now Canon 4F] does not permit a judge to be a mediator without compensation outside the judicial system. A judge's statutory duty to encourage parties to attempt out of court procedures to resolve a dispute does not imply authority to act as a statutory mediator.
> Op. No. 161 (1993).

The Committee revisited that topic five years later and concluded that a sitting judge may, without compensation, serve as a mediator:

> In light of this growing reliance on ADR procedures as an adjunct to traditional forms of adjudication, and in light of the favorable experience of many judges in encouraging and participating in alternative dispute resolution procedures, we withdraw in its entirety our former Opinion 161 and find in the Code no prohibition against an active judge serving as a mediator or arbitrator without compensation so long as the judge follows the guidelines of Canon 3B(8)(b).
> Op. No. 233 (1998). Canon 3(B)(8)(b) states:
>
> > A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:
> >
> > > . . .
> > > (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
>
> TEX. CODE JUD. CONDUCT, CANON 3(B)(8)(b).

One of the main arguments against allowing judges to mediate and/or arbitrate for compensation seems to be that an active judge may have too much on his plate to give his most efficient attention to any ADR he or she is going to get involved in. The Canons, along with the stated advisory opinions, indicate that amendments have been made, and possibly will continue to be made, as the reliance on ADR continues to grow. Moreover, in accordance with Canon 3(B)(8)(b), so long as there is correct notice and consent in these forms of arbitrations and/or mediations, then each parties should be well aware of the conditions of having an active judge take on their ADR, of which little concerns compensation.

The Judicial Ethics Committee has twice been asked whether a former district judge, qualified to accept judicial assignments, may act as a mediator or arbitrator when not on judicial assignment. The Committee initially considered such a judge to be the same as a "retired judge subject to recall," and said the judge could act as a mediator or arbitrator so long as not on judicial assignment. Op. No. 99 (1987). A year later the Committee compared a former district judge with a senior judge and said she could act as a mediator or arbitrator as long as she refrained from performing judicial services at the time. Op. No. 124 (1988). These advisory opinions thus seem to be leaning towards disallowing an actively busy judge from engaging in ADR.

One argument to be made for amending Canon 4(F) in the manner Judge Pollard requests would be that Canon 6 exempts from Canon 4F "Justices of the Peace, unless the court on which the judge serves has jurisdiction of the matter or parties involved in the arbitration or mediation." TEX. CODE JUD. CONDUCT, CANON 6(C)(1)(c); *Compare* Op. No. 208 (1997). Opinion no. 208 states that a justice of peace may serve as a CASA (Court appointed special advocate) in the county in which she serves as a justice of the peace. However, he or she must always comply with Canon 3A (requiring that the judicial duties of a judge take precedence over the judge's other activities). So the argument can be made that there have been provisions to allow Justices of the Peace to be arbitrators and mediators, which the proposed amendment seeks for "Constitutional County Judges", so long as we make sure the court on which the judge serves does not have jurisdiction over the matter, which is also alluded to in Judge Pollard's amendment request.