SCAC MEETING AGENDA
Friday, February 15, 2019
9:00 a.m. – 5:00 p.m.

Location: **Texas Association of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. WELCOME (Babcock)

2. STATUS REPORT FROM CHIEF JUSTICE HECHT

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the September 28 and 29, 2018 meetings.

3. COMMENTS FROM JUSTICE BOYD

4. FORMS FOR AN APPLICATION FOR INJUNCTIVE RELIEF IN CYBERBULLYING CASES

735-822 Sub-Committee Members:
The Hon. Stephen Yelenosky - Chair
Lamont Jefferson – Vice Chair
Frank Gilstrap
Pete Schenkkan

(a) June 11, 2018 Memo re: Cyberbullying
(b) Cyberbullying Restraining Order (2-8-2019)
(c) Cyberbullying Petition (2-8-2019)
(d) Cyberbullying Instructions (2-8-2019)
(e) Cyberbullying Statute
(f) S.B. No. 179
(g) Cyberbullying Constitutional Precedents on Student Speech

5. DISCOVERY RULES

171-205 Sub-Committee Members:
Mr. Robert Meadows - Chair
The Hon. Tracy Christopher – Vice Chair
Prof. Alexandra Albright
The Hon. Jane Bland
The Hon. Harvey Brown
David Jackson
The Hon. Ana Estevez
Kent Sullivan
Kimberly Phillips

(h) 2019-2-11 R. Meadows Letter to C. Babcock
(i) Discovery Subcommittee Proposed Amendments (2-6-2019)
(j) Rule 215 Sanctions Albright Working Document
(k) Revised Spoliation Rule (2-6-2019)
(l) Spoliation Draft Rule (Texas)

6. TEXAS RULE OF CIVIL PROCEDURE 244

216-299a Sub-Committee Members:

Prof. Elaine Carlson – Chair
Thomas C. Riney – Vice Chair
The Hon. David Peeples
Alistair B. Dawson
Robert Meadows
The Hon. Kent Sullivan
Kennon Wooten

(m) February 11, 2019 Report re: TRCP 244

7. TEXAS RULE OF CIVIL PROCEDURE 167

166-166a Sub-Committee Members:

Richard Munzinger – Chair
Pete Schenkkan – Vice Chair
The Hon. David Peeples
The Hon. Jeffrey Boyd
Prof. Elaine Carlson
Nina Cortell
Rusty Hardin

8. EX-PARTE COMMUNICATIONS IN PROBLEM-SOLVING CASE

Judicial Administration Sub-Committee Members:

Nina Cortell - Chair
***Kennon* Wooten – Vice Chair**
The Hon. David Peeples
Michael A. Hatchell
Prof. Lonny Hoffman
The The Hon. Tom Gray
The Hon. Bill Boyce
The Hon. David Newell

(n) Memo to TSCAC on Ex Parte Communications

Tab A

From: Frank Gilstrap

To: Stephen Yelenosky, Lamont Jefferson, Pete Schenkkan

Date: June 11, 2018

Re: Cyberbullying

Here are the docs attached to the December 2017 agenda together with the statute. I haven't seen any indication that this difficult item has been withdrawn. Do we want to take a final look before the July meeting? I'm hesitant to dive in if the consensus is to go with what we've got. Nevertheless, I have a few comments

The Instructions:

(1) We start out talking about the "Petition" on pages 1 and 2, but we end up talking about the "Application" on pages 3 and 4.

(2) The statute says that the TRO and TI order do not have to set a trial date, thereby overruling Rule 683. *See* TEX.CIV.PRAC. & REM. CODE §129A.002(e). But the statute says nothing about the TI hearing, and Rule 680 and—certainly--due process require a TI hearing. The instructions barely mention this saying only that "you will have to have another hearing with the other parent or person present if you want additional orders" Instructions, p.3. There needs to be a clear warning that an evidentiary hearing will be required. Also, page 4 tells the petitioner that, if the TRO is

denied, he will have to decide whether to continue the suit. We should also tell him that, if he doesn't want to continue, he will have to take action to dismiss the suit. The current instructions could give the impression that if he does nothing, the suit will automatically go away/

(3) The instructions say that cyberbullying includes "threatening to use" the phone or internet. See instructions, p.1. In general, an injunction can be used to prevent "threatened" harm. But our statute is only available to "the recipient" of cyberbullying behavior. *See* TEX.CIV.PRAC. & REM. CODE §129A.002(a). If cyberbullying has only been "threatened" the plaintiff is not yet a "recipient" and the statute does not apply. Similarly, the court may grant injunctive relief "to prevent any further cyberbullying." *Id.* §129A.002(b). And the plaintiff may obtain relief by "showing that the plaintiff is likely to succeed in establishing that the individual was cyberbullying the recipient." *Id.* §129A.002(c).

The Petition:

The statute contemplates four different scenarios depending on the age of the victim and the age of the bully at the time suit is filed:

(1) When both the victim and the bully are minors, then the parent of the victim sues the parent of the bully.

(2) When the victim has turned 18 and the bully is still a minor, the victim sues the parent of the bully.

(3) When the victim is still a minor and the bully is over 18 then the parent of the victim sues the bully.

(4) When the victim has turned 18, and the bully is over 18, then the victim sues the bully.

This is complicated. When I sit down and try to fill out the Petition under each of the above scenarios, I grow somewhat confused. Maybe we need two forms: one for scenarios 1 and 3 and another for scenarios 2 and 4. The first is filled out by the parent. The second is filled out by the victim who has turned 18.

At any rate, the current petition could use some work. For example, instead of saying "Check the appropriate box" it could say "check one of the boxes below."

Tab B

NO. _____

In re	§	
	§	IN THE _____ COURT
_____	§	
[Name of student]	§	OF_____
	§	COUNTY

CYBERBULLYING RESTRAINING ORDER

I. PARTIES

Petitioner**:** _____ appeared

on behalf of _____, student.

This Petitioner's relationship to the student is:

☐ Parent

☐ Guardian

☐ Other: _____

Respondent: _____☐ appeared ☐ did not appear

on behalf of _____, student.

This Petitioner's relationship to the student is:

☐ Parent

☐ Guardian

☐ Other: _____

II. FINDINGS

The Court finds that Petitioner is likely to succeed in proving at a final hearing that

_____ has ☐ cyberbullied ☐ threatened to cyberbully

_____ by ☐ phone ☐ over the internet and unless a restraining order is issued the behavior is likely to continue. This order was granted

without notice to the opposing party and without a hearing because the emotional injury to the Petitioner's child is irreparable and ongoing, or if threatened, it is imminent.

III. ORDER

IT IS THEREFORE ORDERED that _____ shall take reasonable actions to stop _____ from using a phone or the Internet to cyberbully_____.

☐ IT IS FURTHER ORDERED that _____ shall take possession of _____'s ☐ phone ☐ computer.

☐ IT IS FURTHER ORDERED that _____ shall instruct _____ to delete what he or she posted about _____.

☐ IT IS FURTHER ORDERED that

_____

_____

_____.

This order expires after fourteen (14) days from the date of signature.

SIGNED on _____, 20____, at _____o'clock __m.

_____

JUDGE PRESIDING

Tab C

NO. _____

In re	§	
	§	OF IN THE _____ COURT
	§	
_____	§	
[Name of student]	§	_____
	§	COUNTY, TEXAS

PETITION FOR A CYBERBULLYING RESTRAINING ORDER

1 **PETITIONER** (ADULT APPLYING FOR THE ORDER ON BEHALF OF STUDENT):

Name: _____

Address: _____

_____

County: _____

I am the parent of, legal guardian of, or person in a parental relationship to

_____, who is a student under 18 years old.

2 **RESPONDENT** (ADULT THE ORDER WOULD RESTRAIN):

The person I believe has committed or has threatened to commit cyberbullying of my child is a student. I believe that student's name is _____.

☐ I have reason to believe that student is under 18 years old, and a parent of that student or another person in a parental relationship to that student is named below. I also believe that adult lives or works at the address below.

Name: _____

Address: _____

City: _____

County: _____ (if known)

[Optional] I have reason to believe the adult named below is also a parent or person in a parental relationship to the student. I also have reason to believe that adult lives or works at the address below.

Name: _____

Address: _____

City: _____

County: _____ (if known)

OR

☐ The student I believe has committed or has threatened to commit cyberbullying of my child is a student who I believe is 18 years old or older. I have reason to believe the name and address of the student are:

Name: _____

Address: _____

_____

County: _____
(if known)

3 GROUNDS FOR A RESTRAINING ORDER

As described more fully in my attached Declaration Under Penalty of Perjury, the student I have named above has harassed my child by phone or over the Internet or has threatened to do so and this has been hurtful to my child

4 REQUEST FOR RESTRAINING ORDER

I request that the Court issue a Temporary Restraining Order as soon as possible without waiting for this Petition and Declaration to be delivered to the Respondent. I also request that, after a hearing with notice to the Respondent, the Court issue a Temporary Injunction. I also request that, after the Respondent has had an opportunity to file a written response, a final hearing has been scheduled and notice of it given, and a final hearing has been held, the Court issue a Permanent Injunction.

5 **FEES AND COSTS**

I request that the Court order the Respondent to pay all court fees and to reimburse me for any fees I have already paid.

REQUEST THAT RECORD BE SEALED

To protect the privacy of my child, I request that the Court issue an order sealing all documents filed with the clerk that legally may be sealed.

Respectfully Submitted,

_____
PETITIONER

Declaration Under Penalty of Perjury

All of my statements in my Petition for Cyberbullying Restraining Order are true. In addition, I know the following:

_____, the other student, bullied my child or threatened to bully my child using a phone or the internet.

I know this because:

☐ I heard what the student said to my child on the phone.
☐ My child told me what the student said during the phone call or immediately afterwards when my child was very upset by the call.
☐ I saw what the student wrote on the internet, and I can show the court a copy of it.

I heard or saw this about _____ days ago.

Here is what I heard or saw:

_____

_____

_____

_____

_____

_____

_____

I know that my child was hurt by this because:

_____

_____

_____

_____

My name is:

_____ _____ _____,
(First) (Middle) (Last)

my date of birth is: _____, and my address is

Address: _____

_____

County: _____

I declare under penalty of perjury that my declaration above is true and correct.

Signed in _____ County, State of _____, on the date of

_____.

_____
Signature of Person Making Declaration

Tab D

What can I do if my child has been harassed by another student on the phone or internet?

As with any problem your child has at school, you can talk to teachers and school officials. When another student is harassing your child you should consider talking to the other child's parent. Often the other student's parent is not aware of his or her child's behavior and will voluntarily take measures to stop it.

What if I've talked with teachers, school officials, and the other child's parents, and it doesn't stop the harassment?

There is a Texas law specifically addressing harassment of a child by phone or the internet but the new law applies only if the harassment meets the definition of "cyberbullying." If the cyberbullying law does not apply to your child's situation, there may be another more general law that does apply. If you can, you should see an attorney about other laws because it will be difficult to find and use them on your own.

What is "cyberbullying"?

"Cyberbullying" is defined under Texas law to be harassment of one student by another student (1) by using, or threatening to use, a phone or the Internet, (2) when the bullied student is younger than 18 at the time of the harassment, and (3) when the harassment is related to school or affects the bullied student's education. The law applies to an alleged cyberbully of any age as long as he or she was a student *at the time of the cyberbullying*.

A "student" is someone enrolled in public or private school or being home-schooled. The law does not define what is related to school or affects a child's education. The "Internet" includes, for example, text messages, instant messages, email, postings on social media, and photographs posted on a web page.

The student who has been bullied must have been younger than 18 *at the time of the bullying*. This means that an older child can still sue for harassment that occurred before he or she turned 18. Once your child becomes an adult at age 18, he or she must complete and sign the Petition

and Declaration. Although these instructions say "your child," if you are now an adult, the instructions are directed to you.

The cyberbullying law does not apply to an Internet service provider, such as Facebook, or to a library or school. For anyone not covered by the cyberbullying law, there might be another law that offers some protection. You will have to consult a lawyer about that.

How does the law work?

The law prohibits cyberbullying and gives you the right to ask a court to issue orders intended to stop it. Again, you should first try to resolve the problem informally. Sometimes you can reach a resolution that not even a judge could grant because of limitations on what a judge can do. If you are able to reach an agreement, you can avoid the time, perhaps missed work, and stress of going to court.

How do I ask a court to stop cyberbullying?

You can start the process in court by filing a Petition and Declaration. A form Petition and Declaration are attached. The Petition and Declaration begin a lawsuit to determine if your child has been cyberbullied.

Who can complete and sign the Petition?

You do not have to hire a lawyer to complete the Petition, but you should if you can. Whether you hire a lawyer or not, anyone you sue might hire a lawyer. If you do not hire a lawyer you must complete and sign the Petition yourself.

Who can complete and sign the Declaration?

Only a parent of the minor or a person acting as a parent to the minor can complete and sign the Declaration. A person acting as a parent may be a legal guardian or, for example, a grandparent who is raising the minor.

What can I do if my child has been harassed by another student on the phone or internet?

Who do I sue?

If the alleged cyberbully is under 18 at the time the Petition is filed, the Respondent (the person sued) is a parent of that child or a person acting as a parent to that child. If the alleged cyberbully is 18 or older at the time the Petition is filed, the Respondent is the alleged cyberbully. The Petition itself guides you in completing it for a cyberbully who is a minor and for a cyberbully who is 18 or older.

Completing and signing the Petition and Declaration

At the top of the Petition, fill in you child's name. The clerk of the court will provide the case number, the court number, and the county. Provide the information requested in the Petition and sign it. Answer the questions in the Declaration. You must sign the Declaration "under penalty of perjury," which means you can be prosecuted for perjury if you purposely give false information.

The Petition and Declaration will be public

Before you decide to file a Petition and Declaration, be aware that all documents filed with the clerk, including any screen shot of a message bullying your child, are public records available to anyone who requests them from the clerk. The documents may also be available through the clerk's web site. When you see a judge, you can ask the judge to make documents unavailable to the public, and the judge will consider whether it is appropriate to do so. Even a judge, however, cannot make some documents confidential, like orders of the court, and the courtroom itself is open to the public.

Where to file the Petition

You or someone acting on your behalf must deliver the Petition and Declaration to the Court Clerk of the county or state district court where you live. If you do not know where the courthouse is, you can call the main number for your county. You also may find information on the County or District Clerk's web site.

What can I do if my child has been harassed by another student on the phone or internet?

Is there a charge to file the Petition?

When you file the Petition, you are required to pay the standard fee charged by the county in which you file. You should find out the amount of the fee and whether you can pay by cash, check or credit card by calling the clerk of the court. If you believe the filing fee should be waived because of your income, ask the clerk how you can get the paperwork you will need to file. A request for a waiver cannot be made over the phone. It must be made in writing and under oath.

What happens after I file the Petition and Declaration?

When you file your Petition and Declaration ask the clerk to explain the next steps. The Court Clerk can explain the next step in the process, but the clerk cannot give you legal advice or tell you what a judge might do in your case. Different courthouses have different procedures for these Petitions. In some courthouses, at the time you file the clerk may tell you wait to see a judge or to return at another time. In others you may have to talk to other courthouse staff or the judge's staff. Whatever the procedure, in every courthouse a judge has the final word on when you will go before the judge.

When do I go before a judge?

Holding any type of court proceeding without notifying the person sued is rare because in our system of justice every person is entitled to explain his or her side of the story. So, the judge has to consider whether your Petition is so urgent that an exception should be made. After reading your Petition and Declaration, the judge may decide that the hearing should wait until the other student's parents are notified.

What can I do if my child has been harassed by another student on the phone or internet?

What happens when I go before a judge?

The judge will give you an opportunity to explain what has happened to your child and why you believe it was cyberbullying. You may be required to testify in court under oath, which means you can be prosecuted for perjury if you purposely give false information. The judge has the authority to decide if it is likely that your child has been cyberbullied or not. The judge may instead delay his or her decision.

What can the judge do if the judge finds it is likely that my child has been cyberbullied?

If the judge finds it is likely that your child has been cyberbullied, the judge has authority to issue a "Cyberbullying Restraining Order. The judge also has authority, for various reasons, not to issue a restraining order. The order is an official document signed by a judge instructing an adult to take measures to stop cyberbullying. The restraining order is "served," which means delivered in-hand by an authorized person. A person who violates a restraining order may be subject to the judge's power to enforce the order.

If the judge grants the order, when is it effective and how long does it last?

The order is effective as soon as the person restrained by the order receives a copy of it, and it remains in effect for only two weeks. During those two weeks you or your attorney can talk with the other child's parents, and you may reach an agreement that ends the case without going to court again. If you don't reach an agreement, to continue your case you will have to set a hearing and notify the other parent. At this hearing, the court will require you and the other parent to testify under oath. If the court grants an order at that hearing, the

judge decides how long it will be effective.

What if the judge decides not to issue a restraining order?

If the judge denies the restraining order, you still do have the right to ask for that hearing and again request an order. These instructions cannot and do not provide any guidance on whether or how to do that.

Tab E

Section 11 of Statute relating to Cyberbullying and other statutory provisions it incorporates by reference

Title 6, **Civil Practice and Remedies Code**, is amended by **adding Chapter 129A** to read as follows: T. 6 Ch. 129A

CHAPTER 129A. **RELIEF FOR CYBERBULLYING OF CHILD**

Sec. 129A.001.

DEFINITION. In this chapter, "cyberbullying" has the meaning assigned by Section 37.0832 (a), **Education Code**.

----------[the referenced provision of Education Code is inserted below]----------

Texas Education Code § 37.0832

(a) In this section:

(1) “Bullying”:

(A) means a single significant act or a pattern of acts by one or more students directed at another student that exploits an imbalance of power and involves engaging in written or verbal expression, expression through electronic means, or physical conduct that satisfies the applicability requirements provided by Subsection (a-1), and that:

(i) has the effect or will have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student’s person or of damage to the student’s property;

(ii) is sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student;

(iii) materially and substantially disrupts the educational process or the orderly operation of a classroom or school; or

(iv) infringes on the rights of the victim at school; and

(B) includes cyberbullying.

(2) “Cyberbullying” means bullying that is done through the use of any electronic communication device, including through the use of a cellular or other type of telephone, a computer, a camera, electronic mail, instant messaging, text messaging,

a social media application, an Internet website, or any other Internet-based communication tool.

(a-1) This section applies to:

(1) bullying that occurs on or is delivered to school property or to the site of a school-sponsored or school-related activity on or off school property;

(2) bullying that occurs on a publicly or privately owned school bus or vehicle being used for transportation of students to or from school or a school-sponsored or school-related activity; and

(3) cyberbullying that occurs off school property or outside of a school-sponsored or school-related activity if the cyberbullying:

(A) interferes with a student's educational opportunities; or

(B) substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity.

----------[end of inserted section of Education Code]----------

Sec. 129A.002. **INJUNCTIVE RELIEF**.

(a) A recipient of cyberbullying behavior who is younger than 18 years of age at the time the cyberbullying occurs or a parent of or person standing in parental relation to the recipient may seek injunctive relief under this chapter against the individual who was cyberbullying the recipient or, if the individual is younger than 18 years of age, against a parent of or person standing in parental relation to the individual.

(b) A court may issue a temporary restraining order, temporary injunction, or permanent injunction appropriate under the circumstances to prevent any further cyberbullying, including an order or injunction:

(1) enjoining a defendant from engaging in cyberbullying; or

(2) compelling a defendant who is a parent of or person standing in parental relation to an Iindividual who is younger than 18 years of age to take reasonable actions to cause the individual to cease engaging in cyberbullying.

(c) A plaintiff in an action for injunctive relief brought under this section is entitled to a temporary restraining order on showing that the plaintiff is likely to succeed in establishing that the individual was cyberbullying the recipient. The plaintiff is not required to plead or prove that, before notice can be served and a hearing can be held, immediate and irreparable injury, loss, or damage is likely to result from past or future

cyberbullying by the individual against the recipient.

(d) A plaintiff is entitled to a temporary or permanent injunction under this section on showing that the individual was cyberbullying the recipient.

(e) A court granting a temporary restraining order or temporary injunction under this section may, on motion of either party or sua sponte, order the preservation of any relevant electronic communication. The temporary restraining order or temporary injunction is not required to:
(1) define the injury or state why it is irreparable;
(2) state why the order was granted without notice; or
(3) include an order setting the cause for trial on the merits with respect to the ultimate relief requested.

Sec. 129A.003. **PROMULGATION OF FORMS.**

(a) The supreme court shall, as the court finds appropriate, promulgate forms for use as an application for initial injunctive relief by individuals representing themselves in suits involving cyberbullying and instructions for the proper use of each form or set of forms.

(b) The forms and instructions:

(1) must be written in language that is easily understood by the general public;
(2) shall be made readily available to the general public in the manner prescribed by the supreme court; and
(3) must be translated into the Spanish language.
(c) The Spanish language translation of a form must:
(1) state:
(A) that the Spanish language translated form is to be used solely for the purpose of assisting in understanding the form and may not be submitted to the court; and
(B) that the English language version of the form must be submitted to the court; or

(2) be incorporated into the English language version of the form in a manner that is understandable to both the court and members of the general public.

(d) Each form and its instructions must clearly and conspicuously state that the form is not a substitute for the advice of an attorney.

Section 11 of Statute relating to Cyberbullying and other statutory provisions it incorporates by reference

(e) The attorney general and the clerk of a court shall inform members of the general public of the availability of a form promulgated by the supreme court under this section as appropriate and make the form available free of charge.

(f) A court shall accept a form promulgated by the supreme court under this section unless the form has been completed in a manner that causes a substantive defect that cannot be cured.

Sec. 129A.004. **INAPPLICABILITY.**

(a) An action filed under this chapter may not be joined with an action filed under Title 1,4, or 5, Family Code.

(b) Chapter 27 does not apply to an action under this chapter.
[Chapter 27 of the TCPRC is the "anti-SLAPP" statute.]

Sec. 129A.005 **Certain Conduct Excepted**

This chapter does not apply to a claim brought against an interactive computer service, as defined by **47 U.S.C. Section 230**, for cyberbullying.

----------[**47 U.S.C.A. § 230** (West) inserted below]----------

(2) Interactive computer service
The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Tab F

AN ACT

relating to harassment, bullying, and cyberbullying of a public school student or minor and certain mental health programs for public school students; increasing a criminal penalty.

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

SECTION 1. This Act shall be known as David's Law.

SECTION 2. Section 37.0832, Education Code, is amended by amending Subsections (a) and (c) and adding Subsections (a-1) and (f) to read as follows:

(a) In this section:

(1) "Bullying":

(A) [~~, "bullying"~~] means a single significant act or a pattern of acts by one or more students directed at another student that exploits an imbalance of power and involves[~~, subject to Subsection (b),~~] engaging in written or verbal expression, expression through electronic means, or physical conduct that satisfies the applicability requirements provided by Subsection (a-1), [~~that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district~~] and that:

(i) [~~(1)~~] has the effect or will have the effect of physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property; [~~or~~]

(ii) [~~(2)~~] is sufficiently severe, persistent, or [~~and~~] pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student;

(iii) materially and substantially disrupts the educational process or the orderly operation of a classroom or school; or

(iv) infringes on the rights of the victim at school; and

(B) includes cyberbullying.

(2) "Cyberbullying" means bullying that is done through the use of any electronic communication device, including through the use of a cellular or other type of telephone, a computer, a camera, electronic mail, instant messaging, text messaging, a social media application, an Internet website, or any other Internet-based communication tool.

(a-1) This section applies to:

(1) bullying that occurs on or is delivered to school property or to the site of a school-sponsored or school-related activity on or off school property;

(2) bullying that occurs on a publicly or privately owned school bus or vehicle being used for transportation of students to or from school or a school-sponsored or school-related activity; and

(3) cyberbullying that occurs off school property or outside of a school-sponsored or school-related activity if the cyberbullying:

(A) interferes with a student's educational opportunities; or

(B) substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity.

(c) The board of trustees of each school district shall adopt a policy, including any necessary procedures, concerning bullying that:

(1) prohibits the bullying of a student;

(2) prohibits retaliation against any person, including a victim, a witness, or another person, who in good faith provides information concerning an incident of bullying;

(3) establishes a procedure for providing notice of an incident of bullying to:

(A) a parent or guardian of the alleged victim on or before the third business day after the date the incident is reported; and

(B) a parent or guardian of the alleged bully within a reasonable amount of time after the incident;

(4) establishes the actions a student should take to obtain assistance and intervention in response to bullying;

(5) sets out the available counseling options for a student who is a victim of or a witness to bullying or who engages in bullying;

(6) establishes procedures for reporting an incident of bullying, including procedures for a student to anonymously report an incident of bullying, investigating a reported incident

of bullying, and determining whether the reported incident of bullying occurred;

(7) prohibits the imposition of a disciplinary measure on a student who, after an investigation, is found to be a victim of bullying, on the basis of that student's use of reasonable self-defense in response to the bullying; and

(8) requires that discipline for bullying of a student with disabilities comply with applicable requirements under federal law, including the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.).

(f) Each school district may establish a district-wide policy to assist in the prevention and mediation of bullying incidents between students that:

(1) interfere with a student's educational opportunities; or

(2) substantially disrupt the orderly operation of a classroom, school, or school-sponsored or school-related activity.

SECTION 3. Subchapter A, Chapter 37, Education Code, is amended by adding Section 37.0052 to read as follows:

Sec. 37.0052. PLACEMENT OR EXPULSION OF STUDENTS WHO HAVE ENGAGED IN CERTAIN BULLYING BEHAVIOR. (a) In this section:

(1) "Bullying" has the meaning assigned by Section 37.0832.

(2) "Intimate visual material" has the meaning assigned by Section 98B.001, Civil Practice and Remedies Code.

(b) A student may be removed from class and placed in a disciplinary alternative education program as provided by Section

37.008 or expelled if the student:

(1) engages in bullying that encourages a student to commit or attempt to commit suicide;

(2) incites violence against a student through group bullying; or

(3) releases or threatens to release intimate visual material of a minor or a student who is 18 years of age or older without the student's consent.

(c) Nothing in this section exempts a school from reporting a finding of intimate visual material of a minor.

SECTION 4. Subchapter A, Chapter 37, Education Code, is amended by adding Section 37.0151 to read as follows:

Sec. 37.0151. REPORT TO LOCAL LAW ENFORCEMENT REGARDING CERTAIN CONDUCT CONSTITUTING ASSAULT OR HARASSMENT; LIABILITY. (a) The principal of a public primary or secondary school, or a person designated by the principal under Subsection (c), may make a report to any school district police department, if applicable, or the police department of the municipality in which the school is located or, if the school is not in a municipality, the sheriff of the county in which the school is located if, after an investigation is completed, the principal has reasonable grounds to believe that a student engaged in conduct that constitutes an offense under Section 22.01 or 42.07(a)(7), Penal Code.

(b) A person who makes a report under this section may include the name and address of each student the person believes may have participated in the conduct.

(c) The principal of a public primary or secondary school

may designate a school employee, other than a school counselor, who is under the supervision of the principal to make the report under this section.

(d) A person who is not a school employee but is employed by an entity that contracts with a district or school to use school property is not required to make a report under this section and may not be designated by the principal of a public primary or secondary school to make a report. A person who voluntarily makes a report under this section is immune from civil or criminal liability.

(e) A person who takes any action under this section is immune from civil or criminal liability or disciplinary action resulting from that action.

(f) Notwithstanding any other law, this section does not create a civil, criminal, or administrative cause of action or liability or create a standard of care, obligation, or duty that provides a basis for a cause of action for an act under this section.

(g) A school district and school personnel and school volunteers are immune from suit resulting from an act under this section, including an act under related policies and procedures.

(h) An act by school personnel or a school volunteer under this section, including an act under related policies and procedures, is the exercise of judgment or discretion on the part of the school personnel or school volunteer and is not considered to be a ministerial act for purposes of liability of the school district or the district's employees.

SECTION 5. Sections 37.218(a)(1) and (2), Education Code,

are amended to read as follows:

(1) "Bullying" has the meaning assigned by Section 37.0832 [~~25.0342~~].

(2) "Cyberbullying" has the meaning assigned by Section 37.0832 [~~means the use of any electronic communication device to engage in bullying or intimidation~~].

SECTION 6. Section 5.001, Education Code, is amended by adding Subdivision (5-a) to read as follows:

(5-a) "Mental health condition" means an illness, disease, or disorder, other than epilepsy, dementia, substance abuse, or intellectual disability, that:

(A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or

(B) grossly impairs behavior as demonstrated by recent disturbed behavior.

SECTION 7. Section 12.104(b), Education Code, is amended to read as follows:

(b) An open-enrollment charter school is subject to:

(1) a provision of this title establishing a criminal offense; and

(2) a prohibition, restriction, or requirement, as applicable, imposed by this title or a rule adopted under this title, relating to:

(A) the Public Education Information Management System (PEIMS) to the extent necessary to monitor compliance with this subchapter as determined by the commissioner;

(B) criminal history records under Subchapter C,

Chapter 22;

(C) reading instruments and accelerated reading instruction programs under Section 28.006;

(D) accelerated instruction under Section 28.0211;

(E) high school graduation requirements under Section 28.025;

(F) special education programs under Subchapter A, Chapter 29;

(G) bilingual education under Subchapter B, Chapter 29;

(H) prekindergarten programs under Subchapter E or E-1, Chapter 29;

(I) extracurricular activities under Section 33.081;

(J) discipline management practices or behavior management techniques under Section 37.0021;

(K) health and safety under Chapter 38;

(L) public school accountability under Subchapters B, C, D, E, F, G, and J, Chapter 39;

(M) the requirement under Section 21.006 to report an educator's misconduct;

(N) intensive programs of instruction under Section 28.0213; [~~and~~]

(O) the right of a school employee to report a crime, as provided by Section 37.148;

(P) bullying prevention policies and procedures

under Section 37.0832;

(Q) the right of a school under Section 37.0052 to place a student who has engaged in certain bullying behavior in a disciplinary alternative education program or to expel the student; and

(R) the right under Section 37.0151 to report to local law enforcement certain conduct constituting assault or harassment.

SECTION 8. Section 21.054, Education Code, is amended by adding Subsections (d-2) and (e-2) to read as follows:

(d-2) Continuing education requirements for a classroom teacher may include instruction regarding how grief and trauma affect student learning and behavior and how evidence-based, grief-informed, and trauma-informed strategies support the academic success of students affected by grief and trauma.

(e-2) Continuing education requirements for a principal may include instruction regarding how grief and trauma affect student learning and behavior and how evidence-based, grief-informed, and trauma-informed strategies support the academic success of students affected by grief and trauma.

SECTION 9. Subchapter J, Chapter 21, Education Code, is amended by adding Section 21.462 to read as follows:

Sec. 21.462. RESOURCES REGARDING STUDENTS WITH MENTAL HEALTH NEEDS. The agency, in coordination with the Health and Human Services Commission, shall establish and maintain an Internet website to provide resources for school district or open-enrollment charter school employees regarding working with students with

mental health conditions. The agency must include on the Internet website information about:

(1) grief-informed and trauma-informed practices;

(2) building skills related to managing emotions, establishing and maintaining positive relationships, and responsible decision-making;

(3) positive behavior interventions and supports; and

(4) a safe and supportive school climate.

SECTION 10. Section 33.006, Education Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

(b) In addition to a school counselor's responsibility under Subsection (a), the school counselor shall:

(1) participate in planning, implementing, and evaluating a comprehensive developmental guidance program to serve all students and to address the special needs of students:

(A) who are at risk of dropping out of school, becoming substance abusers, participating in gang activity, or committing suicide;

(B) who are in need of modified instructional strategies; or

(C) who are gifted and talented, with emphasis on identifying and serving gifted and talented students who are educationally disadvantaged;

(2) consult with a student's parent or guardian and make referrals as appropriate in consultation with the student's parent or guardian;

(3) consult with school staff, parents, and other community members to help them increase the effectiveness of student education and promote student success;

(4) coordinate people and resources in the school, home, and community;

(5) with the assistance of school staff, interpret standardized test results and other assessment data that help a student make educational and career plans; [~~and~~]

(6) deliver classroom guidance activities or serve as a consultant to teachers conducting lessons based on the school's guidance curriculum; and

(7) serve as an impartial, nonreporting resource for interpersonal conflicts and discord involving two or more students, including accusations of bullying under Section 37.0832.

(c) Nothing in Subsection (b)(7) exempts a school counselor from any mandatory reporting requirements imposed by other provisions of law.

SECTION 11. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 129A to read as follows:

CHAPTER 129A. RELIEF FOR CYBERBULLYING OF CHILD

Sec. 129A.001. DEFINITION. In this chapter, "cyberbullying" has the meaning assigned by Section 37.0832(a), Education Code.

Sec. 129A.002. INJUNCTIVE RELIEF. (a) A recipient of cyberbullying behavior who is younger than 18 years of age at the time the cyberbullying occurs or a parent of or person standing in parental relation to the recipient may seek injunctive relief under

this chapter against the individual who was cyberbullying the recipient or, if the individual is younger than 18 years of age, against a parent of or person standing in parental relation to the individual.

(b) A court may issue a temporary restraining order, temporary injunction, or permanent injunction appropriate under the circumstances to prevent any further cyberbullying, including an order or injunction:

(1) enjoining a defendant from engaging in cyberbullying; or

(2) compelling a defendant who is a parent of or person standing in parental relation to an individual who is younger than 18 years of age to take reasonable actions to cause the individual to cease engaging in cyberbullying.

(c) A plaintiff in an action for injunctive relief brought under this section is entitled to a temporary restraining order on showing that the plaintiff is likely to succeed in establishing that the individual was cyberbullying the recipient. The plaintiff is not required to plead or prove that, before notice can be served and a hearing can be held, immediate and irreparable injury, loss, or damage is likely to result from past or future cyberbullying by the individual against the recipient.

(d) A plaintiff is entitled to a temporary or permanent injunction under this section on showing that the individual was cyberbullying the recipient.

(e) A court granting a temporary restraining order or temporary injunction under this section may, on motion of either

party or sua sponte, order the preservation of any relevant electronic communication. The temporary restraining order or temporary injunction is not required to:

(1) define the injury or state why it is irreparable;

(2) state why the order was granted without notice; or

(3) include an order setting the cause for trial on the merits with respect to the ultimate relief requested.

Sec. 129A.003. PROMULGATION OF FORMS. (a) The supreme court shall, as the court finds appropriate, promulgate forms for use as an application for initial injunctive relief by individuals representing themselves in suits involving cyberbullying and instructions for the proper use of each form or set of forms.

(b) The forms and instructions:

(1) must be written in language that is easily understood by the general public;

(2) shall be made readily available to the general public in the manner prescribed by the supreme court; and

(3) must be translated into the Spanish language.

(c) The Spanish language translation of a form must:

(1) state:

(A) that the Spanish language translated form is to be used solely for the purpose of assisting in understanding the form and may not be submitted to the court; and

(B) that the English language version of the form must be submitted to the court; or

(2) be incorporated into the English language version of the form in a manner that is understandable to both the court and

members of the general public.

(d) Each form and its instructions must clearly and conspicuously state that the form is not a substitute for the advice of an attorney.

(e) The attorney general and the clerk of a court shall inform members of the general public of the availability of a form promulgated by the supreme court under this section as appropriate and make the form available free of charge.

(f) A court shall accept a form promulgated by the supreme court under this section unless the form has been completed in a manner that causes a substantive defect that cannot be cured.

Sec. 129A.004. INAPPLICABILITY. (a) An action filed under this chapter may not be joined with an action filed under Title 1, 4, or 5, Family Code.

(b) Chapter 27 does not apply to an action under this chapter.

Sec. 129A.005. CERTAIN CONDUCT EXCEPTED. This chapter does not apply to a claim brought against an interactive computer service, as defined by 47 U.S.C. Section 230, for cyberbullying.

SECTION 12. Sections 161.325(a-1), (d), (e), (f), and (i), Health and Safety Code, are amended to read as follows:

(a-1) The list must include programs in the following areas:

(1) early mental health intervention;

(2) mental health promotion [~~and positive youth development~~];

(3) substance abuse prevention;

(4) substance abuse intervention; [~~and~~]

(5) suicide prevention;

(6) grief-informed and trauma-informed practices;

(7) building skills related to managing emotions, establishing and maintaining positive relationships, and responsible decision-making;

(8) positive behavior interventions and supports and positive youth development; and

(9) safe and supportive school climate.

(d) A [~~The board of trustees of each~~] school district may develop practices and procedures [~~may adopt a policy~~] concerning each area listed in Subsection (a-1), including mental health promotion and intervention, substance abuse prevention and intervention, and suicide prevention, that:

(1) include [~~establishes~~] a procedure for providing notice of a recommendation for early mental health or substance abuse intervention regarding a student to a parent or guardian of the student within a reasonable amount of time after the identification of early warning signs as described by Subsection (b)(2);

(2) include [~~establishes~~] a procedure for providing notice of a student identified as at risk of committing suicide to a parent or guardian of the student within a reasonable amount of time after the identification of early warning signs as described by Subsection (b)(2);

(3) establish [~~establishes~~] that the district may develop a reporting mechanism and may designate at least one person to act as a liaison officer in the district for the purposes of

identifying students in need of early mental health or substance abuse intervention or suicide prevention; and

(4) set [~~sets~~] out available counseling alternatives for a parent or guardian to consider when their child is identified as possibly being in need of early mental health or substance abuse intervention or suicide prevention.

(e) The practices and procedures developed under Subsection (d) [~~policy~~] must prohibit the use without the prior consent of a student's parent or guardian of a medical screening of the student as part of the process of identifying whether the student is possibly in need of early mental health or substance abuse intervention or suicide prevention.

(f) The practices [~~policy~~] and [~~any necessary~~] procedures developed [~~adopted~~] under Subsection (d) must be included in:

(1) the annual student handbook; and

(2) the district improvement plan under Section 11.252, Education Code.

(i) Nothing in this section is intended to interfere with the rights of parents or guardians and the decision-making regarding the best interest of the child. Practices [~~Policy~~] and procedures developed [~~adopted~~] in accordance with this section are intended to notify a parent or guardian of a need for mental health or substance abuse intervention so that a parent or guardian may take appropriate action. Nothing in this section shall be construed as giving school districts the authority to prescribe medications. Any and all medical decisions are to be made by a parent or guardian of a student.

SECTION 13. Section 42.07(b)(1), Penal Code, is amended to read as follows:

(1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated through the use of [~~by~~] electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine; and

(B) a communication made to a pager.

SECTION 14. Section 42.07(c), Penal Code, is amended to read as follows:

(c) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if:

(1) the actor has previously been convicted under this section; or

(2) the offense was committed under Subsection (a)(7) and:

(A) the offense was committed against a child under 18 years of age with the intent that the child:

(i) commit suicide; or

(ii) engage in conduct causing serious bodily injury to the child; or

(B) the actor has previously violated a temporary

restraining order or injunction issued under Chapter 129A, Civil Practice and Remedies Code.

SECTION 15. Section 37.0832(b), Education Code, is repealed.

SECTION 16. The change in law made by this Act applies only to an offense committed or conduct violating a penal law of this state that occurs on or after the effective date of this Act. An offense committed or conduct that occurs before the effective date of this Act is governed by the law in effect on the date the offense was committed or conduct occurred, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed or conduct violating a penal law of this state occurred before the effective date of this Act if any element of the offense or conduct occurred before that date.

SECTION 17. It is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act to each person or entity, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid for any reason, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected.

SECTION 18. This Act takes effect September 1, 2017.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 179 passed the Senate on May 3, 2017, by the following vote: Yeas 31, Nays 0; May 17, 2017, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 19, 2017, House granted request of the Senate; May 27, 2017, Senate adopted Conference Committee Report by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 179 passed the House, with amendments, on May 12, 2017, by the following vote: Yeas 130, Nays 11, one present not voting; May 19, 2017, House granted request of the Senate for appointment of Conference Committee; May 27, 2017, House adopted Conference Committee Report by the following vote: Yeas 136, Nays 11, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Tab G

Constitutional Precedents on Student Speech

From *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 507 (5th Cir. 2009).

The Supreme Court has issued four major opinions on public school regulation of student speech. First, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), a public school punished students who wore black armbands to school to protest the Vietnam War. *Id*. at 504. The Court confirmed that "students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id*. at 506, and "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id*. at 511. Schools can restrict student speech only if it materially interferes with or disrupts the school's operation, id. at 512, and cannot "suppress 'expressions of feelings with which they do not wish to contend.' " *Id*. at 511 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir.1966)).

Since *Tinker*, every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 687(1986), the Court ruled that schools can prohibit "sexually explicit, indecent, or lewd speech." The Court held in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988), that schools can also regulate school-sponsored speech.

Finally, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Court determined that schools can prohibit "[s]peech advocating illegal drug use." Id. at 2638 (Alito, J., concurring).

Palmer argues that under these decision, he wins on the merits. Reading *Tinker, Fraser, Hazelwood*, and *Morse* together, Palmer believes the Court has established a bright-line rule that schools cannot restrict speech that is not disruptive, lewd, school-sponsored, or drug-related. If this were the rule, Palmer indeed would prevail, because the District has stipulated that his shirts do not fall into any of these categories. Palmer's proposed categorical rule, however, is flawed, because it fails to include another type of student speech restriction that schools can institute: content-neutral regulations." [In this case the court upheld the constitutionality of a dress code that disallowed wording on T-shirts except for small logos and school-sponsored shirts.]

Tab H

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February 11, 2019

Supreme Court Advisory Committee
c/o Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
ebabcock@jw.com

RE: Discovery Subcommittee's Revised Proposed Rules

Dear Chairman Babcock:

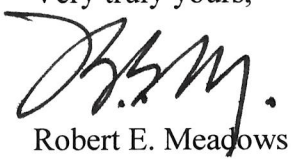
The Discovery Subcommittee has completed its review and rewrite of the discovery rules, consistent with our task of modernizing the rules, to improve efficiency and decrease the cost of litigation. For the most part, the recommended changes are the result of thorough discussions and approvals of the Discovery Subcommittee's proposals at SCAC meetings in September 2016, and February, April, and June 2017. What has not been taken up by the full SCAC are suggested changes to Rule 215 and an expanded rule on spoliation.

Our subcommittee's original recommendation on spoliation was limited in scope, dealing singularly with ESI in the manner of recent changes to the FRCP. We heard from a number of SCAC members that the federal rule is too narrow in scope and should not be limited to ESI. We also were advised that in modern litigation the burdens of discovery with ESI are so great that litigants deserve a more precise understanding of the 'duty' to preserve ESI for litigation purposes. Our subcommittee has examined both concerns and has an initial proposal for consideration by the SCAC.

Accordingly, you will find attached, the Discovery Subcommittee's revised proposed rules, including a new Rule 215, and draft spoliation rule, along with an alternative version submitted to our committee for consideration. It is our recommendation, given the prior and exhaustive consideration by the SCAC of the other discovery rules changes, that the full committee now limit its focus to what we do with Rule 215 and the issue of spoliation.

Thank you and do not hesitate to contact me if there are questions about where are in work or with our proposed next steps.

Very truly yours,



Robert E. Meadows

REM:mfv
Attachments
cc: Marti Walker; mawalker@jw.com (w/attachments)

Tab I

Texas Supreme Court Advisory Committee
Discovery Subcommittee Proposed Amendments
February 2019

Key:

- Proposed rule amendments based on SCAC discussions September 2016-June 2017 are in yellow highlight in the draft.
- Deletions based on SCAC discussions September 2016-June 2017 have been removed from the draft.
- Previous subcommittee suggestions that were rejected by the SCAC have been removed.
- Discovery Subcommittee new suggested changes are underlined.

Index

General Rules and Disclosures, Stipulations about Discovery Procedure: Tex. R. Civ. P. 190-194

RULE 190. DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required.

Every case must be governed by a discovery control plan as provided in this Rule.

(a) Initial Pleading. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

(b) Change by Court Order. On motion and showing of good cause by a party, the court may change the level designated by the plaintiff.

190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $100,000 or Less (Level 1)

(a) **Application.** This subdivision applies to:

(1) any suit that is governed by the expedited actions process in Rule 169; and

(2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $100,000.

(b) **Limitations**. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when initial disclosures are due and continues until 180 days after the date the initial disclosures are due.

(2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. If one side designates more than one expert, the opposing side may have an additional two hours of total deposition time for each additional expert designated. The court may modify the deposition hours so that no party is given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate

interrogatory.

(4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.

(c) **Reopening Discovery**. If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3 Discovery Control Plan –Level 2

(a) **Application**. Discovery must be conducted in accordance with this subdivision for a level 2 suit.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period**. All discovery must be conducted during the discovery period, which begins when initial disclosures are due and continues until:

(A) 30 days before the date set for trial, in cases under the Family Code; or

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

(ii) nine months after the initial disclosures are due; or

(C) a docket control order sets a new date for the end of discovery.

(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 25 written

interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(4) **Requests for Production.** Any party may serve on any other party no more than 25 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

190.4 Discovery Control Plan - Level 3(a) **Application.** Discovery under level 3 is governed by this rule. After a conference required by this rule, the parties must submit a discovery control plan and proposed order(s) to the court for its consideration. The plan must include the items listed in 190.4(c).

(b) Conference

(1) **Conference timing.** The parties must confer as soon as practicable.

(2) **Conference content; Parties' responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 194; discuss any issues about preserving discoverable information; and develop a proposed discovery control plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery control plan, and for submitting to the court within 14 days after the conference a written report outlining the proposed discovery control plan.

(3) **No discovery before conference. Unless otherwise ordered by the court,** a party may not seek discovery from any party before the parties have conferred as required by this rule. This does not include initial disclosures.

(c) **Discovery control plan.** The discovery control plan must state the parties' views and proposals on:

(1) a date for trial or for a conference to determine a trial setting;

(2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;

(3) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses;

(4) what changes should be made in the timing, or form, of the initial disclosures under Rule 194, including a statement of when initial disclosures were made or will be made;

(5) the subjects on which discovery may be needed, and whether discovery should be

conducted in phases or be limited to or focused on particular issues;

(6) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(7) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Texas Rule of Evidence 511;

(8) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed;

(9) Dispositive Motion deadlines;

(10) Expert challenges deadlines; and

(11) proposed docket control order(s).

(d) Docket Control Order. Upon receipt of the discovery control plan, the trial court must issue a docket control order.

190.5 Modification of Docket Control Order

The court may modify a docket control order at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery:

(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:

(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

190.6 Certain Types of Discovery Excepted

This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule.

RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS

191.1 Modification of Procedures

Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.

191.2 Conference

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.

191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections

(a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed:

> (1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and service e-mail address; or
>
> (2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and service email address, if any.

(b) **Effect of signature on disclosure.** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(c) **Effect of signature on discovery request, notice, response, or objection.** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:

(1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) has a good faith factual basis;

(3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.

(e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code.

191.4 Filing of Discovery Materials.

(a) **Discovery materials not to be filed.** The following discovery materials must not be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served only on parties;

(2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;

(3) documents and tangible things produced in discovery; and

(4) statements prepared in compliance with Rule 193.3(b) or (d).

(b) **Discovery materials to be filed.** The following discovery materials must be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;

(2) motions and responses to motions pertaining to discovery matters; and

(3) agreements concerning discovery matters, to the extent necessary to comply with Rule

11.

(c) **Exceptions.** Notwithstanding paragraph (a):

(1) the court may order discovery materials to be filed;

(2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and

(3) a person may file discovery materials necessary for a proceeding in an appellate court.

(d) **Retention requirement for persons.** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.

(e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court.

191.5 Service of Discovery Materials.

Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record.

RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS

192.1 Forms of Discovery.

Permissible forms of discovery are:

(a) required disclosures;

(b) requests for production and inspection of documents and tangible things;

(c) requests and motions for entry upon and examination of real property;

(d) interrogatories to a party;

(e) requests for admission;

(f) oral or written depositions; and

(g) motions for mental or physical examinations.

192.2 Timing and Sequence of Discovery.

(a) **Timing.** Unless otherwise agreed to by the parties, or ordered by the court a party may not serve discovery until after the initial disclosures are due.

(b) **Sequence.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.

192.3 Scope of Discovery.

(a) **Generally.** Unless otherwise ordered by the court, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter of the pending action and proportional to the needs of the case as set forth in 192.4(b). Information within this scope of discovery need not be admissible in evidence to be discoverable.

(b) **Documents, information and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents, information and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

(c) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.

192.4 Limitations on Scope of Discovery.

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the discovery sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

192.5 Work Product.

(a) **Work product defined.** Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

(b) **Protection of work product.**

(1) **Protection of core work product--attorney mental processes**. Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable.

(2) **Protection of other work product**. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) **Incidental disclosure of attorney mental processes**. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

(c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

(1) information discoverable under Rule 194 concerning experts, trial witnesses, witness statements, and contentions;

(2) trial exhibits ordered disclosed under Rule 166 or Rule 194;

(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;

(4) any photograph or electronic image of underlying facts (e.g., a photograph of the

accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and

(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

(d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

192.6 Protective Order.

(a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that:

(1) the requested discovery not be sought in whole or in part;

(2) the extent or subject matter of discovery be limited;

(3) the discovery not be undertaken at the time or place specified;

(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

192.7 Definitions.

As used in these rules

(a) *Written discovery* means requests for disclosure, requests for production and inspection of

documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.

(b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.

(c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.

(d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.

RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY

193.1 Responding to Written Discovery; Duty to Make Complete Response.

A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply.

193.2 Objecting to Written Discovery

(a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. An objection must state whether any responsive materials are being withheld on the basis of that objection.

(b) **Duty to respond when partially objecting; objection to time or place of production.** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order.

(c) **Good faith basis for objection.** A party may object to written discovery only if a good faith

factual and legal basis for the objection exists at the time the objection is made.

(d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry.

(e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.

(f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.

193.3 Asserting a Privilege

A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that:

(1) information or material responsive to the request has been withheld,

(2) the request to which the information or material relates, and

(3) the privilege or privileges asserted.

(b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and

(2) asserts a specific privilege for each item or group of items withheld.

(c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

(d) **Privilege not waived by production**. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

193.4 Hearing and Ruling on Objections and Assertions of Privilege.

(a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

(b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

(c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

193.5 Amending or Supplementing Responses to Written Discovery.

(a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery

was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:

(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and

(2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

(b) **Time and form of amended or supplemental response**. An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.

(c) **Use of Material or Information Withheld under other Objection.** A party may not use—at any hearing or trial—material or information withheld from discovery under any objection, including an objection sustained by the court, without timely amending or supplementing the party's response to include that discovery in accordance with these rules.

193.6 Failing to Timely Respond - Effect on Trial

(a) **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

(b) **Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

(c) **Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to

carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

193.7 Production of Documents Self-Authenticating

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

RULE 194. DUTY TO DISCLOSE

194.1 Required Disclosures.

(a) **In general**. Except as exempted by this Rule or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4. Unless the court orders otherwise, all disclosures under Rule 194 must be in writing, signed, and served. In ruling on an objection that initial disclosures are not appropriate in this action, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(b) **Production.** Copies of documents and other tangible items required to be disclosed under this rule ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

194.2 Initial Disclosures.

(a) **Time for initial disclosures.** Both the plaintiff and the defendant must make the initial disclosures at or within 30 days after the filing of the defendant's answer unless a different time is set by agreement or court order. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after the filing of the party's

answer, unless a different time is set by agreement or court order.

(b) **Content.** Without awaiting a discovery request, a party must provide the following:

(1) the correct names of the parties to the lawsuit;

(2) the name, address, and telephone number of any potential parties;

(3) the legal theories and the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(4) a computation of each category of damages claimed by a party. Each disclosing party must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(5) the name, address, e-mail, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation;

(6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment;

(7) except as otherwise provided by law, the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial

(8) the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial;

(9) the statement of any person with knowledge of relevant facts--a "witness statement"- regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person

may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.;

(10) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(11) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(12) the name, address, and telephone number of any person who may be designated as a responsible third party.

(c) **Proceedings exempt from initial disclosure**. The following proceedings are exempt from initial disclosure, but a court may order that the parties make particular disclosures as appropriate:

(1) an action for review on an administrative record;

(2) a forfeiture action arising from a state statute;

(3) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(4) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(5) an action to enforce or quash an administrative summons or subpoena;

(6) an action by the state to recover benefit payments;

(7) an action by the state to collect on a student loan guaranteed by the state;

(8) a proceeding ancillary to a proceeding in another court; and

(9) an action to enforce an arbitration award.

194.2A Initial Disclosures Under Title I and V of the Texas Family Code [R. Orsinger to report from family law bar].

194.3 Expert Disclosure.

In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties expert information as provided by Rule 195.

194.4 Pretrial Disclosures.

(a) **In General**. In addition to the disclosures required by Rules 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(1) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(2) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(b) **Time for Pretrial Disclosures; Objections**. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

194.5 No Objection or Assertion of Work Product. No objection or assertion of work product is permitted to a disclosure under this rule.

194.6 Certain Responses Not Admissible.

A disclosure under Rule 194.2(b)(3) and (4) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

Experts: Tex. R. Civ. P. 195

RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES

195.1 Permissible Discovery Tools.

A party may request another party to designate and disclose information concerning testifying expert witnesses only through disclosure under Rule 194 and through other discovery permitted by this rule.

195.2 Schedule for Designating Experts.

Unless otherwise ordered by the court, a party must designate experts - that is, furnish information described in Rule 195.5(b) - by the following dates:

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;

(b) with regard to all other experts, 60 days before the end of the discovery period.

195.3 Scheduling Depositions.

(a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

> (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.
>
> (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

(b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably

promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

195.4 Oral Deposition.

In addition to the information disclosed under Rule 195.5, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.

195.5 Expert Disclosures and Reports.

(a) **Disclosures**. Pursuant to Rule 194.3, and without awaiting a discovery request, a party must provide the following for any testifying expert and for any expert who has been retained or specially employed in anticipation of litigation or to prepare for trial and whose mental impressions or opinions have been reviewed by a testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify; and

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) For any expert retained by, employed by, or otherwise subject to the control of the responding party, a party must provide the following:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony;

(B) the expert's current resume and bibliography;

(C) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(D) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(E) a statement of the compensation to be paid for the study and testimony in the

case.

(b) **Expert reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition. If the trial court orders an expert report for a witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, the report must contain:

(1) a complete statement of all opinions the witness will express and the basis and reasons for them;

(2) the facts or data considered by the witness in forming them; and

(3) any exhibits that will be used to summarize or support them.

(c) **Expert communication exempt from disclosure.** Communications between the party's attorney and any testifying expert witness in the case are exempt from discovery regardless of the form of the communications, except to the extent that the communications:

(1) relate to compensation for the expert's study or testimony;

(2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(d) **Draft reports or disclosures.** Any draft of a report by an expert or disclosure required under this rule is protected from disclosure regardless of the form in which the draft is recorded.

(e) **Expert employed for trial preparation.** A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial and whose mental impressions or opinions have not been reviewed by a testifying expert. But a party may do so as provided in Rule 204.2 (Report of Examining Physician or Psychologist) or on showing exceptional circumstances under which it is impracticable for the party to obtain facts on the same subject by other means.

195.6 Amendment and Supplementation.

A party's duty to amend and supplement written discovery regarding a testifying expert is

governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them.

195.7 Cost of Expert Witnesses.

When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.

Production and Inspection: Tex. R. Civ. P. 196

RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY

196.1 Request for Production and Inspection to Parties.

(a) **Request.** A party may serve on another party a request for production or for inspection within the scope of discovery, to inspect, sample, test, photograph and copy the following items in the responding party's possession, custody, or control:

> (1) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
>
> (2) any designated tangible things.

(b) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.

(c) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 requests for production or for inspection in a Level 1 case or 25 requests for production or for inspection in Level 2 or Level 3 cases, including all discrete subparts.

(d) **Contents of request.** The request

> (1) must describe with reasonable particularity each item or category of items to be inspected;
>
> (2) must specify a reasonable time (on or after the date on which the response is due), place, and manner for the production or inspection and for performing the related acts; and
>
> (3) If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

(e) **Requests for production of medical or mental health records regarding nonparties.**

> (1) **Service of request on nonparty.** If a party requests another party to produce

medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) **Exceptions.** A party is not required to serve the request for production on a nonparty whose medical records are sought if:

(A) the nonparty signs a release of the records that is effective as to the requesting party;

(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or

(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

(3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records.

196.2 Response to Request for Production and Inspection.

(a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request.

(b) **Content of response.** For each item or category of items, the response:

(1) must either state that inspection and related activities will be permitted as requested or state an objection or privilege under Rule 193.;

(2) may state that it will produce copies of documents or electronically stored information instead of permitting inspection;

(3) state, as appropriate, that production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(4) state, as appropriate, that no items have been identified - after a diligent search - that are responsive to the request.

196.3 Production.

(a) **Time and place of production.** Subject to any objections stated in the response, the production must be completed no later than the time for the production or inspection specified in the request or another reasonable time specified in the response. Subject to any objections stated in the response, the responding party must produce the requested

documents or tangible things within the person's possession, custody or control at the place requested or the place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. Copies must be produced on the same level of resolution as the originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.

(c) **Organization.** The responding party must produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.

196.4 Electronically Stored Information.

(a) **Request.** To obtain discovery of electronically stored information, the requesting party must specify the form in which the requesting party wants it produced.

(b) **Responses and Objections.** The response:

> (1) must either state that production of the electronically stored information that is responsive to the request and is reasonably available to the responding party in its ordinary course of business will occur or state an objection or privilege under Rule 193;
>
> (2) may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use. The court must order a reasonable form of production, considering the scope and limitations of discovery. If the court orders the responding party to comply with the request that the responding party cannot—through reasonable efforts—retrieve or produce as requested, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) **Producing the Electronically Stored Information**. Unless otherwise stipulated or ordered by the court, if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and a party need not produce the same electronically stored information in more than one form.

196.5 Destruction or Alteration.

Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court.

196.6 Expenses of Production.

Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

196.7 Request of Motion for Entry Upon Property.

(a) **Request or motion.** A party may serve on any other party a request within the scope of discovery to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. If the land or property belongs to a non-party, the party seeking entry onto designated land or other property possessed or controlled by the nonparty must file a motion and notice of hearing on all parties and the nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.

(b) **Timing of request.** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must be filed no later than 30 days before the end of any applicable discovery period.

(c) **Requested time, place, and other conditions of inspection.** The request must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made.

(d) **Response to request for entry.**

(1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request.

(2) **Content of response.** The responding party must state an objection or privilege under Rule 193, and state, as appropriate, that:

(A) entry or other requested action will be permitted as requested;

(B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(C) entry or other requested action cannot be permitted for reasons stated in the response.

(e) **Requirements for order for entry on nonparty's property.** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the subject matter of the action.

Interrogatories: Tex. R. Civ. P. 197

RULE 197. INTERROGATORIES TO PARTIES

197.1 Interrogatories – In General.

(a) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written interrogatories in a Level 1 case or 25 written interrogatories in Level 2 or Level 3 cases, including all discrete subparts, but excluding interrogatories asking a party only to identify or authenticate specific documents.

(b) **Scope.** A written interrogatory may inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.

(c) **Timing of request.** A party may serve written interrogatories on another party no later than 30 days before the end of the discovery period.

197.2 Response to Interrogatories.

(a) **Responding parties; verification.** A responding party - not an attorney of record as otherwise permitted by Rule 14 - must sign the answers under oath or a declaration except that:

(1) when answers are based on information obtained from other persons, the party may so state, and

(2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.

(b) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories.

(c) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege under Rule 193.

(d) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained

from public records, from the responding party's business records, or from an examination, auditing, compilation, abstract or summary of the responding party's business records (including electronically stored information), and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by

(1) specifying the records that must be reviewed, in sufficient detail to enable the requesting party to locate and identify them as readily as the responding party could; and,

(2) if applicable, producing the records or compilation, abstract or summary of the records; and

(3) stating a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

197.3 Use.

Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.

Admissions: Tex. R. Civ. P. 198

RULE 198. REQUESTS FOR ADMISSIONS

198.1 Request for Admissions.

(a) **Request.** A party may serve on another party written requests that the other party admit, for purposes of the pending action only, the truth of any matter within the scope of discovery, including:

(1) facts, the application of law to fact, or opinions about either; and

(2) the genuineness of any described documents.

(b) **Number**. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written requests for admissions in a Level 1 case or 25 written requests for admissions in Level 2 or Level 3 cases, including all discrete subparts, but excluding requests asking a party only to identify or authenticate specific documents.

(c) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.

(d) **Form; copy of a document**. Each matter for which an admission is requested must be stated separately. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

198.2 Response to Requests for Admissions.

(a) **Time to respond; effect of failure to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request. If a response is not timely served, the request is considered admitted without the necessity of a court order.

(b) **Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(c) **Motion regarding the sufficiency of an answer or objection.** The requesting party may move

to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.

198.3 Effect of an Admission; Withdrawal or Amendment.

An admission made by a party under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding. An admission made by a party under this rule may be used only against the responding party. A matter admitted under this rule is conclusively established unless the court, on motion, permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if:

(a) the party shows good cause for the withdrawal or amendment; and

(b) the court finds that the withdrawal or amendment would promote the presentation of the merits of the action and the court is not persuaded that the withdrawal or amendment would prejudice the requesting party in maintaining or defending the action on the merits.

Depositions, Pre-Suit Depositions, and Depositions Pending Appeal:

Tex. R. Civ. P. 199-203

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

199.1 Oral Examination; Alternative Methods of Conducting or Recording.

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

(b) **Hour limitations.** Unless otherwise stipulated or ordered by the court, each party may have no more than the following amount of time for depositions:

(1) For Level 1 cases, each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. If one side designates more than one expert, the opposing side may have an additional two hours of total deposition time for each additional expert designated. The court may modify the deposition hours so that no party is given unfair advantage.

(2) For Level 2 cases, each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) For Level 3 cases, each side may have no more than 60 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(c) **Depositions by remote means.** The parties may stipulate—or the court may on motion

order—an oral deposition by telephone or other remote electronic means. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.

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

199.2 Procedure for Noticing Oral Depositions.

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

(b) **Content of notice.**

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

(2) **Time and place.** The notice must state a reasonable time and place for the oral

deposition. The place may be in:

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

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

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

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

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

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

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

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

199.3 Compelling Witness to Attend.

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

199.4 Objections to Time and Place of Oral Deposition.

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

199.5 Examination, Objection, and Conduct During Oral Depositions.

(a) **Attendance.**

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

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

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

(b) **Oath; examination.** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. An objection at the time of the examination to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. The record must state:

(1) the officer's name and business address;

(2) the date, time, and place of the deposition;

(3) the deponent's name;

(4) the administration of the oath or affirmation to the deponent; and

(5) the identity of all persons present.

(c) **Qualifications and Objections to Translator** [Placeholder]

(d) **Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. The court must allow additional time consistent with Rule 192.3 and Rule 192.4 if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

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

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

(g) **Instructions not to answer.** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(h) **Suspending the deposition.** If the time limitations for the deposition have expired or the

deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

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

199.6 Hearing on Objections.

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

RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS

200.1 Procedure for Noticing Deposition Upon Written Questions.

(a) **Who may be noticed; when.** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

(b) **Content of notice.** The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response.

200.2 Compelling Witness to Attend.

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

200.3 Questions and Objections.

(a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice.

(b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions.

(c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision.

200.4 Conducting the Deposition Upon Written Questions.

The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.

RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS

201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.

(a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this

State. The deposition may be taken by:

(1) notice;

(2) letter rogatory, letter of request, or other such device;

(3) agreement of the parties; or

(4) court order.

(b) **By notice.** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken.

(c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must:

(1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;

(2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and

(3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.

(d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must:

(1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and

(2) must state the time, place, and manner of the examination of the witness.

(e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.

(f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.

(g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199.

201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions.

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

RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS

202.1 Generally.

A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

(b) to investigate a potential claim or suit.

202.2 Petition

The petition must:

(a) be verified;

(b) be filed in a proper court of any county:

(1) where venue of the anticipated suit may lie, if suit is anticipated; or

(2) where the witness resides, if no suit is yet anticipated;

(c) be in the name of the petitioner;

(d) state either:

(1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or

(2) that the petitioner seeks to investigate a potential claim by or against petitioner;

(e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;

(f) if suit is anticipated, either:

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or

(2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons;

(g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and

(h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.

202.3 Notice and Service.

(a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) **Service by publication on persons not named.**

(1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is

published.

(2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.

202.4 Order.

(a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

(b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

202.5 Manner of Taking and Use.

Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from

any unfair prejudice or to prevent abuse of this rule.

RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL

AND WRITTEN DEPOSITIONS

203.1 Signature and Changes.

(a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.

(b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within 30 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.

(c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply:

(1) if the witness and all parties waive the signature requirement;

(2) to depositions on written questions; or

(3) to non-stenographic recordings of oral depositions.

203.2 Certification.

The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating:

(a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness;

(b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted,

whether the witness returned the transcript, and if so, the date on which it was returned.

(c) that changes, if any, made by the witness are attached to the deposition transcript;

(d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;

(e) the amount of time used by each party at the deposition;

(f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and

(g) that a copy of the certificate was served on all parties and the date of service.

203.3 Delivery.

(a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return:

(1) the transcript to the party who asked the first question appearing in the transcript, or

(2) the recording to the party who requested it.

(b) **Notice.** The deposition officer must serve notice of delivery on all other parties.

(c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee.

203.4 Exhibits.

At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The

person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.

203.5 Motion to Suppress.

A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a non-stenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections.

203.6 Use.

(a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party.

(b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if:

(1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or

(2) that party has had a reasonable opportunity to redepose the witness and has failed

to do so.

(c) **Different proceeding.** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.

Physical and Mental Examinations: Tex. R. Civ. P. 204

RULE 204. PHYSICAL AND MENTAL EXAMINATION

204.1 Motion and Order Required.

(a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to:

(1) submit to a physical or mental examination by a suitably licensed examiner; or

(2) produce for such examination a person in the other party's custody, conservatorship or legal control.

(b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties.

(c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances:

(1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or

(2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

(d) **Requirements of order.** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by who will perform it.

204.2 Examiner's Report.

(a) **Right to report by the party or person examined.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist. The court on motion may limit delivery of a report on such terms as are just.

(b) **Contents of report.** The written report must set out in detail the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition.

(c) **Request by the moving party.** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. The court on motion may limit delivery of a report on such terms as are just.

(d) **Waiver of privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(e) **Failure to deliver a report.** If an examiner fails or refuses to make a report the court may exclude the testimony if offered at the trial.

(f) **Agreements; relationship to other rules**. This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

204.3 Effect of No Examination.

If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination.

204.4 Cases Arising Under Titles II or V, Family Code.

In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint:

(a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert;

(b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.

204.5 Definitions.

For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.

Discovery from Non-Parties: Tex. R. Civ. P. 205

RULE 205. DISCOVERY FROM NON-PARTIES

205.1 Forms of Discovery; Subpoena Requirement.

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

(a) an oral deposition;

(b) a deposition on written questions;

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

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

205.2 Notice.

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

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

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

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

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

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

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

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

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

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

Sanctions, including spoliation: Tex. R. Civ. P. 215

RULE 215. ABUSE OF DISCOVERY; SANCTIONS **215.1 Motion for Sanctions or Order Compelling Discovery.** A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:	
a) **Appropriate court.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty may be made in any district court where the discovery is or will be taken if different from the district where the action is pending. ~~On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.~~	Parties must go to the court where case is pending; nonparties to the district where discovery taken if different from where action pending. NOTE: This allows nonparties who have to produce documents only to go to local court.
(b) **Motion.** (1) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such disclosure. (2) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, response, designation, production, or inspection. This motion may be made if: (i) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or (ii~~2~~) if a party, or other deponent, or a person designated to testify on behalf of a party or other	Changed now that adopting initial disclosures. Used the federal rule's division between failure to make a disclosure and failure to respond to a request. This changes this rule substantively to allow for sanctions (other than fees) without a previous order compelling discovery ONLY when the party fails to make initial disclosures. The second portion of (b)(1) has been moved from elsewhere in the current rule.

deponent fails: (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or (B) to answer a question propounded or submitted upon oral examination or upon written questions; or (iii~~3~~) if a party fails: (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or (B) to answer an interrogatory submitted under Rule 197; or (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196.~~;~~ ~~the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.~~ When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6. c) **Evasive or incomplete answer.** For purposes of this	

subdivision an evasive or incomplete answer is to be treated as a failure to answer. (d) **Disposition of motion to compel: award of expenses.** If the motion is granted, the court ~~shall~~must, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied. (e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.	Note TX uses “may” for award of sanctions after denial of motion. Federal Rules say “must”.

215.2 Failure to Comply with Order or with Discovery Request.

(a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) **Sanctions by Court in Which Action is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the

failure to obey any orders except an order to submit to a physical or mental examination; (7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination. (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court. **215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.** If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment. **215.4 Failure to Comply with Rule 198** (a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or	Note 215.4 could be included in Rule 198.

objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion. (b) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit. **215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.** (a) **Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. (b) **Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in	

attending, including reasonable attorney fees.

215.6 Exhibits to Motions and Responses.

Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

215.7 Duty to Preserve Electronically Stored Information; Sanctions

(a) Duty. A party has a duty to take reasonable and proportional steps to preserve electronically stored information relevant to the dispute or lawsuit after:

(1) Service of a citation;
(2) Service of a notice that complies with 215.7(b); or
(3) From the time a claim of privilege under 192.5(a) arises.

(b) **Notice.** A written notice to preserve electronically stored information or of litigation triggers the duty described in 215.7(a). The notice shall state with specificity the claim or claims of the anticipated action. A party receiving such notice must take reasonable and proportional steps to preserve electronically stored information, which may differ from steps that the party seeking preservation demands.

(c) **Failure to Preserve Electronically Stored Information.** A court may order sanctions described in 215.7(d) if electronically stored information that should have been preserved is lost because:

(1) a party failed to take reasonable steps to preserve it;
(2) it cannot be restored or replaced through additional discovery; and
(3) the trial court finds prejudice to another party from loss of the information.

(d) **Sanctions.**

(1) the party may present evidence concerning the loss of the evidence;
(2) the court may order measures no greater than necessary to cure the prejudice but must not comment

on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence; and (3) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment. (e) **Safe harbor.** Unless a party is subject to the duty to preserve described in 215.7(a), a party's management of electronically stored information in accordance with its usual course of business or ordinary practices does not constitute an intent to deprive another party the information's use in the litigation for purposes of 215.7(d)(3).	
215.8. Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.	Texas needs this.

Tab J

Tex. R. Civ. P. 215(with redline suggestions)	Fed. R. Civ. P. 37	Issues
RULE 215. ABUSE OF DISCOVERY; SANCTIONS	**RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS**	
215.1 Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1) *In General*.** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.	
a) **Appropriate court.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty may be made in any district court where the discovery is or will be taken if different from the district where the action is pending. ~~On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any~~	**(2) *Appropriate Court*.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty ~~must~~ may be made in ~~the~~ any district court where the discovery is or will be taken if different from the district where the action is pending.	**I prefer the Federal rule as redlined—parties must go to the court where case is pending; nonparties to the district where discovery taken if different from where action pending. NOTE: This allows nonparties who have to produce documents only to go to local court.**

~~district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.~~		
(b) **Motion.** (1) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such disclosure. (2) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, response, designation, production, or inspection. This motion may be made if: (i) If a party or other deponent which is a corporation or other	**(3) *Specific Motions*.** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 194~~26(a)~~xx, any other party may move to compel disclosure and for appropriate sanctions. **(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30or 31; **(ii)** a corporation or other entity fails to	**We need to change this rule now that we are adopting initial disclosures. I have used the federal rule's division between failure to make a disclosure and failure to respond to a request. This changes this rule substantively to allow for sanctions (other than fees) without a previous order compelling discovery ONLY when the party fails to make initial disclosures.** **The highlighted portion of (b)(1) has been moved from elsewhere in the current rule.**

entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or (ii~~2~~) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails: (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or (B) to answer a question propounded or submitted upon oral examination or upon written questions; or (~~3~~iii) if a party fails: (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or (B) to answer an interrogatory submitted under Rule 197; or (C) to serve a written response to a request for inspection submitted under Rule 196, after	make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.	

proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196.~~;~~ ~~the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery~~.		
When taking a deposition on oral examination, the proponent of the question may complete or	**(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or	

adjourn the examination before he applies for an order.	adjourn the examination before moving for an order.	
If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.		
c) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.	**(4)** ***Evasive or Incomplete Disclosure, Answer, or Response*****.** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.	
(d) **Disposition of motion to compel: award of expenses.** If the motion is granted, the court must~~shall~~, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other	**(5)** ***Payment of Expenses; Protective Orders*****.** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct	

circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.	necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award of expenses unjust.	
If the motion is denied, the court may, after opportunity for hearing, require the	**(B)** *If the Motion Is Denied*. If the motion is denied, the court may issue any protective	**TX uses "may" for award of sanctions after denial of motion. Feds say "must"**

moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.	order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.	
If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.	**(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.	
(e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h),	*(No directly related provision)*	

the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.		
215.2 Failure to Comply with Order or with Discovery Request. (a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions Sought in the District Where the Deposition Is Taken*****.** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.	
(b) **Sanctions by Court in Which Action is Pending.** If a party or an officer, director,	**(b) . . .**	

or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204~~.1~~ or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following: (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party; (2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him; (3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;	**(2) Sanctions Sought in the District Where the Action Is Pending.** **(A)** ***For Not Obeying a Discovery Order.*** If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part;	

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; (6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.	(vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. **(B)** ***For Not Producing a Person for Examination****.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** ***Payment of Expenses****.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.	

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.		
	(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit. **(1)** ***Failure to Disclose or Supplement*****.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable expenses,	**Exclusion sanction is in Texas Rule 193.6.**

	including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).	
c) **Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.	*(No directly related provision)*	
215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by	*(No directly related provision)*	

paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.		
215.4 Failure to Comply with Rule 198 (a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion. (b) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the	**(2) *Failure to Admit*.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making	**215.4 could be included in Rule 198**

reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.	that proof. The court must so order unless: **(A)** the request was held objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance; **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.	
215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses. (a) **Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees. (b) **Failure of witness to attend.** If a party gives notice of the taking of an oral	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1) *In General*.** **(A)** *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if: **(i)** a party or a party's officer, director, or managing agent—or a person designated	

deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.	under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. **(2)** ***Unacceptable Excuse for Failing to Act*.** A failure described in Rule 37(d)(1)(A) is not excused on the	

	ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3) *Types of Sanctions*.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.	
215.6 Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.	*(No directly related provision)*	
215.7	(e) Failure to Preserve Electronically Stored Information. [addressed separately]	
(No directly related provision)	**(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in	**Texas needs this.**

215.8. Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.	developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.	

(No directly related provision)	**(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.	

Tab K

215.7 Duty to Preserve Electronically Stored Information; Sanctions

(a) **Duty.** A party has a duty to take reasonable and proportional steps to preserve electronically stored information relevant to the dispute or lawsuit after:

(1) Service of a citation;

(2) Service of a notice that complies with 215.7(b); or

(3) From the time a claim of privilege under 192.5(a) arises.

(b) **Notice.** A written notice to preserve electronically stored information or of litigation triggers the duty described in 215.7(a). The notice shall state with specificity the claim or claims of the anticipated action. A party receiving such notice must take reasonable and proportional steps to preserve electronically stored information, which may differ from steps that the party seeking preservation demands.

(c) **Failure to Preserve Electronically Stored Information.** A court may order sanctions described in 215.7(d) if electronically stored information that should have been preserved is lost because:

(1) a party failed to take reasonable steps to preserve it;

(2) it cannot be restored or replaced through additional discovery; and

(3) the trial court finds prejudice to another party from loss of the information.

(d) **Sanctions.**

(1) the party may present evidence concerning the loss of the evidence;

(2) the court may order measures no greater than necessary to cure the prejudice but must not comment on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence; and

(3) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(e) **Safe harbor.** Unless a party is subject to the duty to preserve described in 215.7(a), a party's management of electronically stored information in accordance with its usual course of business or ordinary practices does not constitute an intent to deprive another party the information's use in the litigation for purposes of 215.7(d)(3).

Tab L

DUTY TO PRESERVE ELECTRONICALLY STORED INFORMATION; SANCTIONS

(a) DUTY.

1) Prior to service of a citation or notice as specified in subsection (b) of this Rule, a party's duty regarding electronically stored information is to not act with the intent to deprive another actual or potential party to a lawsuit of the use of that information in the lawsuit that the party knows about or reasonably anticipates. Absent service of a citation or notice as specified in subsection (b) of this Rule, a party may manage electronically stored information in accordance with its usual course of business or ordinary practices and such actions do not constitute an intent to deprive another party of the use of the information in any lawsuit.

2) After service of a citation or notice that complies with subsection (b) of this Rule, a party has a duty to take reasonable and proportional efforts to preserve electronically stored information relevant to the dispute or lawsuit in compliance with subsections (b)(1) and (b)(2) of this Rule.

3) In the event of any dispute, the party seeking discovery of electronically stored information has the burden to prove the existence of a duty to preserve the specific electronically stored information at issue under this Rule.

(b) NOTICE.

1) Notwithstanding its usual course of business, a party must take reasonable and proportional steps to preserve electronically stored information after:

   A. Service of a citation; or

   B. Service of a notice to preserve electronically stored information. The notice shall be conspicuously styled "NOTICE TO PRESERVE ELECTRONICALLY STORED INFORMATION," and it shall state with specificity the claim or claims of the anticipated action. The notice shall be served on the party or the party's designated agent for service of process as provided by law.

2) A party's duty to preserve electronically stored information under this subsection is limited to electronically stored information in its possession, custody, or control that is directly relevant to the claim or claims identified in the citation or notice and any known or reasonably anticipated defenses or counterclaims concerning the asserted claim or claims.

3) The Notice in subsection (b)(1)(B) may contain specific requests to preserve certain sources or types of electronically stored information but such identifications or demands are not determinative of the scope of any duty to preserve; the party's duty to preserve remains bounded by reasonableness and proportionality and the party obligated to preserve electronically stored information is in the best position to

determine the scope, means, methods and manners of reasonable and proportional preservation.

(c) AVAILABLE RELIEF.

1) A party may petition the court for relief from a notice to preserve electronically stored information. The court shall grant such relief if:

A. The notice was not properly served;

B. The notice failed to state with specificity the claim or claims of the anticipated action; or

C. The notice is otherwise unduly burdensome as may be determined by reference to Rules 192 and 196.

2) Any party may petition the court for relief regarding the scope of preservation required in connection with service of a citation or a notice to preserve electronically stored information. The court shall grant relief if:

A. The party seeking preservation reasonably has made demands regarding the scope or preservation that are not reasonable or proportional and the party subject to the duty to preserve has a reasonable belief that a dispute regarding preservation needs clarification

B. The party seeking preservation reasonably has actual knowledge that the party subject to the duty to preserve is not taking reasonable and proportional efforts to preserve relevant electronically stored information.

3) A motion for relief under subsections (c)(1) and (2)(A) is not necessary if a party takes reasonable and proportional steps to preserve electronically stored information even if those steps are different from those demanded by a party seeking preservation.

4) A motion for relief under subsections (c)(2)(B) is not necessary for a party to later assert that a party with the duty to preserve relevant electronically stored information failed to take reasonable steps under subsection (d).

5) A motion for relief under this subsection may be filed in a proper court of any county where venue of the anticipated suit may lie or where the actual lawsuit has been filed.

3) The filing of a petition does not constitute waiver of any otherwise valid objections to personal jurisdiction in subsequent litigation.

(d) SANCTIONS. If electronically stored information that should have been preserved in accordance with this Rule is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court, upon finding prejudice to another party from the loss of the information:

1) May order measures no greater than necessary to cure the prejudice; or

2) May, only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

A. Presume that the lost information was unfavorable to the party;

B. Instruct the jury that it may or must presume the information was unfavorable to the party; or

C. Dismiss the action or enter a default judgment if lesser remedies are inadequate to cure the prejudice.

Tab M

From: Subcommittee Rules 216-299a
Professor Elaine Carlson, Chair
Tom Riney, Vice Chair
Judge David Peeples
Alistair Dawson
Kennon Wooten
Kent Sullivan
Bobby Meadows

Date: February 10, 2019

Re: The Role of an Attorney Ad Litem Appointed Pursuant to TRCP 244 When Defendant is Served by Publication

Issue:

What is the appropriate role of an attorney ad litem appointed pursuant to Texas Rule of Civil Procedure (TRCP) 244 when a defendant is served by publication?

Existing Rule & Proposal of The State Bar of Texas Committee on Court Rules

TRCP 109 allows, on a limited basis, service by publication on a defendant in Texas civil lawsuits:

> When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, and to such party when the affidavit is made by his agent or attorney, or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service.

TRCP 244 requires the court to appoint an attorney ad litem to represent the absent defendant served by publication:

> Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

The State Bar of Texas Committee on Court Rules, concerned at the amount of the ad litem attorney fees that may be taxed against a prevailing plaintiff and questioning the propriety of the ad litem attorney providing full-blown representation of a missing defendant, proposed amendments to TRCP 244 that would limit the role of the attorney ad litem. Specifically, Carlos Soltero, Chair of the Committee, proffered this explanation:

> Under the current Rule 244, which provides for the appointment of an attorney to defend a suit in which service is made by publication, appointed attorneys have often perceived a duty to exhaust all remedies available to the non-appearing defendant and, in many cases, to represent the defendant's interests on appeal. The fees for these services are taxed as costs, ultimately borne by the plaintiff. *See Cahill v. Lyda,* 826 S.W.2d 932 (Tex. 1992).
>
> The practice of appointing an attorney for an absent defendant has its roots in Mexican and Spanish law and was adopted in Texas after Texas attained statehood. *See* Millar, *Jurisdiction Over Absent Defendants: Two Chapters in American Civil Procedure*, 14 La. L. Rev. 321, 335-335 (1954). This practice reflects a minority view in American jurisprudence, having been adopted by only four states. Id. At 335-38 (adopting Spanish law were Texas, Louisiana, Kentucky and Arkansas). One of those states, Louisiana, has abandoned the Spanish rule in favor of a rule similar to the rule proposed here. *See* La. Code Civ. Proc. Ann. art. 5094 (West 2003).
>
> The proposed Rule 244 limits and clarifies the role of the appointed attorney, whose duties would end after the attorney submits a report documenting the efforts made to locate the defendant and provide notice of the proceedings. The Committee believes that the proposed rule, by preventing automatic entry of default judgments against defendants who can be located, accomplishes the primary aim of the current rule. The Committee also notes that when a default judgment is entered following service by publication, Rule 329 allows the defendant two years in which to file a motion for new trial seeking to set aside the judgment.
>
> The principal advantage of the proposed rule is that it reduces the cost of the litigation. The proposed rule, by providing that the appointed attorney is not responsible for defending the suit or pursing an appeal, and by requiring fees and expenses awarded to be reasonable, eliminates the often-substantial fees and expenses associated with those responsibilities. Moreover, by clarifying that the appointed attorney does not represent the defendant, the proposed rule addresses the concern that under the current rule, the appointed attorney might owe a duty to a non-appearing defendant who later comes forward and alleges the representation was inadequate. By eliminating the specter of liability to the absent defendant, the proposed rule eliminates the current incentive for attorneys to render services and incur expenses whose benefit to the absent defendant cannot be justified in light of their cost to the plaintiff.

The proposal of the State Bar of Texas Committee on Court Rules is as follows:

244.1 APPOINTMENT OF ATTORNEY. If service has been made by publication and no answer has been filed nor appearance entered within the prescribed time, the court must appoint an attorney who, without acting as an attorney for any party, must use due diligence to try to locate the defendant.

244.2 REPORT OF ATTORNEY. The appointed attorney must make a report in open court or file a report with the court not later than the thirtieth day after being appointed, or within such other reasonable time period as the court may allow. The report must describe the parties' attempts to locate the defendant or obtain service of nonresident notice, describe the appointed attorney's attempts to locate the defendant, and provide the defendant's location, if discovered. No judgment on service by publication may be granted before the report is made and the court finds that the defendant cannot be located or personal service cannot be obtained.

244.3 DISCHARGE OF ATTORNEY. The court must discharge the appointed attorney from any further duties upon receiving a report from the attorney that complies with this Rule. The appointed attorney will have no duty or authority to represent the defendant on the merits of the case or to appeal any judgment in the case.

244.4 FEES AND EXPENSES. The court must award the attorney a reasonable fee for services provided and all reasonable expenses incurred during the appointment, to be taxed as part of the costs in the judgment rendered by the court.

Analysis:

Citation by publication is constructive service accomplished by publishing a truncated citation in the newspaper for four weeks generally in the county where the lawsuit is pending. TEX. R. CIV. P. 114-11. As observed by the United States Supreme Court in the seminal case of *Mullane v. Central Hanover Bank*, it is a very weak form of notice and raises serious due process concerns. **The form of service [personal, substituted or constructive] must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."** *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (emphasis added). The Court observed:

> It would be idle to pretend that publication alone is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper,

> and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint. Id. at 315.

However, the Court recognized that, for missing or unknown persons service by publication would not offend due process. *Id.* at 317.

The United States Supreme Court revisited the adequacy of service by publication in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 1983). Notice of a public auction of real property for unpaid taxes was given to creditors by publication. Indiana law required that notice be posted at the county courthouse and published for three consecutive weeks. The Court held "unless the mortgagee is not reasonably identifiable, constructive notice [by publication] alone does not satisfy the mandate of *Mullane*." *Id*. at 798. The identity of the mortgagee was known and the Court assumed the mortgagee's address could be ascertained by reasonably diligent efforts. When an interested party's identity is known, service by publication is generally inadequate and violates due process guarantees. However, constructive service by publication is sufficient when the interested party's identity is not known.

In *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), the United States Supreme Court held notice of a probate proceeding by publication to known creditors of the decedent or creditors whose identity could be reasonably ascertainable violated due process and Oklahoma statutes to the contrary were constitutionally infirm. The creditor, unaware of the probate proceeding, did not file its claim in the probate proceeding until after the statutory deadline passed. However, because a judgment premised on service by publication as to known creditors is void, the collateral attack by the creditor could be made at any time.

The Texas Supreme Court addressed the constitutionality of service by publication in *In re E.R*., 385 S.W.3d 552 (Tex. 2012). A mother's parental rights were terminated with service by citation accomplished by publication. The court held that method of service is invalid absent a demonstrated diligent attempt to locate the parent. The trial court must "inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant before granting a judgment when the only service of citation is by publication." TEX. R. CIV. P. 109; ; *see also* TEX. FAM.CODE § 161.107(b) ("If a parent of the child has not been personally served in a suit in which the Department of Family and Protective Services seeks termination, the department must make a diligent effort to locate that parent."). A lack of diligence makes service by publication ineffective. The court clarified what constitutes sufficient diligence, opining;

> A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality. Even disregarding the factual dispute about what [Mother] L.R. told Chidozie about her address, the uncontroverted evidence here establishes a lack of diligence. Chidozie neglected "obvious inquiries" a prudent investigator would have made. *In the Interest of S.P.,* 672 N.W.2d at 848. She did not contact L.R.'s mother, nor she did attempt service by mail in an effort to obtain a forwarding

> address. She did not pursue other forms of substituted service that would have been more likely to reach L.R., such as leaving a copy with L.R.'s mother. *See* TEX.R. CIV. P. 106(b)(1); *see also McDonald v. Mabee,* 243 U.S. 90, 92, 37 S.Ct. 343, 61 L.Ed. 608 (1917) ("To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."). Even if L.R.'s address was not "reasonably ascertainable," an address was unnecessary for personal service on L.R. because she visited the Department's offices during the relevant time period. When a known parent has not left the jurisdiction, when she has attended at least two court hearings and has come to the Department offices for a prescheduled, hour-long meeting with her children during the very period service was being attempted, and when the Department can reach her by telephone and can communicate with her family members, service by publication cannot provide the kind of process she is due. Sending a few faxes, checking websites, and making three phone calls—none of which were to L.R. or her family members—is not the type of diligent inquiry required before the Department may dispense with actual service in a case like this. *Mullane* authorized service by publication when "it is not reasonably possible or practicable to give more adequate warning." *Mullane,* 339 U.S. at 317, 70 S.Ct. 652. Here, it was both possible and practicable to more adequately warn L.R. of the impending termination of her parental rights, and notice by publication was therefore constitutionally inadequate. *Jones v. Flowers,* 547 U.S. 220, 237, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).
>
> *In re E.R.* at 566-567.

The Family Code provision that "the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed" only applies to parents for whom service by publication is valid. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *Id.* at. 566. However, a parent must take prompt action to set aside the judgment upon learning of an adverse judgment, even when service by publication violated their due process rights. "If, after learning that a judgment has terminated her rights, a parent unreasonably stands mute, and granting relief from the judgment would impair another party's substantial reliance interest, the trial court has discretion to deny relief." The record at issue in the case was silent as to when Mother learned that her rights were terminated or what actions she took in response. Accordingly, the case was reversed and remanded to the trial court to determine if Mother unreasonably delayed in seeking relief after learning of the judgment. If she acted with reasonable diligence, she would be entitled to a new trial.

Sub-Committee Recommendation

The subcommittee shares the due process concerns about the efficacy of service by publication and questions the realistic ability of an attorney ad litem to adequately

represent an absent client served by publication. Constructive service of citation need not be limited to publication and may be effectuated by any method of service reasonably calculated under the circumstances to give the absent defendant notice (such as through a social media platform). Another subcommittee chaired by Richard Orsinger is currently exploring alternative methods of constructive service besides service by publication.

This subcommittee is tasked with addressing (1) the appropriate role of an attorney ad litem appointed when a defendant is served constructively and (2) the payment of the ad litem fees. The subcommittee noted the disparity in the rules that require prior court approval before obtaining an order approving substituted service on someone other than the defendant and the provisions of TRCP 109 that allow the clerk to issue citation by publication for a defendant without prior judicial approval. Also of concern is the potential imposition of substantial ad litem costs (including attorneys fees of the ad litem) that may be taxed against the plaintiff (*see, e.g.*, *Garza v. Slaughter*, 331 S.W.3d 43 (Tex. App.-Houston [1st Dist.] 2010, no pet.)), as well as the lack of limitation on the scope of the ad litem's role. *See, e.g.*, *Cahill v. Lyda,* 826 S.W.2d 932, 933 (Tex. 1992) ("The attorney ad litem must exhaust all remedies available to the client and, if necessary, represent his [absent] client's interest on appeal."); *In re Estate of Stanton*, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. denied) ("It the attorney ad litem's duty to defend the rights of his involuntary client with the same vigor and astuteness as he would employ in the defense of clients who had expressly employed him for such purpose."); *Isaac v. Westheimer Colony Assoc.*, 933 S.W.2d 588, 590 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("The purpose of the portion of Rule 244 requiring the appointment of an attorney ad litem is to provide a non-appearing defendant effective representation."). The efficacy of an appointed ad litem to represent an absent defendant on the merits of the proceeding is questionable. Accordingly, the subcommittee suggests limiting the scope of the attorney ad litem's role.

The subcommittee recommends combining and amending TRCP 109 and 244 as follows:

Rule 109 [Constructive Service of Process] Citation By Publication

A plaintiff should first attempt to obtain service of citation on a defendant, pursuant to Rule 106, by personal in hand service or via the mail (certified or registered, return receipt requested) by qualified process servers. As to a non-resident defendant, the same attempt should be made in conformity with Rule 108.[1]

[If personal service of process is unsuccessful, the plaintiff must use diligent efforts to obtain information of where the defendant resides or a location where the defendant can probably be found before moving for substituted service under Rule 106(b).

If substituted service is unsuccessful [or if substituted service is not possible as the whereabouts of a defendant are unknown after diligent efforts have been made], the plaintiff may move for constructive service under this rule. The motion must be supported by a detailed affidavit by an affiant with personal knowledge describing with particularity the actions the plaintiff took in attempting to locate the defendant and the results of all earlier service attempts. An oral hearing on the motion must be conducted by the court and a record made. It is the court's duty to inquire into the sufficiency of the diligence exercised by the plaintiff in attempting to ascertain the defendant's residence or whereabouts.

If the trial court is not satisfied that sufficient diligent efforts have been made, the court may either order the plaintiff to make additional efforts to locate the defendant or appoint an attorney ad litem to assist the court in attempting to locate the defendant's residence or a location where the defendant can probably be found. The ad litem will have no other role and cannot recover fees or costs associated with any other role. The ad litem must assist the court alone and must not act as an attorney for any party.

[The trial court should inform the plaintiff of the following:] Reasonable and necessary fees sought by the attorney ad litem will be taxed as costs. While costs generally are taxed against the unsuccessful party, TEX. R. CIV. P. 131, for good cause the trial court may tax costs against the successful party. TEX. R. CIV. P. 141. The plaintiff may be required to pay those costs before final judgment and failing to do so, the plaintiff's suit may be dismissed, TEX. R. CIV. P. 143, or the plaintiff's property may be levied on, seized, and sold to satisfy unpaid costs, including unpaid ad litem fees. TEX. R. CIV. P. 129–130.

[1] For example, if the plaintiff has a last known mailing address, diligence requires service first via the mail to determine if the defendant can be served at that location and if not, whether a forwarding address for the defendant can be obtained.

The ad litem must review the plaintiff's efforts, conduct its own diligent search for the defendant, and file an affidavit with the trial court not later than the thirtieth day after being appointed or within such other reasonable time period as the court allows. The affidavit must describe with particularity the actions taken by the plaintiff and the ad litem in attempting to locate the defendant and the results of those efforts. An oral hearing must be conducted by the court and a record made. It is the duty of the court to inquire into the sufficiency of the diligence exercised by the attorney ad litem in attempting to ascertain the defendant's residence or whereabouts.

If the trial court is not satisfied that sufficient diligent efforts have been made by the ad litem, the court may direct the ad litem to undertake additional efforts to locate the defendant [or appoint a different ad litem to undertake that task]. If the trial court is satisfied that a diligent effort has been made by the ad litem to locate the defendant but that those efforts were unsuccessful, the court must discharge the ad litem from any further duties and may order constructive service [by publication] or service by any means reasonably effective under the circumstances to give the defendant notice pursuant to Rule 109a. The clerk shall issue citation in accordance with the court's order.

If the defendant fails to timely file an answer or otherwise timely appear, the trial court may enter a default judgment.

A diligent search, for purposes of this rule, must include inquiries that someone who really wants to find the defendant would make. A diligent search is measured not by the quantity of the search but the quality of the search. In determining whether a search is diligent, the trial court should consider the attempts made to locate the missing person or entity to see if attempts are made through channels expected to render the missing identity. While a reasonable search does not require the use of all possible or conceivable means of discovery, it is an inquiry that a reasonable person would make, and it must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought. Whether all reasonable means have been exhausted has to be determined by the circumstances of each particular case.

If the attorney ad litem requests compensation, the attorney ad litem must be reimbursed for reasonable and necessary expenses incurred and paid a reasonable hourly fee for necessary services performed. At the conclusion of the appointment, an attorney ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. On request of any party, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary.

Duties of Attorney Ad Litem under the Family Code

Do we want to enumerate more specifically the duties of the attorney at litem?

V.T.C.A., Family Code § 107.014

§ 107.014. Powers and Duties of Attorney ad Litem for Certain Parents

Effective: September 1, 2013

(a) Except as provided by Subsections (b) and (e), an attorney ad litem appointed under Section 107.013 to represent the interests of a parent whose identity or location is unknown or who has been served by citation by publication is only required to:

(1) conduct an investigation regarding the petitioner's due diligence in locating the parent;

(2) interview any party or other person who has significant knowledge of the case who may have information relating to the identity or location of the parent; and

(3) conduct an independent investigation to identify or locate the parent, as applicable.

(b) If the attorney ad litem identifies and locates the parent, the attorney ad litem shall:

(1) provide to each party and the court the parent's name and address and any other available locating information unless the court finds that:

(A) disclosure of a parent's address is likely to cause that parent harassment, serious harm, or injury; or

(B) the parent has been a victim of family violence; and

(2) if appropriate, assist the parent in making a claim of indigence for the appointment of an attorney.

(c) If the court makes a finding described by Subsection (b)(1)(A) or (B), the court may:

(1) order that the information not be disclosed; or

(2) render any other order the court considers necessary.

(d) If the court determines the parent is indigent, the court may appoint the attorney ad litem to continue to represent the parent under Section 107.013(a)(1).

(e) If the attorney ad litem is unable to identify or locate the parent, the attorney ad litem shall submit to the court a written summary of the attorney ad litem's efforts to identify or locate the parent with a statement that the attorney ad litem was unable to identify or locate the parent. On receipt of the summary required by this subsection, the court shall discharge the attorney from the appointment.

Credits Added by Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), § 5, eff. Sept. 1, 2013.

Compensation for Attorney Ad Litem

We may want to borrow from TEX. R. CIV. P. 173?

TEX. R. CIV. P. 173 Guardian Ad Litem

173.1. Appointment Governed by Statute or Other Rules

This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules

173.2. Appointment of Guardian ad Litem

(a) *When Appointment Required or Prohibited*. The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if:

(1) the next friend or guardian appears to the court to have an interest adverse to the party, or

(2) the parties agree.

(b) *Appointment of the Same Person for Different Parties*. The court must appoint the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

173.3. Procedure

(a) *Motion Permitted But Not Required*. The court may appoint a guardian ad litem on the motion of any party or on its own initiative.
(b) *Written Order Required*. An appointment must be made by written order.
(c) *Objection*. Any party may object to the appointment of a guardian ad litem.

173.4. Role of Guardian ad Litem

(a) *Court Officer and Advisor*. A guardian ad litem acts as an officer and advisor to the court.

(b) *Determination of Adverse Interest*. A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.

(c) *When Settlement Proposed*. When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

(d) *Participation in Litigation Limited*. A guardian ad litem:

(1) may participate in mediation or a similar proceeding to attempt to reach a settlement;
(2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest;
(3) must not participate in discovery, trial, or any other part of the litigation unless:
(A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and
(B) the participation is directed by the court in a written order stating sufficient reasons.

173.5. Communications Privileged

Communications between the guardian ad litem and the party, the next friend or guardian, or their attorney are privileged as if the guardian ad litem were the attorney for the party.

173.6. Compensation

(a) *Amount*. If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.

(b) *Procedure*. At the conclusion of the appointment, a guardian ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.

(c) *Taxation as Costs*. The court may tax a guardian ad litem's compensation as costs of court.

(d) *Other Benefit Prohibited*. A guardian ad litem may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule.

173.7. Review

(*a) Right of Appeal.* Any party may seek mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation. Any party and a guardian ad litem may appeal an order awarding the guardian ad litem compensation.

*(b) Severance***.** On motion of the guardian ad litem or any party, the court must sever any order awarding a guardian ad litem compensation to create a final, appealable order.

*(c) No Effect on Finality of Settlement or Judgment***.** Appellate proceedings to review an order pertaining to a guardian ad litem do not affect the finality of a settlement or judgment.

COMMENT--2004

1. The rule is completely revised.

2. This rule does not apply when the procedures and purposes for appointment of guardians ad litem (as well as attorneys ad litem) are prescribed by statutes, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.

3. The rule contemplates that a guardian ad litem will be appointed when a party's next friend or guardian appears to have an interest adverse to the party because of the division of settlement proceeds. In those situations, the responsibility of the guardian ad litem as prescribed by the rule is very limited, and no reason exists for the guardian ad litem to participate in the conduct of the litigation in any other way or to review the discovery or the litigation file except to the limited extent that it may bear on the division of settlement proceeds. See *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004) (per curiam). A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.

4. Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Rule 44. In no event may a guardian ad litem supervise or supplant the next friend or undertake to represent the party while serving as guardian ad litem.

5. As an officer and advisor to the court, a guardian ad litem should have qualified judicial immunity.

6. Though an officer and adviser to the court, a guardian ad litem must not have *ex parte* communications with the court. See Tex. Code Jud. Conduct, Canon 3.

7. Because the role of guardian ad litem is limited in all but extraordinary situations, and any risk that might result from services performed is also limited, compensation, if any is sought, should ordinarily be limited.

8. A violation of this rule is subject to appropriate sanction.

Tab N

Memorandum to Texas Supreme Court Advisory Committee on

Ex Parte Communication in Problem-Solving Courts

1. Referral inquiry from Chief Justice Hecht:

Ex Parte Communications in Problem-Solving Courts. In the attached email, Hon. Robert Anchondo proposes adding a comment to or amending Cannon 3 of the Code of Judicial Conduct to permit ex parte communications in problem-solving courts. The following article may inform the Committee's work: Brian D. Shannon, *Specialty Courts, Ex Parte Communications, and the Need to Revise the Texas Code of Judicial Conduct*, 66 Baylor L. Rev. 127 (2014).

- The referenced law review article is attached as Exhibit "A."

- The referenced email from Hon. Robert Anchondo is excerpted here:

Greetings Jaclyn, pursuant to our conversation I am respectfully requesting that Canon 3 (B) (8) (e) be modified or a comment be included as follows to address ex parte communication issues facing problem solving courts: **"A judge may initiate, permit, or consider ex parte communication expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving court such as many mental health courts, drug courts, DWI treatment courts, veterans courts, juvenile courts. In this capacity, the judge may assume a more interactive role with the parties, treatment providers, community supervision officers, law enforcement officers, social workers, and others"**. Regulation of ex parte contacts in the drug court context is evolving. Under the 1990 version of the ABA Model Code of Judicial Conduct, ex parte communications were prohibited, except in limited situations involving administrative purposes, scheduling, or emergencies. The 2007 ABA Model Code of Judicial Conduct dramatically changes the ethical landscape by permitting ex parte communication in drug and other problem solving courts. Rule 2.9 (A) (5) of the 2007 Model Code provides that a judge may "initiate, permit, or sider any ex parte communication when expressly authorized by law to do so." The comment to this provision states: "A judge may initiate, permit, or consider ex parte communications when authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, DWI problem courts or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others." Please forward this information to whomever it may be necessary to address this issue and hopefully resolve performing our duties of Judicial Office Impartially and Diligently. Thank you for your attention.

2. Excerpt from Canon 3 of Texas Code of Judicial Conduct:

Performing the duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(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.

3. Subcommittee's alternative suggestions for discussion by the full committee:

a. No change to Canon 3.

b. Add an additional exception to Canon 3.B(e) so that it reads: "considering an ex parte communication expressly authorized by law or the parties' consent."

c. Add consent provision and comment, such as that suggested by the ABA Model Code:

"A judge may initiate, permit, or consider ex parte communications when authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, DWI problem courts or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others."

Exhibit A

SPECIALTY COURTS, EX PARTE COMMUNICATIONS, AND THE NEED TO REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Brian D. Shannon*

*Charles "Tex" Thornton Professor of Law, Texas Tech University School of Law; B.S., summa cum laude, Angelo State University, 1979; J.D., with high honors, The University of Texas School of Law, 1982. Professor Shannon serves on the board of directors for StarCare Specialty Health System (formerly known as Lubbock Regional Mental Health & Mental Retardation Center), is a past chair of the State Bar of Texas Committee on People with Disabilities, and from 2003-11 was a gubernatorial appointee to the Texas Governor's Committee on People with Disabilities. This Article represents the opinions of the author, however, and does not necessarily reflect the views of these other organizations. Shannon also served on the Texas legislative task force that re-wrote the Texas statutes pertaining to competency to stand trial, and he is the co-author of multiple editions of a book on Texas criminal procedure as it relates to persons diagnosed with mental illness. Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness: An Analysis and Guide (NAMI-Texas 4th ed. 2008). For their comments and guidance, the author would like to thank Judge Ruben Reyes, who chairs the Texas Governor's Criminal Justice Advisory Council and is the presiding judge of the Lubbock County, Texas, Adult Drug Court, and Judge Oscar Kazen, who is the Associate Probate Court Judge for Bexar County, Texas, and presides over a specialty court that oversees San Antonio's Involuntary Outpatient Civil Commitment Program.

Exhibit A

I. INTRODUCTION

As of January 2013, there were roughly "140 operational specialty courts in Texas."[1] These specialty courts include an array of focuses, "such as adult and juvenile drug courts, veteran courts, DWI courts, . . . family drug courts," and mental health courts.[2] A listing of Texas specialty courts that is maintained by the Texas Governor's office includes the foregoing types of specialty courts, as well as reentry courts, DWI hybrid courts, co-occurring disorder courts, and prostitution courts.[3] These courts differ from the usual adjudicatory model. For example, the first of the "Ten Key Components" of drug courts is the following: "Drug courts integrate alcohol and other drug treatment services with justice system case processing."[4] Going beyond adjudication and punishment, the "mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity."[5] Correspondingly, the following characteristics are typical of "the vast majority of mental health courts":[6]

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[1] The Governor of the State of Tex. Crim. Justice Div., *Criminal Justice Advisory Council Report: Recommendations for Texas Specialty Courts*, at 1, OFFICE OF THE GOVERNOR - RICK PERRY, http://governor.state.tx.us/files/cjd/CJAC_Report_January_2013.pdf (last visited Nov. 23, 2013) [hereinafter CJAC Report]. A listing maintained by the Texas Governor's office of all such specialty courts in Texas identified a total of 140 specialty courts as of August 1, 2013. *See* The Governor of the State of Tex. Crim. Justice Div., *Texas Specialty Courts*, OFFICE OF THE GOVERNOR–RICK PERRY (Aug. 1, 2013), *available at* http://governor.state.tx.us/files/cjd/Specialty_Courts_By_County_August_2013.pdf [hereinafter Specialty Courts List].

[2] CJAC Report, *supra* note 1, at 1; *see also* The Governor of the State of Tex., Executive Order RP 77—Relating to the reauthorization of the operation of the Governor's Criminal Justice Advisory Council, 37 Tex. Reg. 2806 (2012), *available at* http://governor.state.tx.us/news/executive-order/16995/.

[3] Specialty Courts List, *supra* note 1, at 1.

[4] BUREAU OF JUSTICE ASSISTANCE, NCJ 205621, *Defining Drug Courts: The Key Components*, at 1 (2004), *available at* https://www.ncjrs.gov/pdffiles1/bja/205621.pdf.

[5] *Id.*

[6] COUNCIL OF STATE GOV'TS JUSTICE CENTER, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*, at vii (2007), BUREAU OF JUSTICE ASSISTANCE - HOME, https://www.bja.gov/Publications/MHC_Essential_Elements.pdf (last visited Nov. 23, 2013).

> • A specialized court docket, which employs a problem-solving approach to court processing in lieu of more traditional court procedures for certain defendants with mental illnesses.
>
> • Judicially supervised, community-based treatment plans for each defendant participating in the court, which a team of court staff and mental health professionals design and implement.
>
> • Regular status hearings at which treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions are imposed on participants who do not adhere to conditions of participation.
>
> • Criteria defining a participant's completion of (sometimes called graduation from) the program.[7]

The judge's role in a specialty court differs from that of the traditional judicial role.[8] As a specialty court judge, "the judge's role is less that of a traditional 'umpire,' than a problem-solver, who coordinates court proceedings with one or more parties and a range of service providers, including social workers, psychologists, drug, alcohol, employment, or family counselors, and others."[9] As one mental health court judge described, "Being a judge in a problem-solving court looks very different from what has been the judge's traditional role. A judge in a problem-solving court becomes the leader of a team rather than a dispassionate arbitrator."[10] In that regard, "the collaborative nature of drug court decision

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[7] *Id.* For further discussion of specialty courts generally (often called "therapeutic" or "problem-solving" courts); *see, e.g.*, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS (2002), *available at* http://www.courtinnovation.org/sites/default/files/JudgesProblem SolvingCourts1.pdf.

[8] *See* CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 5.03(7), 5-23 (5th ed. 2013).

[9] *Id.*

[10] Louraine C. Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model Code*, 28 JUST. SYS. J. 317, 317 (2007). Judge Arkfeld presided over both a mental health court and a homeless court; *see* Court Leadership Institute of Arizona, *Faculty*, ARIZONA JUDICIAL BRANCH, *available at* http://www.azcourts.gov/clia/Faculty.aspx & http://www.azcourts.gov/clia/

Exhibit A

making (seen most clearly in staffings) may undermine perceptions of judicial independence and impartiality."[11] In addition, because the judge—as team leader—will be coordinating information and discussion between multiple members of the specialty court team, "in such a capacity, *ex parte* communications with these various participants can be difficult to avoid."[12] Correspondingly, "a blanket prohibition on *ex parte* communication" could thwart the specialty court judge's efforts at addressing the "underlying causes of legal problems giving rise to the cases they adjudicate" such as substance abuse or mental illness.[13] In addition, exposure to ex parte communications and extensive involvement in staffings can lead to concerns regarding a specialty court judge's impartiality in any subsequent judicial proceedings—particularly in situations in which an individual has been terminated from the specialty court program.[14]

The Texas Code of Judicial Conduct does not include any provisions that recognize the new role of judges in specialty courts.[15] This Article will discuss the shortcomings in this regard in the Texas Code of Judicial Conduct, particularly with regard to ex parte communications; the approach set forth in the American Bar Association's 2007 Model Code of Judicial Conduct; and the law in several other states.[16] Finally, the Article will propose revisions to the Texas Code of Judicial Conduct pertaining to ex parte communications and specialty courts, and the related topic of disqualifications or recusals.[17]

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[11] William G. Meyer, *Ethical Obligations of Judges in Drug Courts*, THE DRUG COURT JUDICIAL BENCHBOOK 197 (Douglas B. Marlowe & William G. Meyer eds., Nat'l Drug Court Inst. 2011).

[12] GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (italics in original). At specialty court team staffings, "the judge in the problem-solving court now hears all kinds of information that a judge would not normally hear, nor would the information necessarily be considered relevant to the determination of the facts or law of the case at hand." Arkfeld, *supra* note 10, at 317.

[13] GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (emphasis in original).

[14] *See* Meyer, *supra* note 11, at 205–06 (discussing possible disqualification issues, and observing that a "judge should disclose on the record information that he or she believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes that there is no real basis for disqualification").

[15] TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2005 & Supp. 2013).

[16] *See generally* ABA MODEL CODE OF JUD. CONDUCT (2011).

[17] There are other ethical issues that can arise with regard to specialty courts that are beyond the scope of this Article. For an excellent overview discussion of ethical issues in drug courts that

II. SPECIALTY COURTS AND CURRENT SHORTCOMINGS IN THE TEXAS CODE OF JUDICIAL CONDUCT

The Texas Code of Judicial Conduct does not mention specialty courts.[18] Indeed, although a January 2005 report of the Texas Supreme Court's Task Force on the Code of Judicial Conduct included recommendations for several amendments to the Texas Code, that report also did not address specialty courts.[19] Accordingly, the current Texas Code presumptively governs judges in both traditional courts, as well as specialty courts.[20] There are several sections relevant to ex parte communications and disqualifications or recusals. First, Canon 3(B)(8) places significant limits on the judge's consideration of ex parte communications.[21] Although the current Canon includes an exception for ex parte communications that are "expressly authorized by law," the Texas Code, however, does not further define the phrase "authorized by law."[22] Does it extend to local rules establishing specialty courts, or is it limited to statutes, formally adopted administrative regulations, and court opinions? As will be discussed below, in contrast to the Texas Code, the 2007 ABA Model Code provides further guidance in this regard with respect to specialty courts.[23] Similar changes are warranted for the Texas Code.

Another issue concerning specialty courts that should be considered and addressed pertains to disqualifications or recusals. Canon 3 of the Texas Code requires a judge to perform the duties of office "impartially and diligently."[24] Specifically, subsection (B)(1) of Canon 3 requires that a judge not decide a matter "in which disqualification is required or recusal is

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would be pertinent to any specialty court, *see* Meyer, *supra* note 11; *see also* GEYH ET AL., *supra* note 8, § 10.05(3), at 10-27 (highlighting situations in which specialty court judges had "associated with criminal defendants outside of court in ways that appear improper").

[18] *See generally* TEX. CODE JUD. CONDUCT.

[19] *See* Tex. Supreme Court Task Force on the Code of Jud. Conduct, *Final Report and Recommendations* (2005), *available at* http://www.scjc.state.tx.us/pdf/rpts/cjcfinalreport.pdf (recommending several amendments to the Code). The Texas Supreme Court has never adopted any of the Task Force's recommendations for Code amendments. *See* Kevin Dubose, *The Development of Judicial Ethics in Texas*, 1 State Bar of Tex. Prof. Dev. Program, The History of Texas Supreme Court Jurisprudence Course 13, 13.6 (2013).

[20] TEX. CODE JUD. CONDUCT, Preamble.

[21] *Id.* Canon 3(B)(8).

[22] *Id.* Canon 3(B)(8)(e).

[23] *See infra* Part III.

[24] TEX. CODE JUD. CONDUCT, Canon 3.

appropriate."[25] In addition, a "judge shall perform judicial duties without bias or prejudice," and a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . ."[26] A specialty court judge may learn a considerable amount of information about a program participant both on the record and through ex parte communications as the specialty court's team leader.[27] In addition, due to "the intense level of involvement a problem-solving judge has with the defendant and the case, there has always been a question about the judge's impartiality."[28] As discussed below, some states have adopted particular provisions relating to disqualifications or recusals in specialty court proceedings.[29] Should the Texas Code of Judicial Conduct be amended to include any specific rule in this regard for specialty courts?

III. THE ABA MODEL APPROACH

The American Bar Association (ABA) substantially revised its Model Code of Judicial Conduct in 2007.[30] For the first time, the Model Code included recognition of specialty courts.[31] In particular, the revised Code addressed specialty courts in Comment 3 to Section 1 of the Application provisions of the Code, which provides:

> In recent years many jurisdictions have created what are often called "problem solving" courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others

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[25] *Id.* Canon 3(B)(1).

[26] *Id.* Canon 3(B)(5)–(6); *see also* TEX. R. CIV. P. 18b(b)(1)–(3) (identifying certain grounds for recusal in civil cases including questionable impartiality, "personal bias or prejudice," and "personal knowledge of disputed evidentiary facts").

[27] *See* Arkfeld, *supra* note 10, at 318.

[28] *Id.* at 319.

[29] *See infra* notes 135–142 and accompanying text.

[30] GEYH ET AL., *supra* note 8, § 1.03, at 1-5. There were also further amendments in 2010. *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

[31] *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.9 cmt. 4 (2011); One specialty court judge observed that the 2007 "Code for the first time recognizes those of us who work in problem-solving courts." *See* Arkfeld, *supra* note 10, at 318.

> outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on "problem solving" courts shall comply with this Code except to the extent local rules provide and permit otherwise.[32]

In the lead-up to the adoption of the 2007 ABA Model Code, several witnesses at hearings conducted by the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct "urged the Commission to create special ethical rules" for specialty courts.[33] Because of the number and wide variety of specialty courts, however, the Commission opted not to adopt separate ethical guidelines solely for specialty courts.[34] Instead, the Commission set forth Comment 3 as quoted above, by which the ABA recognized that judges presiding over specialty courts are engaging in "nontraditional" activities as part of their duties.[35] The Comment also reflects the Commission's intent that local rules governing specialty courts should prevail over the Code's provisions when they "specifically authorize conduct not otherwise permitted under these Rules."[36] Accordingly, in those

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[32] ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

[33] Mark L. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 264 (2007); *see also* Arkfeld, *supra* note 10, at 318 (stating that "[f]or those who sit in problem-solving court, one of the hopes was that the new Code would address their issues and the concerns that arise out of this new way of conducting court proceedings").

[34] *See* Harrison, *supra* note 33, at 264 (observing that the "Commission was ultimately unwilling to" create separate ethical rules for specialty courts "because therapeutic courts are too numerous and varied to enable the Commission to devise enforceable rules of general applicability for such courts."); *see also* Michele B Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 119 (2011) (observing that "Unfortunately, the ABA fell short of adopting guidelines specifically for alternative courts.").

[35] ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

[36] *Id.*; *see also* Arkfeld, *supra* note 10, at 318 (asserting that Comment 3 reflects an acknowledgement "that the states, which may adopt or modify whatever portions of the Code they feel are appropriate, may allow judges to do things the Code restricts, for example, engage in ex parte communications in the course of monitoring a drug offender's sentence in which treatment is ordered."). *But see* Neitz, *supra* note 34, at 120 (criticizing the Commission's decision to leave these determinations up to local rules: "By leaving these issues to be resolved at the state and local level, the ABA's reluctance to create ethical guidelines for the unique circumstances of nontraditional courts creates a dilemma for judges in these courts.").

states that have adopted the 2007 Model Code, judges in specialty courts who face ethical questions will need to review their state's version of the Code, but may also consult local rules that govern the specialty court.[37]

The 2007 ABA Model Code also addressed and acknowledged that the judge's role in a specialty court is different from that of a court in a traditional proceeding in the coverage of issues pertaining to ex parte communications.[38] First, Model Rule 2.9(A)(5) provides that "[a] judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so."[39] In turn, the 2007 Model Code defines "law" to include "court rules as well as statutes, constitutional provisions, and decisional law."[40] The drafters of the 2007 ABA Model Code provided further guidance with regard to this subsection by including Comment 4 that specifically discussed ex parte communications in specialty courts:

> A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[41]

This provision and comment go further than previous ethical guidelines in attempting to address specialty courts. Nonetheless, "the Commission stopped short of recommending an express problem-solving justice exception to the bar on ex parte communications" due to the wide variety and types of specialty courts.[42] Accordingly, some commentators have

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[37] In addition, should specialty court judges and court administrators located in 2007 Model Code states believe that the Code does not address a particular issue, Comment 3 suggests that "the option exists that a local rule or administrative order could be implemented that would exempt the judge from the Code's requirements." Arkfeld, *supra* note 10, at 318.

[38] *See* ABA MODEL CODE OF JUDICIAL CONDUCT Application § I cmt. 3 (2011).

[39] *Id.* Canon 2, R. 2.9(A)(5).

[40] *See id.* at Terminology (defining "law" for purposes of the Model Code).

[41] *See id.* Canon 2, R. 2.9(A)(5) cmt. 4.

[42] *See* GEYH ET AL., *supra* note 8, at 5-23 (citing CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 38 (2009)).

suggested that states or local jurisdictions do more to tailor statutes or court rules to address the unique needs of specialty courts in their jurisdictions.[43]

IV. A REVIEW FROM OTHER STATES

Although there is not yet a considerable amount of case authority regarding ex parte communications and disqualification or recusal issues arising from specialty court proceedings, several other states have considered these issues in both judicial decisions and ethics opinions.[44] In addition, about half the states have adopted the 2007 ABA Model Code and its provisions recognizing specialty courts.[45] This Section will examine the existing case law and ethics opinions from other states, and then turn to a review of those states that have not only adopted that 2007 ABA Model Code, but also included additional, unique provisions relating to specialty courts.

A. Case Law and Ethics Opinions

A judge overseeing a specialty court will often be exposed to a significant amount of information about a program participant not only through traditional judicial processes, but also via program staffings or ex parte communications with court team members.[46] What, then, is the judge's proper action in a situation in which a hearing is necessary, for example, to consider whether an individual's specialty court participation

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[43] *See id.* (reviewing the history of the development of the special rule for ex parte communications for specialty courts and concluding, "The solution, then, lies in courts of the several jurisdictions developing rules of their own that relax restrictions on *ex parte* communications to meet the special needs of problem-solving justice in their respective court systems."); *see also* Arkfeld, *supra* note 10, at 321 (expressing a concern that the phrase in Rule 2.9(A)(5) and in Comment 4 regarding "expressly authorized by law" might be "open to interpretation" and not necessarily extend to specialty courts that "do not operate under a specific law or administrative order," but nonetheless arguing "that the judge may ethically proceed with the defense attorney present and with waivers in place").

[44] *See, e.g., In re* Disqualification of Giesler, 985 N.E.2d 486 (Ohio 2011).

[45] *See* GEYH ET AL., *supra* note 8, § 1.03, at 1-6–1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Judicial Conduct, although most with revisions to various sections").

[46] *See* Meyer, *supra* note 11, at 205 (observing that a judge overseeing a specialty court will "often have substantial information about . . . [specialty] court participants—some of which was gained through on-the-record colloquies and pleadings and other information from informal staffings . . . .") (focusing on drug courts).

should be terminated or in subsequent proceedings on issues such as parole revocation or sentencing? Case authority, as well as ethics opinions, from other jurisdictions with regard to these questions vis-à-vis specialty court judges provide mixed outcomes. This Section will explore relevant recent judicial decisions and ethics opinions from several other states.

1. New Hampshire

In the New Hampshire case of *State v. Belyea*, Defendant pleaded guilty to forgery and credit card offenses and, following certain probation violations, received a suspended sentence, but with the condition that he take part in a drug court program.[47] During his time with the program, he garnered three program sanctions, the last of which resulted from his leaving the state without permission for two months.[48] Thereafter, the State moved to impose the previously suspended sentence and to terminate Defendant's participation in the drug court program.[49] In response to the State's motion, Defendant moved to recuse the judge "from presiding over any termination proceedings, contending that the judge's participation as a member of the drug court team, which had recommended his termination, created an appearance of impropriety."[50] The trial judge denied the motion and presided over the termination hearing.[51] At the close of the hearing, the judge "ruled that the defendant's participation in the Program [sic] was 'no longer warranted,' and he imposed the . . . suspended sentence."[52] On appeal, Defendant urged that the judge should have recused himself and contended "that a disinterested observer would entertain significant doubt about whether . . . [the trial judge] prejudged the facts and was able to remain indifferent to the outcome of the termination hearing."[53] In particular, he asserted that because the judge had been a part of the treatment team, the judge had "already evaluated the evidence and likely

[47] 999 A.2d 1080, 1081 (N.H. 2010).

[48] *Id.* at 1082.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* Defendant admitted during the hearing that he indeed had been out of the state for nearly two months. *Id.*

[53] *Id.* at 1085.

given input about the recommendation to terminate" to other members of the team.[54]

The New Hampshire Supreme Court rejected Defendant's appeal and noted that his "argument rest[ed] upon the faulty premise that . . . when . . . [the judge] participated as a member of the drug court team and monitored the defendant's progress, he acted in some role other than as a neutral and detached magistrate."[55] Instead, the Court found that the trial judge "remained an impartial judicial officer," and that there was nothing in the record to reflect that the judge "acted as an investigator, advocate, or prosecutor when participating with the drug court team."[56] The Court observed further, "It is not uncommon for judges to acquire information about a case while sitting in their judicial capacity in one judicial setting and later to adjudicate the case without casting significant doubt on their ability to render a fair and impartial decision."[57] The trial judge in *Belyea* "listened to current information on the defendant's progress or problems in the Program" as part of the entire drug court team and considered "recommendations presented by individual members of the team, as a result of the defendant's purported misconduct."[58]

With regard to Defendant's contention of bias based on the trial judge's prior participation as part of the treatment team, the New Hampshire Supreme Court concluded that there was "no evidence that he had or considered facts not known by the drug treatment team or that he had personal, independent knowledge of any facts relied upon in ordering Defendant's termination from the Program [sic]."[59] Moreover, as the presiding judge of the drug court team, the trial judge had solely "learned information about the defendant's compliant and noncompliant behavior in the context of the [team's] weekly review meetings and in the presence of the entire team, and retained the authority to decide and impose any sanctions . . . for a participant's misconduct."[60] Accordingly, the New

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[54] *Id.*

[55] *Id.*

[56] *Id.* The New Hampshire Supreme Court also observed that the trial judge's participation was "in the presence of the entire drug court team, which included a lawyer from the New Hampshire Public Defender Program." *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1087.

[60] *Id.* at 1086. The record also revealed that there were "no disputed evidentiary facts that . . . [the trial judge] relied upon terminating . . . [Defendant] from the program. At the hearing, the

Hampshire Supreme Court determined that no "objective, disinterested observer would . . . entertain significant doubt about . . . [the trial judge's] impartiality."[61]

2. Idaho

Like New Hampshire, other courts have taken the view that a specialty court judge can preside over termination hearings. For example, in *State v. Rogers*, the Idaho Supreme Court considered an appeal by a drug court participant who had been terminated from the program and sentenced for possession of a controlled substance.[62] Defendant had initially pleaded guilty to possession, but the State agreed to a dismissal should Defendant successfully complete the drug court program.[63] After the drug court judge "confronted [Defendant] with information suggesting [Defendant] had been attempting to solicit fellow drug court participants to enter into a prostitution ring or 'adult entertainment business,'" the judge "terminated [Defendant] from the drug court program" and thereafter imposed a sentence on the original possession charge.[64]

On appeal, Defendant alleged that his termination violated due process protections.[65] The Idaho Supreme Court determined that because Defendant pleaded guilty to enter into the drug court program, he then had a protected "liberty interest at stake as he . . . [would] no longer be able to assert his innocence if expelled from the program."[66] Because he had a liberty interest in remaining in the program, he was therefore "entitled to procedural due process before he . . . [could] be terminated from that program."[67]

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defendant agreed that he had left the state for two months without permission." *Id.* This was a "clear violation" of the drug court policies, and the judge's decision to terminate Defendant from the program and impose the previously suspended sentence was based solely on Defendant's "admitted misconduct in fleeing the state, as well as his three prior Program [sic] sanctions." *Id.*

[61] *Id.* at 1086–87.

[62] 170 P.3d 881, 882 (Idaho 2007).

[63] *Id.*

[64] *Id.* at 883. Defendant had also previously violated drug court rules and was sanctioned, yet had "seemed to improve markedly [thereafter] and even earned praise for his performance from the drug court judge" on two occasions. *Id.*

[65] *Id.* at 882–83.

[66] *Id.* at 884.

[67] *Id.* The Court reasoned that a liberty interest was implicated because prior to his termination from the drug court program "he was living in society (subject to the restrictions of

Notwithstanding this holding, however, the Court also determined that the drug court judge could preside over the termination proceedings, as well as any ensuing sentencing hearing, and that such subsequent adjudicatory processes would satisfy procedural due process requirements.[68]

3. Minnesota

Similarly, consider the court's dicta in an unpublished Minnesota Court of Appeals case involving the termination of parental rights.[69] Evidence in that case revealed that the children's mother had "received nine sanctions for drug court violations" and also "had one missed [drug] test, one diluted [drug] test, and one positive test for cocaine."[70] After the trial court terminated her parental rights, and among her contentions on appeal, Appellant asserted that the trial judge "should have voluntarily removed himself as the judge . . . because he . . . had previous knowledge of facts outside of the record and preside[d] over the county's drug court program."[71] The appellate court declined to rule on the contention because the parent had not properly objected at trial.[72] Nonetheless, the court added, "In any event, we see no basis for removal."[73] The court found no evidence of bias or reason to question the judge's impartiality and declared that "any knowledge the judge had of the appellant's drug history was obtained in his judicial capacity" and not via his personal or private life.[74] The court concluded, "Any information the district court judge obtained about appellant through her participation in the county's drug court program was acquired in his judicial capacity" not his private life.[75] "Therefore, he was

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complying with the drug court program), and after his termination from . . . [the drug court program] he was incarcerated." *Id.* at 885.

[68] *Id.* at 886. The Court also observed that "the neutral court may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed to [Defendant] prior to the hearing, is reliable, and would assist the court in making its determination." *Id.*

[69] *In re* Welfare of Children of C.C., No. 07-JV-11-2909, 2012 Minn. App. LEXIS 471, at *1, *3 (Minn. Ct. App. May 29, 2012).

[70] *Id.* at *4.

[71] *Id.* at *20.

[72] *Id.*

[73] *Id.* at *21–22.

[74] *Id.*

[75] *Id.*

not required to disqualify himself under the Minnesota Code of Judicial Conduct."[76]

4. Kentucky

Kentucky takes a similar view. In 2011 the Ethics Committee of the Kentucky Judiciary issued an ethics opinion "regarding recusal when the drug or mental health court judge will be the same judge presiding over a probation revocation hearing."[77] The ethics committee concluded that in general a specialty court judge may preside at a subsequent revocation hearing at which program termination serves as the basis for the revocation, and that "recusal would only be required in certain circumstances."[78] In particular, the committee opined that if the specialty court judge "receives the reason for the termination from the program in the course of his or her official duties, and no part of the evidence at a subsequent revocation hearing is dependent on the judge's personal knowledge of any pertinent circumstances, no recusal is required."[79]

In formulating this opinion, the Ethics Committee of the Kentucky Judiciary reasoned that a specialty court judge "by the very nature and purpose of the program, must remain familiar with the status of the participant, who has voluntarily elected to enter the program."[80] The committee observed further, however, that recusal could "be required in situations where information on which the revocation may be based comes from the judge's 'personal knowledge,' *i.e.*, information learned by the judge outside the regular drug or mental health court process."[81] The

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[76] *Id.*; *see also* Wilkinson v. State, 641 S.E.2d 189, 190 (Ga. Ct. App. 2006). The court rejected an appeal from a trial judge's decision to terminate an individual from a drug court program. *Id.* One of the issues on appeal was the drug court judge's purported refusal to consider the defendant's recusal motion relating to the termination hearing. *Id.* at 191. The court of appeals found the contention without merit and relied, in part, on the fact that the defendant had waived certain rights to seek recusal of the drug court judge as part of entering into the drug court contract. *Id.* The court also stated, "[W]e will not interfere with a trial court's termination of a drug contract absent manifest abuse of discretion on the part of the trial court." *Id.* at 190.

[77] The Ethics Comm. of the Ky. Judiciary, *Judicial Ethics Opinion JE-122*, KY BENCH & BAR, November 2011, at 34, 34, *available at* http://www.kybar.org/documents/benchbar_searchable/benchbar_1111.pdf.

[78] *Id.*

[79] *Id.* at 35.

[80] *Id.*

[81] *Id.*

committee then identified an example that would likely require recusal as a situation in which the specialty court judge "personally observed the . . . [program] participant committing some act that would form or support the basis for termination from the program."[82]

5. Tennessee

By way of contrast, however, the Tennessee Court of Criminal Appeals took a very different approach to the recusal question in *State v. Stewart* by focusing on due process concerns.[83] In *Stewart*, Defendant claimed "that his due process rights were violated because the judge presiding over his probation revocation had previously served as a member of his drug court team and had received *ex parte* information regarding Defendant's conduct at issue by virtue of his prior involvement."[84] The court agreed that due process required that a different judge, who had "not previously reviewed the same or related subject matter as part of the defendant's drug court team," must adjudicate the probation revocation proceedings.[85] Defendant in *Stewart* was not successful in his drug court participation, and accrued numerous program violations.[86] Consequently, "a trial judge who had participated in a significant amount of the defendant's drug court treatment, including his expulsion from the program," presided over Defendant's probation revocation hearing.[87] Defendant "urged the trial judge to recuse

[82] *Id.* In formulating its opinion, the committee observed that the "Kentucky Supreme Court has stated that drug court 'is a **court function**, clearly laid out as an alternative sentencing program . . . .'" *Id.* (citing Commonwealth v. Nicely, 326 S.W.3d 441, 444 (Ky. 2010)) (emphasis in original). The committee also noted, "Ordinarily, recusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse." *See id.* (quoting Marlowe v. Commonwealth, 709 S.W.2d 424, 428 (Ky. 1986)) (internal citations omitted) (internal quotation marks omitted).

[83] No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, *28 (Tenn. Crim. App. Aug. 18, 2010).

[84] *Id.* at *1.

[85] *Id.* at *1–2.

[86] *See id.* at *8–10. The appellate court observed that the case was "not a shining example of a successful drug court program intervention" and that as part of the program, "the defendant had ongoing issues with marijuana usage and repeatedly failed to comply with basic program requirements." *Id.* at *8. He was also "'sanctioned' five or six times and sentenced to significant jail terms wholly outside of those envisioned by his original sentence or probation." *See id.* at *8–10 (delineating a lengthy list of the defendant's drug court program violations and sanctions).

[87] *Id.* at *10–11.

himself because of his prior participation on the drug court team," but the judge declined, "citing the practical difficulties of bringing in a new judge every time someone violates their drug court contract."[88] The trial judge then found that Defendant had violated his probation terms, and the court sentenced him to jail time.[89]

On appeal, the Tennessee Court of Criminal Appeals determined that due process bars "any member of the defendant's drug court from adjudicating a subsequent parole revocation *when the violations or conduct at issue in both forums involves the same or related subject matter.*"[90] Given the liberty interest at stake, the court first observed, "[i]t is now firmly established that a probationer is entitled to due process when a State attempts to remove his probationary status and have him incarcerated."[91] The Court then identified the minimum required procedural protections and described the right to a "neutral hearing body" as "[o]ne of the most fundamental" of the due process rights.[92] In finding a violation of due process in *Stewart*, the Court reasoned that "the role of a judge in the drug courts program is, by its very nature, almost the polar opposite of 'neutral and detached.'"[93] In great detail, the Court highlighted the following array of due process concerns with regard to a drug court judge's neutrality in later presiding at a defendant's probation revocation hearing:

> • Drug court judges are expected "'*to step beyond* their traditionally independent and objective arbiter roles.'"[94]

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[88] *Id.* at *11. In seeking recusal, the defendant argued "that the judge would already be familiar with the materials that would comprise most of the State's proof at the probation revocation by virtue of his [prior] involvement." *Id.* Although the trial judge denied the motion to recuse, he "stated that he would not mind getting further guidance from the Court of Criminal Appeals on the issue as it was likely to arise again in other cases." *Id.*

[89] *Id.* at *12.

[90] *Id.* (emphasis in original).

[91] *Id.* at *13.

[92] *Id.* at *13–14. The court further opined that "a defendant's rights are plainly violated when his probation revocation case is reviewed by something other than a 'neutral and detached' arbiter" and that in Tennessee, trial judges serve as the probation revocation adjudicators. *Id.* at *14 & n.1.

[93] *Id.* at *14.

[94] *Id.* at *15 (emphasis in original) (quoting Key Components, *supra* note 4, at 15). The court further explained that under Tennessee law, drug court treatment programs are required to operate "according to the principles established by the Drug Courts Standards Committee of the National Association of Drug Court Professionals." *Id.* at *14. *See also* TENN. CODE ANN. § 16-22-104

• Drug court judges are expected to "issue praise for regular attendance or a period of clean drug tests, offer encouragement, and even award the participants tokens of accomplishment during open court ceremonies" for program successes.[95]

• Drug court judges should have "frequent status hearings and maintain regular communications with other program staff to uncover noncompliance," should instill a "fear that big brother is always watching," and address program infractions "with responses ranging from disparaging remarks to jail time."[96]

• Drug court judges are "an integral part of the defendant's 'therapeutic team'" and are "expected to 'play an active role in the [participant's] drug treatment process.'"[97] Accordingly, a drug court judge "will necessarily find it difficult, if not impossible, to reach the constitutionally-required level of detachment when dealing with a course of conduct . . . [that was] previously reviewed as a member of a drug court team."[98]

• Drug court judges will have participated in team decisions about treatment and services, and thus will "develop a stake in the success or failure" of the selected programs.[99]

• Drug court judges are participating in a collaborative process of decision-making that "poses an additional threat

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(West 2013) (setting forth ten general principles for the establishment and operation of drug court programs). Given the lack of further legislative elucidation of these ten principles, the court turned to the National Association of Drug Court Professionals' program guidelines for further clarification. *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *14–15.

[95] *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *14–15 (citing Key Components, *supra* note 4, at 13). The court reasoned that such repeated praiseworthy activities could lead the prosecution to "question a judge's impartiality." *Id.* at *16.

[96] *Id.* The court further observed that the judge's imposition of disciplinary actions "could cause the defendant to reasonably question the judge's impartiality when reviewing the same subject matter in a different forum later." *Id.* at *17.

[97] *Id.* at *18 (quoting Key Components, *supra* note 4, at 2, 7).

[98] *Id.*

[99] *See id.* at *19 (leading the court to question a drug court judge's detachment in later proceedings).

> to the impartiality of any judge who would later adjudicate a defendant's probation revocation involving the same or related conduct."[100]
>
> • Drug court judges will have received access to a "considerable amount of *ex parte* information . . . as a necessary component of the drug court process."[101]
>
> • Drug court judges, as part of participation in and leadership of the drug court process, are privy "to a considerable amount of information about the defendant's conduct that would not normally be relevant to adjudicating a probation revocation"[102] and will likely be aware of other challenges or problems such as a "participant's mental illnesses, sexually transmitted diseases, domestic violence, unemployment, and homelessness."[103]

Accordingly, the court in *Stewart* concluded that a drug court judge who participated as part of, and presided over, a defendant's drug court team could not "function as a 'neutral and detached' hearing body . . . for alleged probation violations that . . . [were] based on the same or related subject matter" that the drug court team had previously reviewed.[104] In reaching its decision, the court specifically rejected the reasoning of both the Idaho Supreme Court in *State v. Rogers*[105] and the New Hampshire Supreme

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[100] *Id.* at *20. The court suggested that a drug court judge might subordinate his or her views to those of the treatment team, could put certain decisions up to a vote of the treatment team members, and generally be personally invested in "prior collaborative team decisions" that could "cloud the exercise of his or her own individualized, detached, and impartial review" of later adjudicatory processes. *Id.* at *21.

[101] *Id.* at *22. The court identified as troubling potential ex parte contacts such as frequent treatment team communications about a defendant's program participation, and "frequent interactions between the participants and drug court judges, in which the participants will not be represented by counsel." *Id.* at *23–25. The court further opined that "it simply strains credulity to believe that judges could or would consistently set aside all of the considerable amount of information they receive in this *ex parte* manner at a later probation revocation." *Id.* at *23–24.

[102] *Id.* at *25.

[103] *Id.* at *25 (quoting Key Components, *supra* note 4, at 7).

[104] *Id.* at *30.

[105] *See id.* at *30–*31 (rejecting the approach of State v. Rogers, 170 P.3d 881, 886 (Idaho 2007), and reasoning that the Idaho court had not considered "all of the due process problems attendant to permitting judges to play . . . dual roles with respect to the same subject matter"). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

Court in *State v. Belyea*.[106] In addition, given that the court in *Stewart* reached its conclusion on due process grounds, the court found it "unnecessary to address whether the [Tennessee] Code of Judicial Conduct . . . would also generally require recusal" in similar cases.[107]

Of note, approximately six months following the Tennessee Court of Criminal Appeals' decision in *Stewart*, the state's Judicial Ethics Committee provided an advisory opinion on the very question left unaddressed in *Stewart*: whether the state's Code of Judicial Conduct will "permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court

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[106] *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *31–34 (declining to follow the decision in State v. Belyea, 999 A.2d 1080 (N.H. 2010), and observing that it was "similarly unpersuaded" by *Belyea*'s treatment of the court's "constitutional concerns"). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text. The *Stewart* court also noted that its decision was consistent with an earlier 2008 Tennessee decision. *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *28–29 (citing State v. Stewart, No. M2008-00474-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. Oct. 6, 2008)). In the 2008 *Stewart* case (which coincidentally involved a different defendant with the surname Stewart), the court found a due process violation when the drug court judge delegated decisions about probation revocation and appropriate sentencing to members of the drug court team who had been present at the revocation hearing. *Id.* at *5–6, *10. After presiding at the revocation hearing, the judge asked the team members to deliberate and provide a recommendation. *Id.* at *5–6. The team met without the judge and thereafter provided a recommendation for termination and that the defendant "'serve his original sentence.'" *Id.* at *6. The trial judge adopted "'the ruling of the team.'" *Id.* The appellate court held this to be reversible error and found "telling that the trial judge instructed the drug court team at the hearing, 'I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between.'" *Id.* at *11. Moreover, the appellate court ordered that the matter be heard by a different judge on remand because of concerns that the drug court judge had received ex parte communications in his role with the drug court team, which could have impacted his impartiality in later proceedings. *Id.* at *12. In particular, the court declared that "the trial judge received communication outside the presence of the parties concerning the matter and relied on that communication in disposing of the defendant's case." *Id.* Thereafter, in the 2010 *Stewart* case, the court relied on its earlier holding in the 2008 *Stewart* decision with regard to finding due process concerns pertaining to exposure to ex parte communications during drug court team activities. *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *28–30. *See also* Alexander v. State, 48 P.3d 110, 115 (Okla. 2002) (recognizing "the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant," and declaring that in future cases involving the termination of drug court participation, a "defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution").

[107] *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *12–13.

Exhibit A

program."[108] In contrast to the court's sweeping language in *Stewart*, the state's ethics committee opined that the state's Code of Judicial Conduct "does not automatically require recusal," and that recusal is required "only if the judge determines that he/she cannot be impartial."[109] In contrast to *Stewart*, the ethics committee relied favorably on both the New Hampshire Supreme Court's decision in *State v. Belyea*[110] and the Idaho Supreme Court's opinion in *State v. Rogers*,[111] and quoted both cases with approval.[112] Moreover, the ethics committee added that "[i]t appears that judicial ethical considerations are moving in the direction taken in *Belyea* as to allowing 'special' courts to receive ex parte communications."[113] As for *Stewart*, the ethics committee merely referenced the case and its holding, and then observed that the Tennessee Court of Criminal Appeals had decided the case "upon constitutional rather than ethical grounds and . . . [took] no position as to the latter."[114]

Somewhat inexplicably, the Tennessee ethics committee made no attempt to reconcile its decision, which focused on judicial ethics, with the *Stewart* holding that was grounded on due process considerations.[115]

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[108] Tenn. Judicial Ethics Comm., Advisory Op. 11-01, at 1 (Mar. 23, 2011), *available at* http://www.tncourts.gov/sites/default/files/docs/11-01.pdf.

[109] *Id.*

[110] *See Belyea*, 999 A.2d at 1085–86 (finding no prejudgment of the facts or question as to a drug court judge's impartiality where the judge had acquired information and knowledge while serving in a judicial capacity on the drug court team). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text.

[111] *See* State v. Rogers, 170 P.3d 881, 886 (Idaho 2007) (determining that a drug court judge may serve in subsequent program termination proceedings and sentencing hearings). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

[112] Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2.

[113] *Id.*, at 4. In support of this proposition, the committee referenced the 2007 ABA Model Code of Judicial Conduct and quoted from the ABA's comments to "Rule 2.9 the special considerations granted in this regard to 'problem-solving' courts." *Id. See also supra* notes 31–43 and accompanying text (discussing the 2007 ABA Model Code and provisions included therein pertaining to specialty courts).

[114] Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4. The committee did recognize that *Stewart* had held that "the due process clause prevented a judge who had been a member of the defendant's drug court team from later conducting a probation revocation hearing as to the defendant" for alleged violations "'based on the same or related subject matter that has been reviewed' by the judge as a member of the drug court team." *See id.* (quoting State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Aug. 18, 2010)).

[115] *Id.*

Instead, the ethics committee declared that in Tennessee the courts follow "the same 'reasonableness' standard as was applied in *Belyea*."[116] "That is, the judge must take the more objective, rather than subjective, approach and 'ask what a reasonable, disinterested person knowing all the relevant facts would think about his or her impartiality.'"[117] In turn, a judge's decision on recusal should be made on a "case-by-case basis," and for a drug court judge "the outcome would necessarily depend upon the specific information the judge acquired as a member of the drug court team."[118] Accordingly, the ethics committee concluded "that serving as a functioning member of the drug court team does not in and of itself require recusal of the judge in a revocation hearing."[119] This opinion, of course, appears to run directly counter to the Tennessee Court of Criminal Appeals decision in *Stewart* in which the court sweepingly declared that due process precludes a judge who was a member of a drug court team from later presiding over a probation revocation hearing in which the probation violations are the same as those that were before the drug court team.[120]

Can the 2011 Tennessee ethics opinion and the court's due process decision in *Stewart* be reconciled? Although the court's language in *Stewart* was broad, the specific facts are instructive. Upon reviewing the record, the court observed, "[W]e are additionally troubled by the four or five occasions where the defendant in this case was 'sanctioned' to significant jail time by the drug court team during the two years he participated in the program."[121] This resulted in the defendant being "appreciably worse off from a punitive perspective than if he had chosen not to participate in the drug court program at all."[122] Finding this problematic, the court urged

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[116] *Id.*

[117] *See id.* (quoting Kinard v. Kinard, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998), and referencing the New Hampshire Supreme Court's approach in State v. Belyea, 999 A.2d 1080, 1085–86 (N.H. 2010)).

[118] *Id.* The committee added that under "the 'reasonableness' standard, recusal may be required in one case and not required in another." *Id.*

[119] *Id.* at 5. The committee added further that recusal would be necessary "only if the appearance of impartiality should surface in the face of a fair and honest 'objective standard' analysis by the judge predicated upon the specific facts developed in each particular case." *Id.*

[120] *See* State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, *30 (Tenn. Crim. App. Aug. 18, 2010).

[121] *Id.* at *37. The court added that "the net effect of these sanctions appears to be that approximately a half-year has been tacked onto the overall defendant's sentence." *Id.*

[122] *Id.* The court seemed troubled that a therapeutic form of process could result in the addition of "significant amounts of jail time" as sanctions. *Id.* at *39.

judges who oversee drug court programs to assure that the programs "focus[] on drug addiction therapy and treatment, and recogniz[e] that, for good reason, punishment with substantial periods of incarceration is [the] bailiwick of the traditional criminal justice system."[123] By way of contrast, the ethics committee referenced no comparable egregious facts pertaining to the matter under its review.[124] Instead, the ethics committee noted that individuals who participated in the drug court program pertaining to the matter then under review each executed a detailed "waiver, consenting to the drug court judge's receiving a broad range of ex parte communications regarding the matter."[125] After quoting the waiver in full, the ethics committee concluded that the waiver authorized the drug court judge "to have what would appear to be access to all relevant documents and records but limits its use to 'status hearings, progress reports, and sentencing hearings.'"[126] Accordingly, the ethics committee declined to require an automatic recusal and determined that a case-by-case review was appropriate.[127]

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[123] *Id.* at *41. The court added, "When necessary, truly recalcitrant participants may be swiftly returned to the traditional system via the drug court expulsion process." *Id.*

[124] Indeed, the committee identified virtually no facts with regard to the specific matter for which the drug court judge had requested an ethics opinion. *See* Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2 (setting forth the only references in the opinion to the underlying case).

[125] *Id.* at 2. The waiver authorized disclosure to drug court team members of communications such as "progress notes, medical diagnosis, testing, drug results, attendance records, results of medical testing and drug screens, HIV medical records, counselor and social worker notes and summaries, . . . and all other records associated with rehabilitation and treatment." *Id.* at 3 (quoting waiver).

[126] *Id.* at 3–4. Moreover, the waiver provided that recipients of information obtained throughout the process could "redisclose it only in connection with their official duties as members of the . . . Drug Court Team." *Id.* at 3 (quoting waiver). By way of contrast, although there had been references to a signed waiver in the record before the court in *Stewart*, the record did "not contain a copy, and consequently" the court did "not know the extent of the rights . . . [the defendant] purportedly waived prior to his participation" in the drug court program." *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *39–*40 n.4. The court expressed doubt, however, as to whether—as a matter of due process—the defendant had the power to waive constitutional rights pertaining to "deprivations of his absolute right to liberty, such as those that may have occurred" in the case. *See id.* (discussing same in the context of the court's concern about the drug court having imposed additional jail time for program violations).

[127] Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

B. State Codes of Judicial Conduct

Roughly half the states have adopted the 2007 ABA Model Code of Judicial Conduct.[128] As discussed above, the 2007 Model Code recognizes the unique nature of specialty courts and includes some coverage of ex parte communications rules for such courts.[129] As described in this Section, however, a number of states have promulgated variations of the 2007 Model Code to address specialty courts more specifically.

1. Tennessee

Subsequent to both *Stewart* and the 2011 Tennessee Ethics Committee opinion discussed above,[130] the Tennessee Supreme Court adopted a new Code of Judicial Conduct that became effective on July 1, 2012.[131] Tennessee's new judicial conduct code is modeled in large part on the 2007 ABA Model Code of Judicial Conduct, but with some differences.[132] With regard to specialty courts such as drug courts and mental health courts, like the 2007 ABA Model Code, the revised Tennessee Code includes a general recognition of these courts in the Code's "application" section.[133] In

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[128] *See* GEYH ET AL., *supra* note 8, § 1.03, at 1-6–1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Jud. Conduct, although most with revisions to various sections"). For links to documents that describe the differences between the various state enactments and the text of the 2007 Model Code, see American Bar Ass'n, Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct, *available at* http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html.

[129] *See supra* notes 30–43 and accompanying text.

[130] *Stewart*, 2010 Tenn. Crim. App. LEXIS 691; Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 1. *See supra* notes 83–127 and accompanying text.

[131] *See In re: Petition to Amend New Rule 10, RJC 4.1, Rules of the Tenn. Supreme Court*, Order No. M2012-01031-SC-RL2-RL, at 1 (Tenn. June 26, 2012), *available at* http://www.tba.org/sites/default/files/rule_10_rjc4.1.pdf (adopting a "comprehensive revision of the Tennessee Code of Judicial Conduct").

[132] For a detailed chart comparing the 2012 Tennessee Code with the 2007 ABA Model Code, see *Comparison between final revised Tennessee Code of Judicial Conduct and ABA Model Code of Judicial Conduct (2007)* (Aug. 8, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tennessee_mcjc_final.authcheckdam.pdf.

[133] *See* TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, Application § I cmt. 3 (2012), *available at* http://www.tsc.state.tn.us/rules/supreme-court/10, which states:

> Some states, including Tennessee, have created courts in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be

addition, and specifically with regard to ex parte communications, the new Tennessee Code provides the following:

> When serving on a mental health court or a drug court, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. However, if this ex parte communication becomes an issue at a subsequent adjudicatory proceeding in which the judge is presiding, the judge shall either (1) disqualify himself or herself if the judge gained personal knowledge of disputed facts . . . or the judge's impartiality might reasonably be questioned . . . or (2) make disclosure of such communications subject to the [Code's] waiver provisions . . . .[134]

Accordingly, Tennessee's Supreme Court has adopted an approach that is closer to the 2011 Ethics Committee opinion's advisory opinion that judges in specialty courts are to consider recusal motions on a case-by-case basis,[135] rather than the Tennessee Court of Criminal Appeals' categorical approach based on due process considerations set forth in *Stewart*.[136]

2. Idaho

By way of contrast, consider the Idaho Supreme Court's approach to the same issue. In 2008, the court amended the ex parte contacts provisions of the Idaho Code of Judicial Conduct by adding the following subsection that focuses specifically on specialty courts:

> (f) A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings, or by written documents provided to

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authorized and even encouraged to communicate directly with social workers, probation officers and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. Judges serving on such courts shall comply with this Code except to the extent laws or court rules provide and permit otherwise.

Id.

[134] *Id.* Canon 2, R. 2.9 cmt. 4 (internal citations to other sections of the Code omitted).

[135] Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

[136] State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, *30 (Tenn. Crim. App. Aug. 18, 2010).

> all members of the problem solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.[137]

The Idaho Supreme Court added the foregoing provision following a very restrictive March 2008 Idaho Judicial Council ethics opinion which "stated that 'e-mails, telephone calls or written communications from counselors, drug court coordinators, [or] prosecutors done in an ex parte manner are all prohibited except for those limited situations permitted by the [former] Canons.'"[138] The opinion also directed that the parties must have representation in attendance when the specialty court judge is present at a staffing.[139] The ethics opinion accordingly created a challenge for Idaho specialty courts described as follows: "If counsel does not attend all court sessions and staffings, how can judges [ethically] participate as part of the problem-solving court team . . . ?"[140] Another concern was the "possible infringement of a defendant's rights when a judge who had been exposed to ex parte communications presides over subsequent proceedings involving the termination of the defendant from a problem-solving court, a probation revocation hearing, or sentencing."[141]

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[137] IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf. The term "staffing," as used in the subsection, was added in 2012 and is defined to mean "a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant's progress in the problem solving court, treatment recommendations, or responses to participant compliance issues." *See id.* at Terminology (including the term in a list of "Terminology" definitions, and noting an adoption date of Nov. 30, 2012, with an effective date of Jan. 1, 2013).

[138] *See* Michael Henderson, *Ex Parte Communications – Adapting an Adversarial Rule to the Problem-Solving Setting*, THE ADVOCATE (Idaho), Vol. 51, Sept. 2008, at 48, 48 (quoting ethics opinion).

[139] *Id.*

[140] *Id.*

[141] *Id.* Recall that in State v. Rogers, 170 P.3d 881, 885–86 (Idaho 2007), the Idaho Supreme Court recognized that an individual participating in a drug court program has a protected liberty interest at stake in determinations whether to terminate that person's participation; however, the court also concluded that although the defendant was entitled to a due process hearing, the drug

In response to the 2008 ethics opinion that called into question these practices in the specialty courts, the Idaho Supreme Court "sought a wide range of views" and ultimately adopted amendments to its Code of Judicial Conduct specifically regarding special courts.[142] The new subsection—Canon 3(b)(7)(f)—both recognizes the role of specialty courts, and also authorizes the court to consider ex parte communications at staffings and via written documents that are provided to all members of the specialty court team.[143] The court also added a provision allowing a judge to "initiate, permit, or consider communications dealing with substantive matters or issues on the merits in the absence of a party who had notice . . . and did not appear" at scheduled court proceedings "including a conference, hearing, or trial."[144] Finally, however, the Idaho Supreme Court elected to adopt a blanket rule that any specialty court judge "who has received any . . . ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent" proceeding for program termination, a probation violation, or sentencing . . . .[145]

3. Additional States

Like Idaho, a number of other states have gone beyond the 2007 Model Code's provisions relating to ex parte communications in specialty courts to provide expanded or more specific coverage. Ten of these states, in addition to Idaho, have adopted specific subsections or unique comments that focus

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court judge could "preside over the termination hearings." For a detailed discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

[142] *See* Henderson, *supra* note 138, at 48 (also indicating that the court consulted with judges, court administrators, prosecutors, defense lawyers, and the state's Drug Court and Mental Health Court Coordinating Committee).

[143] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013).

[144] *See id.* Canon 3(B)(7)(e). *See also* Henderson, *supra* note 138, at 48 (observing that this "provision clarifies ex parte prohibition" with regard to scheduled court proceedings).

[145] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f). This decision, of course, represented a reversal, of sorts, from the same court's 2007 decision in *Rogers* that due process did not require that a subsequent termination proceeding must always be considered by a judge different from the previously presiding drug court judge. *See* Rogers, 170 P.3d, at 885–86. *See also* Neitz, *supra* note 34, at 124 (suggesting that this aspect of the "Idaho approach recognizes that ex parte communications can sometimes be useful, but should not be a determining factor in the resolution of a case").

on activities in specialty courts.[146] For example, Arizona's 2009 Code of Judicial Conduct added an additional subsection to Rule 2.9 covering ex parte communications, which provides:

> (6) A judge may engage in ex parte communications when serving on problem-solving courts, if such communications are authorized by protocols known and consented to by the parties or by local rules.[147]

Similarly, in adopting the 2007 Model Code, Hawaii crafted the following additional subsection regarding ex parte communications:

> (6) A judge may initiate, permit, or consider an ex parte communication when serving on a therapeutic or specialty court, such as a mental health court or drug court, provided that the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication and any factual information received that is not part of the record is timely disclosed to the parties.[148]

Ohio has promulgated a comparable provision, which states:

> (6) A judge may initiate, receive, permit, or consider an ex parte communication when administering a *specialized docket*, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the ex parte communication.[149]

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[146] These additional states with unique provisions include Arizona, Hawaii, Ohio, Nebraska, North Dakota, Oklahoma, Kansas, Maryland, Iowa, and New Mexico. *See infra* notes 147–167 and accompanying text.

[147] ARIZ. REV. STAT. ANN., Sup. Ct. Rule 81, Canon 2, R. 2.9(6) (2009), *available at* http://www.azcourts.gov/Portals/37/NewCode/Master%20Word%20Version%20of%20Code.pdf.

[148] HAW. RULES OF CT. ANN., Ex. B, REV. CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2009), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm.

[149] OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2010) (emphasis in original), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf. The Ohio code defines "specialized docket" to include "drug courts, mental health courts, domestic violence courts, child support enforcement court, sex offender courts, OMVI/DUI courts reentry courts, housing courts, and environmental courts." *See id.* at 9, Terminology (defining "specialized docket" for purposes of the Ohio Code of Judicial Conduct).

Nebraska has similarly created a variation on the 2007 ABA Model Code by adopting the following additional subsection pertaining to specialty courts:

> (6) A judge may initiate, permit, or consider ex parte communications when serving on therapeutic or problem-solving courts, mental health courts, or drug courts, if such communications are authorized by protocols known and consented to by the parties. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[150]

In contrast to the more detailed subsections described above, North Dakota and Oklahoma have promulgated narrower provisions that focus on party consent. Indeed, both North Dakota's and Oklahoma's versions of the ex parte rules include the following identical language:

> (4) With the consent of all parties, the judge and court personnel may have ex parte communication with those involved in a specialized court team. Any party may expressly waive the right to receive that information.[151]

Rather than adding a separate subsection to its version of Rule 2.9, when Kansas adopted the 2007 ABA Model Code, the state promulgated a unique comment that cross-references a different court rule pertaining to specialty courts. In particular, the comment provides:

> (4) A judge may initiate, permit, or consider ex parte communications as authorized by Supreme Court Rule 109A when serving on therapeutic or problem-solving

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[150] NEB. REV. CODE OF JUD. CONDUCT § 5-302.9(6) (2011), *available at* http://www.supremecourt.ne.gov/supreme-court-rules/2152/%C2%A7-5-3029-ex-parte-communications.

[151] N.D. CT. RULES, RULES OF JUD. CONDUCT Canon 2, R. 2.9(4) (2012), *available at* http://www.ndcourts.gov/rules/judicial/frameset.htm; OKLA. CODE OF JUDICIAL CONDUCT Chap. 1, App. 4, Rule 2.9(4) (2011), *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=461667. Comment 4 to the North Dakota rule adds, "A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts." N.D. COURT RULES, RULES OF JUD. CONDUCT Canon 2, Rule 2.9(4), Comment (4). Similarly, Oklahoma's version includes virtually the same comment, except it refers to "specialized courts" rather than therapeutic or problem-solving courts. OKLA. CODE OF JUD. CONDUCT Chap. 1, App. 4, R. 2.9(4) & cmt. 4 (2011).

> courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[152]

In turn, Kansas Supreme Court Rule 109A sets forth additional provisions authorizing and regulating specialty courts for persons with mental illness or substance addictions.[153] The rule authorizes ex parte communications between the specialty court judge and members of the "problem-solving court team, either at a team meeting or in a document provided to all members of the team."[154] Moreover, the rule specifically allows the specialty court judge who has received ex parte communications as part of presiding over the specialty court team to preside over subsequent proceedings involving a defendant provided that the judge discloses "the existence and, if known, the nature of" the ex parte information, and both the defendant and the prosecution consent.[155] Accordingly, under this latter provision, if a defendant objects to having the specialty court judge preside over a later program termination, probation revocation, or sentencing proceeding, the rule would require the judge's recusal.[156] Unlike Idaho's unique adaptation of the 2007 ABA Model Code, however, the Kansas approach does not create a blanket requirement for recusal, and both parties may consent to allowing the specialty court judge to preside.[157]

Like Kansas, Maryland's version of the 2007 ABA Model Code pertaining to ex parte communications includes a cross-reference to another procedural rule; the Maryland provision states:

> (6) When serving in a problem-solving court program of a Circuit Court or the District Court pursuant to Rule 16-206,

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[152] KAN. CODE OF JUD. CONDUCT, R. 601B, Canon 2, R. 2.9 cmt. 4 (2009), *available at* http://www.kscourts.org/rules/Judicial_Conduct/Canon%202.pdf.

[153] KAN. SUP. CT. R. 109A, § (a) (2012), *available at* http://www.kscourts.org/rules/District_Rules/Rule%20109A.pdf.

[154] *Id.* § (b).

[155] *Id.* § (c)(1)–(2).

[156] *Id.* § (c)(2).

[157] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf. (describing Idaho's across-the-board requirement that a specialty court judge who has received ex parte communications while leading the specialty court *not* preside over subsequent legal proceedings involving the same defendant who was a part of the specialty court program).

> a judge may initiate, permit, and consider ex parte communications in conformance with the established protocols for the operation of the program if the parties have expressly consented to those protocols.[158]

In turn, Maryland Rule 16-206 sets forth general guidelines for specialty courts in the state, and delineates a process for the planning and approval of specialty courts.[159] The rule also includes official commentary suggesting that a specialty court judge should be sensitive to any prior receipt of ex parte communications in any ensuing post-termination proceedings.[160]

Although they did not adopt unique rules pertaining to specialty court judges, two additional states—Iowa and New Mexico—departed from the proffered language in the 2007 ABA Model Code of Judicial Conduct via the adoption of state-specific comments pertaining to specialty courts. First, Iowa modified the official comments to the "Application" section of the Model Code by including a unique comment pertaining almost exclusively to drug courts (and not to other specialty courts).[161] In contrast to the comparable section of the 2007 ABA Model Code, which provides that "local rules" may take priority in authorizing conduct by specialty court judges not otherwise permitted under the rules, the Iowa provision instead references other "law" regarding specialty courts that can take precedence

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[158] MD. RULE 16-813, Rule 2.9(a)(6) (2010).

[159] MD. RULE 16-206(a)–(c) (2013).

[160] *Id.* at 16-206(e), Committee Note (providing that in the consideration of "whether a judge should be disqualified . . . from post-termination proceedings involving a participant who has been terminated from a problem-solving court program, the judge should be sensitive to any exposure to ex parte communications or inadmissible information the judge may have received while the participant was in the program").

[161] IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Application § I cmt. 3, at 4 (2010). Comment 3, which focuses primarily on drug courts, provides the following:

> In Iowa, many districts have formed drug courts. Judges presiding in drug courts may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When the law specifically authorizes conduct not otherwise permitted under these rules, they take precedence over the provisions set forth in the Iowa Code of Judicial Conduct. Nevertheless, judges serving on drug courts and other "problem solving" courts shall comply with this Code except to the extent the law provides and permits otherwise.

Id.

over conduct permitted by the Iowa rules.[162] In turn, the Iowa Code defines "law" broadly to include not only "court rules," but also "statutes, constitutional provisions, and decisional law."[163] Similarly, New Mexico expanded both the rule pertaining to ex parte communications and one of the comments to its version of the ex parte rule to provide a broader scope of applicable, permissive source law for specialty courts than under the 2007 ABA Model Code.[164] Like Iowa and the 2007 ABA Model Code, the New Mexico Code defines "law" to "encompass[] court rules as well as statutes, constitutional provisions, and decisional law."[165] With regard to its version of the ex parte communications rule, however, New Mexico goes somewhat further in the text of the rule than the 2007 ABA Model Code by specifically providing in its rule that a "judge may initiate, permit, or consider any ex parte communication when expressly authorized by *law, rule, or Supreme Court order* to do so."[166] In addition, New Mexico's comment to its ex parte rule with regard to judges in specialty courts also specifically references authorization by "law, rule, or Supreme Court order."[167]

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[162] *Compare id.* (authorizing other "law" to take priority over the Iowa Code provisions), *with* ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing "local rules" to take priority over conflicting Model Code provisions).

[163] *See* IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Terminology, at 630 (defining "law"). In this regard, the Iowa Code has the same broad definition of "law" as does the 2007 ABA Model Code. *See* ABA MODEL CODE OF JUD. CONDUCT, Terminology (2007) (defining "law"). The ABA Code, however, only references "local rules" with regard to specialty courts in the comments to its "application" section. ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011).

[164] *See* N.M. ST. CT. RULES, RULES OF JUD. CONDUCT R. 21-209(A)(5) & cmt. 4 (2012) (providing an expanded scope of applicable law).

[165] *See id.*, R. Set 21, Terminology (defining "law" for purposes of the code).

[166] *Compare id.* Rule 21-209(A)(5) (quoted in text above with emphasis added), *with* ABA MODEL CODE OF JUD. CONDUCT, Canon 2, Rule 2.9(5) (2011) (using identical language except for including the phrase "authorized by law"–with "law" being otherwise broadly defined in the Terminology section of the 2007 ABA Model Code).

[167] NMRA, Rule 21-209, cmt. 4. In full, Comment 4 provides:

> (4) A judge may initiate, permit, or consider ex parte communications expressly authorized by law, rule, or Supreme Court order, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

V. RECOMMENDATIONS TO REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Texas has not adopted the 2007 ABA Model Code of Judicial Conduct. Nonetheless, jurisdictions around Texas have been actively developing a wide array of specialty courts.[168] In addition, the Texas Legislature has given significant recognition to specialty courts.[169] During the 2013 regular legislative session, the Texas Legislature enacted Senate Bill 462 relating to specialty court programs in the state.[170] In part, the legislation consolidated into a single chapter of the Texas Government Code existing provisions pertaining to drug court programs, family drug court programs, mental health court programs, and veterans court programs that had previously been scattered across the Family Code, the Health and Safety Code, and the Government Code.[171] As noted by the bill's sponsor following the conclusion of the 2013 regular legislative session, however, Senate Bill 462 was also intended to "improve oversight of specialty court programs by requiring them to register with the criminal justice division of the Office of the Governor and follow programmatic best practices in order to receive state and federal grant funds."[172] Moreover, Senate Bill 462 added new language to the Texas Government Code mandating that specialty court

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In contrast, the 2007 ABA Model Code has almost identical language for this comment, but only includes the phrase, "expressly authorized by law" – although "law" has the broad definition set forth in the Code. *See* ABA MODEL CODE OF JUD.CONDUCT, Canon 2, R. 2.9, R. 2.9 cmt. 4, & Terminology.

[168] *See* Specialty Courts List, *supra* note 1, at 1.

[169] *See* Act effective Sept. 1, 2013, 83d Leg., R.S., ch. 747, 2013 Tex. Sess. Law Serv. 1883 (West) (to be codified at Tex. Gov't Code tit. 2, subtit. K (West 2013)), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB00462F.pdf#navpanes=0 [hereinafter S.B. 462].

[170] *Id.*

[171] *See* House Judiciary & Civil Juris. Comm., Bill Analysis, at 1, Tex. C.S.S.B. 462, 83d Leg., R.S. (2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462H.pdf#navpanes=0 (describing the former law).

[172] Tex. Sen. Research Center, Bill Analysis, at 1, Tex. S.B. 462, 83d Leg., R.S. (2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462F.pdf#navpanes=0. The statement of intent also indicates that the new law requires the Governor's Specialty Courts Advisory Council "to recommend programmatic best practices to the criminal justice division." *Id.* This is consistent with a gubernatorial executive order also calling for advice on best practices for specialty courts. *See* The Governor of the State of Tex. Crim. Justice Div., *Ex. Order RP 77 – Relating to the reauthorization of the operation of the Governor's Criminal Justice Advisory Council*, 37 Tex. Reg. 2806 (2012), *available at* http://governor.state.tx.us/news/executive-order/16995/.

programs "shall . . . comply with all programmatic best practices recommended by the Specialty Courts Advisory Council . . . and approved by the Texas Judicial Council."[173]

The recommended programmatic best practices for Texas specialty courts have included the expectation for "adherence to the Ten Key Components and research-based best practices for specialty courts."[174] As described by the Texas Criminal Justice Advisory Council, the National Association of Drug Court Professionals developed "the Ten Key Components . . . as essential characteristics specialty programs must embody."[175] In turn, the Texas Legislature has codified these key components for Texas specialty courts.[176] Of significance to the discussion of a judge's role in a specialty court, these codified program characteristics contemplate an "ongoing judicial interaction with program participants."[177] Accordingly, the state legislature has not only recognized that a judge is engaged in a different, non-traditional role when presiding over a specialty court program, but has also codified the expectation that judges in such programs will have ongoing interactions with the participants. Unfortunately, however, the Texas Code of Judicial Conduct, unlike the 2007 Model ABA Code or its implementation in many states, does not address the unique role performed by judges in specialty courts, and it is

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[173] S.B. 462, *supra* note 170, at § 1.01 (enacting TEX. GOV'T CODE ANN. § 121.002(d)(1) (West Supp. 2013)). A failure to comply can result in the program's ineligibility for state or federal funds. *Id.* § 121.002(e).

[174] *See* CJAC Report, *supra* note 1, at 2.

[175] *See id.* (referencing Key Components, *supra* note 4) (setting forth ten components identified as keys to successful drug court programs)).

[176] *See* CJAC Report, *supra* note 1, at 2. *See also* TEX. GOV'T CODE ANN. § 123.001(a)(1)–(10) (West Supp. 2013) (defining ten "essential characteristics" for Texas drug courts); *id.* § 122.001(1)–(10) (family drug courts); *id.* § 124.001(a)(1)–(10) (veterans courts); *id.* § 125.001(1)–(9) (mental health courts). S.B. 462 re-codified these statutes from their former locations in other parts of the Texas Government Code. S.B. 462, *supra* note 169, at §§ 1.02, 1.04–.06.

[177] TEX. GOV'T CODE ANN. §§ 122.001(7), 123.001(a)(7), 124.001(a)(7), 125.001(5) (West Supp. 2013). *See also* Key Components, *supra* note 4, at 15 (noting that the "judge is the leader of the drug court team" and is the link for participants from "treatment and to the criminal justice system" and indicating that such "courts require judges to step beyond their traditionally independent and objective arbiter roles"). Another key component, now codified in Texas, creates an expectation for "the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants." *See, e.g.*, TEX. GOV'T CODE ANN. § 123.001(a)(2) (West Supp. 2013).

therefore time for the Texas Supreme Court to amend the Texas Code of Judicial Conduct to recognize such courts.

What is the best approach for amending the Texas Code of Judicial Conduct to recognize the unique role of judges in specialty courts – particularly with regard to ex parte communications and disqualifications or recusals? By not having acted as of yet, the Texas Supreme Court has the opportunity to study the actions by other states and adopt provisions that best serve the expanding use of specialty courts in Texas. Amending the ex parte communications section of the Texas Code of Judicial Conduct in a manner comparable to several other states' adoption of provisions comparable to the 2007 ABA Model Code would provide a significant improvement over current law with regard to specialty courts.[178] One approach to doing so would be to amend Canon 3(B)(8) of the Texas Code of Judicial Conduct pertaining to the prohibition on ex parte communications by amending the exception set forth in subsection (e) and adding a new subsection (f), as follows:

> (e) considering an ex parte communication expressly authorized by law, which for purposes of this exception includes statutes, constitutional provisions, decisional law, and state or local court rules or orders; and
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> (f) A judge presiding over a specialty court program such as a drug court, family drug court, mental health court, or veterans court may initiate, permit, or consider ex parte communications with members of the specialty court team at staffing conferences or meetings, or by written documents provided to all members of the specialty court team, consistent with waiver and consent protocols developed and implemented by the specialty court program. In presiding over a specialty court, a judge may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[179]

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[178] The Texas Supreme Court might wish to consider adopting additional portions or all of the 2007 ABA Model Code, but the scope of such a review is beyond the scope of this Article.

[179] The suggested language would amend TEX. CODE JUD. CONDUCT, Canon 3(B)(8). The proposed new language is underlined.

The proposed amendments to subsection (e) represent an amalgam of the Iowa and New Mexico approaches described above.[180] In addition, adopting this language would recognize that specialty court programs are still evolving and different jurisdictions will likely approach problem-solving courts in differing ways.[181] The language suggested for subsection (f) creates an exception specifically addressed to specialty courts, and the text is drawn from the approaches of several states.[182] In addition, the four specific types of specialty courts identified in the proposed language are not intended to be exclusive, but track those four types of programs identified during the 2013 Texas legislative session in S.B. 462.[183] Finally, the proffered language relating to waiver and consent provisions is consistent with one of the Texas Criminal Justice Policy Council's focus areas.[184]

In addition to language pertaining to ex parte communications, the Texas Supreme Court should also consider adding language pertaining to disqualifications or recusals. Canon 3(B)(1) requires that a judge not decide a matter "in which disqualification is required or recusal is appropriate."[185] Moreover, a "judge shall perform judicial duties without bias or prejudice," and a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . ."[186] As discussed above, Idaho has adopted a firm rule that if the specialty court judge receives ex parte communications while presiding over the specialty court team, the judge

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[180] *See supra* notes 161–167 and accompanying text.

[181] *See* CJAC Report, *supra* note 1, at 7 (observing that "the size and diversity of Texas prevents a one-size-fits-all approach"). The Texas Supreme Court could also adopt a comment to the proposed, revised subsection (e) that incorporates the 2007 ABA Model Code's focus on local rules for specialty courts. *See* ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing "local rules" to take priority over conflicting Model Code provisions); *see also, supra* note 32 and accompanying text (quoting the ABA comment). For example, the Texas Supreme Court could consider the following approach for such a new comment: "When local rules establishing a specialty court specifically authorize conduct not otherwise permitted under this Code, they take precedence over the provisions set forth in the Code. Nevertheless, judges presiding over specialty courts shall comply with this Code except to the extent local rules provide and permit otherwise." This proffered language closely tracks the 2007 ABA Model Code's comparable comment.

[182] *See supra* notes 137–167 and accompanying text (notably, Idaho, Nebraska, and Kansas).

[183] *See* S.B. 462, *supra* note 170.

[184] *See* CJAC Report, *supra* note 1, at 7 (recommending the continued "development of standard consent and waiver forms for use by programs to ensure due process rights of participants are protected").

[185] TEX. CODE JUD. CONDUCT, Canon 3(B)(1).

[186] *Id.* Canon 3(B)(5)–(6).

"shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case."[187] That also appears to be the approach of the Tennessee Court of Criminal Appeals, although not that of the Tennessee Supreme Court.[188] This Article does not advocate a blanket requirement for recusal from subsequent proceedings simply because the specialty court judge received ex parte communications in the course of presiding over the specialty court program. Typically, courts consider recusal motions on a case-by-case basis. Why should this type of situation be any different, particularly if the specialty court participant signed a thorough consent and waiver form? Accordingly, one possible approach would be for the Texas Supreme Court to consider adding a new subsection (12) to Canon 3(B) pertaining to a judge's adjudicative responsibilities, as follows:

> (12) If ex parte communications permitted by this Canon become an issue at a subsequent adjudicatory proceeding at which a specialty court judge is presiding, the specialty court judge shall either (1) recuse himself or herself if the judge gained personal knowledge of disputed facts outside the context of the specialty court program, or (2) make disclosure of any such ex parte communications.[189]

The foregoing language is intended to address the possible need for a recusal depending on the nature and extent of the ex parte communications that might arise as part of an individual's participation in a specialty court program. It calls for a case-by-case assessment, rather than employing a blanket rule. Indeed, depending on the nature of the ex parte communications, as well as the extent of any signed waivers or consent documentation, there might be no need for recusal in a particular case.[190] Moreover, if the revised rules permit certain ex parte communications from,

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[187] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f), at 11.

[188] *See supra* notes 83–127 and accompanying text.

[189] This proposal closely tracks language from one of the official comments set forth in the 2012 Tennessee Code of Judicial Conduct. *See* TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, RJC 2.9 cmt. 4; *supra* notes 130–136 and accompanying text. As an alternative, this proposed language could be included at the end of proposed subsection (B)(8)(f), described above. *See supra* text accompanying note 179.

[190] *See, e.g.*, *supra* notes 108–127, and accompanying text (discussing Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108).

for example, treatment team members at a staffing meeting, the presiding specialty court judge will have received that information while performing a now permissible judicial role–and not gained it via "personal knowledge."[191]

VI. CONCLUSION

Specialty courts now comprise a significant and growing part of the Texas judicial landscape. Moreover, given both legislative and gubernatorial support for specialty courts in Texas, this growth will likely continue. To assure that there is appropriate recognition and coverage of this new role for a growing number of Texas judges who preside over specialty courts, it is time for the Texas Supreme Court to follow the lead of a number of states from around the country and amend the Texas Code of Judicial Conduct.

[191] *See* Meyer, *supra* note 11, at 205–06 (asserting that "[w]hen a drug court judge receives information from a treatment provider or other source, this would be subject to the rules on ex parte contacts" and "does not qualify as 'personal knowledge'" requiring disqualification because "the judge has not personally observed the events in question;" but, suggesting that judges should "recuse themselves from any adjudication arising out of events that they did witness, such as a participant appearing in court intoxicated or a participant attempting to escape"). In addition, separate and apart from issues pertaining to ex parte communications, there might exist other reasons by which the specialty court judge should consider whether to recuse himself or herself from an ensuing adversarial proceeding based on possible bias. *See, e.g.*, Arkfeld, *supra* note 10, at 320 (providing the following example of possible bias when the specialty court judge is called to preside at a later sentencing hearing: "The judge who had worked with the defendant throughout the failed treatment process might no longer be in the position to be considered objective and open-minded.").

Exhibit A