SCAC MEETING AGENDA (Amended)
Friday, August 28, 2020 [9:00 a.m. – 5:00 p.m.]
VIA ZOOM

1. WELCOME (C. 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 June 19, 2020 meeting.

3. COMMENTS FROM JUSTICE BLAND

4. AMENDMENTS TO THE RULES GOVERNING ADMISSION TO THE BAR OF TEXAS

Judicial Administration Sub-Committee Members:

Nina Cortell - Chair
Kennon Wooten – Vice Chair
Hon. David Peeples
Michael A. Hatchell
Prof. Lonny Hoffman
Hon. Tom Gray
Hon. Bill Boyce
Hon. David Newell
Susan Henricks - Executive Director/Board of Law Examiners

(a) August 7, 2020 S. Henricks Letter to Justice Busby re: Proposed Order Amending Rule 4 of the Rules Governing Admission to the Bar of Texas

5. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP & OUT OF TIME APPEALS IN PARENTAL RIGHTS TERMINATION CASES

Appellate Sub-Committee Members:

Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. William Dorsaneo
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley
Judge Dean Rucker Family Law Council
(SBOT Family Law Section)

(b) August 24, 2020 Memo re: Parental Termination Appeals
(b(i)) August 26, 2020 Judge Rucker letter to Justice Boyce

6. **PROCEDURES TO COMPEL A RULING**

Judicial Administration Sub-Committee Members:

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

(c) August 24, 2020 Memo re: Procedures To Compel A Ruling

7. **COMPENSATION FOR SUPERVISED PRACTICE**

Judicial Administration Sub-Committee Members:

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

(d) Rule IX. Compensation

8. ***TEXAS RULE OF CIVIL PROCEDURE 306(a)(3)***

300-330 Sub-committee

Frank Gilstrap – Chair
Lamont Jefferson – Vice
Prof. William Dorsaneo
Hon. R. H. Wallace, Jr.
Charles Watson
Sharena Gilliland

(e) August 13, 2020 Rule 306(a)(3) Memo

9. ***TEXAS RULE OF APPELLATE PROCEDURE 24.1(b)(2***

Appellate Sub-Committee Members:

Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. William Dorsaneo
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(f) August 13, 2020 Memo re: TRAP 24.1(b)(2)

10. TEXAS RULE OF APPELLATE PROCEDURE 34.5(a)

Appellate Sub-Committee Members:
Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. William Dorsaneo
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(g) August 13, 2020 Memo re: TRAP 34.5(a)

11. BRIEFING RULES

Appellate Sub-Committee Members:
Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. William Dorsaneo
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(h) August 20, 2020 Memo re: Briefing Rule

12. VACATING OPINIONS

Appellate Sub-Committee Members:
Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. William Dorsaneo
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(i) August 13, 2020 Memo re: TRAP 56.2 Vacating Opinions

Tab A

Board of Law Examiners

Appointed by the Supreme Court of Texas

January 7, 2020

Justice Brett Busby
Supreme Court of Texas
201 West 14th St., 3rd Floor
Austin, Texas 78701

Re: Proposed Order Amending Rule 4 of the Rules Governing Admission to the Bar of Texas

Dear Justice Busby:

With this letter, I am delivering the Board of Law Examiners' proposed amendments to Rule 4 for the Court's consideration.

Currently, Rule 4(d)(2) creates a conclusive finding against the character and fitness of an applicant who has been convicted or placed on deferred adjudication probation for a felony, if less than five years have elapsed since the applicant was released from incarceration or probation. Affected applicants are currently barred from filing any application or declaration of intention to study law, subject to the Board's decision to waive application of the rule, if requested. The effect of the proposed amendments will be to eliminate the conclusion against a finding of good character and eligibility for any such potential applicant. A rebuttable presumption as to lack of character and fitness will remain but it will now be subject to evaluation and Rule 4 will no longer bar the filing of an application or declaration.

The proposed revisions are intended to provide a more equitable and efficient means to consider the qualifications of affected applicants. These applicants will now be able to apply for evaluation of their character and fitness when they are otherwise eligible, like all other applicants. The Board will then evaluate any mitigating evidence such as good conduct and rehabilitation, as provided by Rule 4(f).

Thank you for your consideration of the attached proposed rule revisions. Should you have any questions, you may contact me at 512-463-8929.

Sincerely,

Susan Henricks
Executive Director

MAILING ADDRESS
Post Office Box 13486
Austin, Texas 78711-3486

TELEPHONE: 512- 463-1621 ◆ FACSIMILE: 512- 463-5300 ◆ WEBSITE: https://ble.texas.gov

STREET ADDRESS
205 West 14th Street, 5th Floor
Austin, Texas 78701

(d) The following provisions shall govern the determination of present good moral character and fitness of a Declarant or an Applicant who has been finally convicted of a felony in Texas or placed on probation for a felony with or without an adjudication of guilt in Texas, or who has been finally convicted or placed on probation with or without an adjudication of guilt in another jurisdiction for a crime which would be a felony in Texas. A Declarant or Applicant may be found lacking in present good moral character ~~and~~ or fitness under this rule based on the underlying facts of a felony conviction or deferred adjudication, as well as based on the conviction or probation through deferred adjudication itself.

(1) The record of conviction or order of deferred adjudication for a felony offense is conclusive evidence of guilt, in the absence of an executive pardon for that offense~~.~~

(2) An individual guilty of a felony under this rule is ~~conclusively deemed~~ presumed not to have present good moral character and fitness ~~and shall not be permitted to file a Declaration of Intention to Study Law or an Application~~ for a period of five years after the completion of the sentence and/or period of probation.

~~(3) Upon a credible showing that a felony conviction or felony probation, either with or without an adjudication of guilt, has been reversed on review by an appellate court, or that an executive pardon has been granted, the Declarant or Applicant shall be permitted to file a Declaration of Intention to Study Law or an Application.~~

(e) The following provisions shall govern the determination of present good moral character ~~and~~ or fitness of a Declarant or Applicant who has been licensed to practice law in any jurisdiction and has been disciplined, or allowed to resign in lieu of discipline, in that jurisdiction.

(1) A certified copy of the order or judgment of discipline from the jurisdiction is prima facie evidence of the matters contained in such order or judgment, and a final adjudication in the other jurisdiction that the individual in question has committed professional misconduct is conclusive of the professional misconduct alleged in such order or judgment.

(2) An individual disciplined for professional misconduct in the course of practicing law in any jurisdiction or an individual who resigned in lieu of disciplinary action ("disciplined individual") is deemed not to have present good moral character or~~and~~ fitness and is therefore ineligible to file an Application for Admission to the Texas Bar during the period of such discipline imposed by such jurisdiction, and in the case of disbarment or resignation in lieu of disciplinary action, until the disciplined individual has properly filed an application for re-licensure in the disciplining jurisdiction, in accordance with the procedures established for re-licensure in that jurisdiction, and has obtained a final determination on that application.

Notwithstanding the foregoing provision of this subsection(e)(2) and except as provided in Rule 4(d)(2), if the period of discipline imposed by another jurisdiction exceeds five years, the disciplined individual may file an Application after the expiration of five years from the date of imposition of such discipline, provided that (s)he has obtained a final determination on his/her application for re-licensure in the disciplining jurisdiction.

(3) The only defenses available to an Applicant or Declarant under section (e) are outlined below and must be proved by clear and convincing evidence:

(A) The procedure followed in the disciplining jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

(B) There was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board, consistent with its duty, should not accept as final the conclusion on the evidence reached in the disciplining jurisdiction.

(C) The deeming of lack of present good moral character or~~and~~ fitness by the Board during the period required under the provisions of section (e) would result in grave injustice.

(D) The misconduct for which the individual was disciplined does not constitute professional misconduct in Texas.

(4) If the Board determines that one or more of the foregoing defenses has been established, it shall render such orders as it deems necessary and appropriate.

(f) An individual who applies for admission to practice law in Texas or who files a petition for redetermination of present moral character and fitness ~~after the expiration of the five-year period required~~ under subsection (d)(2) above or after the completion of the disciplinary period assessed or ineligibility period imposed by any jurisdiction under subsection (e) above shall be required to prove, by a preponderance of the evidence:
(1) that the best interest of the public and the profession, as well as the ends of justice, would be served by his or her admission to practice law;
~~(~~2) that (s)he is of present good moral character and fitness; and
(3) that during the five years immediately preceding the present application ~~action~~, (s)he has been living a life of exemplary conduct.

(g) An individual who files a petition for redetermination of present moral character and fitness after a negative determination based on a felony conviction, felony probation with or without adjudication of guilt, or professional misconduct or resignation in lieu of disciplinary action and whose petition is denied after a hearing, is not eligible to file another petition for redetermination until after the expiration of three years from the date of the Board's order denying the preceding petition for redetermination.

(d) The following provisions shall govern the determination of present good moral character and fitness of a Declarant or an Applicant who has been finally convicted of a felony in Texas or placed on probation for a felony with or without an adjudication of guilt in Texas, or who has been finally convicted or placed on probation with or without an adjudication of guilt in another jurisdiction for a crime which would be a felony in Texas. A Declarant or Applicant may be found lacking in present good moral character or fitness under this rule based on the underlying facts of a felony conviction or deferred adjudication, as well as based on the conviction or probation through deferred adjudication itself.

(1) The record of conviction or order of deferred adjudication for a felony offense is conclusive evidence of guilt, in the absence of an executive pardon for that offense

(2) An individual guilty of a felony under this rule is presumed not to have present good moral character and fitness for a period of five years after the completion of the sentence and/or period of probation.

(e) The following provisions shall govern the determination of present good moral character or fitness of a Declarant or Applicant who has been licensed to practice law in any jurisdiction and has been disciplined, or allowed to resign in lieu of discipline, in that jurisdiction.

(1) A certified copy of the order or judgment of discipline from the jurisdiction is prima facie evidence of the matters contained in such order or judgment, and a final adjudication in the other jurisdiction that the individual in question has committed professional misconduct is conclusive of the professional misconduct alleged in such order or judgment.

(2) An individual disciplined for professional misconduct in the course of practicing law in any jurisdiction or an individual who resigned in lieu of disciplinary action ("disciplined individual") is deemed not to have present good moral character or fitness and is therefore ineligible to file an Application for Admission to the Texas Bar during the period of such discipline imposed by such jurisdiction, and in the case of disbarment or resignation in lieu of disciplinary action, until the disciplined individual has properly filed an application for re-licensure in the disciplining

jurisdiction, in accordance with the procedures established for re-licensure in that jurisdiction, and has obtained a final determination on that application.

Notwithstanding the foregoing provision of this subsection(e)(2) and except as provided in Rule 4(d)(2), if the period of discipline imposed by another jurisdiction exceeds five years, the disciplined individual may file an Application after the expiration of five years from the date of imposition of such discipline, provided that (s)he has obtained a final determination on his/her application for re-licensure in the disciplining jurisdiction.

(3) The only defenses available to an Applicant or Declarant under section (e) are outlined below and must be proved by clear and convincing evidence:

(A) The procedure followed in the disciplining jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

(B) There was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board, consistent with its duty, should not accept as final the conclusion on the evidence reached in the disciplining jurisdiction.

(C) The deeming of lack of present good moral character or fitness by the Board during the period required under the provisions of section (e) would result in grave injustice.

(D) The misconduct for which the individual was disciplined does not constitute professional misconduct in Texas.

(4) If the Board determines that one or more of the foregoing defenses has been established, it shall render such orders as it deems necessary and appropriate.

(f) An individual who applies for admission to practice law in Texas or who files a petition for redetermination of present moral character and fitness under subsection (d)(2) above or after the completion of the disciplinary period assessed or ineligibility period imposed by any jurisdiction under subsection (e) above shall be required to prove, by a preponderance of the evidence:

(1) that the best interest of the public and the profession, as well as the ends of justice, would be served by his or her admission to practice law;
2) that (s)he is of present good moral character and fitness; and
(3) that during the five years immediately preceding the present application, (s)he has been living a life of exemplary conduct.

(g) An individual who files a petition for redetermination of present moral character and fitness after a negative determination based on a felony conviction, felony probation with or without adjudication of guilt, or professional misconduct or resignation in lieu of disciplinary action and whose petition is denied after a hearing, is not eligible to file another petition for redetermination until after the expiration of three years from the date of the Board's order denying the preceding petition for redetermination.

Tab B

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **August 24, 2020**

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3 letter refer the following matter to the Appellate Rules Subcommittee:

> **Out-of-Time Appeals in Parental Rights Termination Cases.** A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:
>
> - a narrow late-appeal procedure;
> - an abate-and-remand procedure like the one proposed in the Phase II Report;
> - a habeas- or bill-of-review-style procedure; and
> - prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.
>
> **Suits Affecting the Parent-Child Relationship.** In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

The HB 7 Phase II Report recommends four changes that affect the appellate rules and also have some bearing on the out-of-time appeal assignment: (1) right to counsel, showing authority to appeal, and frivolous appeals; (2) a procedure in the court of appeals to consider ineffective-

assistance-of-counsel claims discovered by appellate counsel; (3) a rule standardizing the currently unwritten understanding on *Anders* briefs; and (4) opinion templates for use in parental termination cases.

II. Background

The subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee has not considered or discussed a similar procedure in the courts of appeals, nor has the subcommittee addressed a procedure for bringing late claims of ineffective assistance of counsel, *Anders* briefs, or frivolous appeals.

The Texas Supreme Court has indicated that it will consider the July 2017 proposals regarding late-filed petitions for review in conjunction with any additional recommendations on parental-termination topics identified in the May 31, 2019 referral letter.

III. Issues for Discussion

The subcommittee has broken down the referral topics into two stages to be addressed in the following order.

1. Stage One: Out-of-time appeals and related issues
    a. HB7 Phase II recommendations: indigent parent's right to counsel on appeal; notice of right to appeal; showing authority to appeal
    b. Assessing proposals for addressing untimely appeals and ineffective claims
        i. HB7 Phase II recommendation: abate and remand for evidentiary hearing in support of IAC claim
        ii. "narrow late-appeal procedure"
        iii. "habeas- or bill-of-review-style procedure" for a collateral attack
        iv. other possible procedures such as a requirement that counsel continue the representation until a notice of appeal has been filed.
2. Stage Two: Briefing and Opinions
    a. Frivolous appeals; *Anders* procedures in the courts of appeals as discussed by the HB7 task force; "Parental Termination Brief Checklist"
    b. Opinion templates as created by the HB7 task force

This memo focuses on Stage One, topic 1(a) with respect to the right to counsel on appeal, notice of right to appeal, and showing authority to appeal. The subcommittee will address Stage One, topic 1(b) and Stage Two in later meetings.

IV. Discussion

A. Notice of Right to Appeal and Right to Representation by Counsel

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of a conservator for the child is requested, an indigent parent is entitled by statute to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code §§ 107.013(a), 107.016(3). In termination cases, this right extends to the filing of a petition for review in the Texas Supreme Court. *In the interest of P.M.*, 520 S.W.3d 24 (Tex. 2016) (per curiam).[1]

The HB7 Task Force made the following recommendations regarding an indigent parent's notice of the right to appeal and the right to counsel on appeal.

> The HB7 Task Force proposes that a defendant in a parental-termination suit be notified in the citation about the right to counsel, including the right to counsel on appeal. This will provide an additional measure of notice in the event appointed counsel later declines to pursue an appeal due to abandonment of the case by the parent. The admonition could be added to the required notice and take the following form:
>
> > "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you."
> >
> > "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."
>
> To the extent the Supreme Court is currently considering a revision of Rule 99 to include standard form citations, the Task Force proposes the creation of a customized form citation, in English and Spanish (and with an internet citation to translations in other languages), to be used in parental termination cases. Such a

[1] The Supreme Court has not addressed whether there is a constitutional or statutory right to appointed counsel in private parental termination suits, or whether such a right extends to a non-indigent parent. The Court also has not addressed whether appointed counsel must be provided for an indigent parent at the petition for review stage in cases in which a governmental entity seeks the appointment of a conservator for a child.

> citation could have language customized to address the availability of default judgments in parental-termination cases.

The subcommittee reviewed and discussed these HB7 Task Force recommendations.

The subcommittee recommends the following revision to the HB7 Task Force's proposed citation language.

> "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you at no cost to you."
>
> "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."

The proposed revision clarifies the practical consequence of being "eligible for appointment of an attorney" and conforms the first paragraph to the second paragraph so they both provide the same information in parallel fashion.

The HB7 Task Force proposal comports with an October 2017 report by the Rules 15-165a Subcommittee entitled, "Modernizing TRCP 99, Issuance and Form of Citation." The full advisory committee discussed this report at its October 2017 meeting, and the proposed revisions to TRCP 99 are pending before the Texas Supreme Court. Among other things, the October 2017 report recommends eliminating from TRCP 99 the description of a citation's mandatory contents and instead promulgating a form citation in plain language that clerks must follow. The Appellate Rules Subcommittee endorses the application of this approach to parental termination cases. The Appellate Rules Subcommittee solicits input from the full advisory committee about whether additional language addressing default judgments or other topics specific to parental termination cases should be considered for inclusion in a form citation for parental termination cases.

B. Showing Authority to Appeal

The HB7 Task Force made the following recommendations (footnotes omitted) with respect to requiring an attorney to show authority to pursue an appeal from a termination order.

> The filing of a notice of appeal starts the process of immediately preparing a record for which a court reporter might not be compensated. To avoid initiating the preparation of an appellate record in circumstances when a terminated parent may not actually be seeking to challenge a final order, the HB7 Task Force recommends an amendment to Rule 28.4(c) to require that a notice of appeal include an attorney certification that "the attorney consulted with the appellant and the appellant has directed the attorney to pursue to the appeal." *See Appendix C, Rule 28.4(c)*. The Task Force further proposes a similar certification in a petition for review filed in the Supreme Court. *See Appendix D, Rule 53.2(l)*. As an enforcement mechanism, the Task Force proposes borrowing from the procedure in Texas Rule of Civil Procedure 12 to challenge an attorney's authority but eliminating the requirement of a sworn motion.

The HB7 Task Force's proposed rule revisions read in part as follows.

> HB7 Task Force Proposed Texas Rule of Appellate Procedure 28.4(c):
>
> (c) *Certification by Appointed Counsel and Motion to Show Authority*. A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court's ruling. The court must rule on the motion to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.
>
> HB7 Task Force Proposed Texas Rule of Appellate Procedure 53.2(l):
>
> (l) *Certification by Appointed Counsel*. In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

The subcommittee reviewed and discussed these HB7 Task Force proposals.

The subcommittee recommends a different approach regarding an enforcement mechanism in proposed TRAP 28.4(c).

Questions arose among the subcommittee members regarding the necessity of creating a motion-to-show-authority procedure. If the full advisory committee concludes such a procedure is necessary, then the subcommittee recommends creating a simpler procedure. Grafting the procedure from TRCP 12 onto TRAP 28.4(c) makes for a lengthy and potentially cumbersome or redundant appellate rule. Instead of adding language to proposed TRAP 28.4(c) delineating the procedure for challenging authority to appeal, the subcommittee recommends (1) adding a second sentence to proposed TRAP 28.4(c) stating that a motion challenging an attorney's authority to pursue a parental-termination appeal will be handled in the trial court under TRCP 12, and (2) supplementing TRCP 12 as necessary to accommodate the accelerated timeframes applicable to parental-termination appeals.

The full committee discussed the questions of authority and intent to appeal at length during the November 1, 2019 meeting. Substantial consideration was given to the issue of "phantom" appeals pursued on behalf of absent parents whose intent to pursue an appeal from a termination order may be difficult for trial counsel or the trial court to confirm because they cannot be located. The full committee votes indicated a preference for a rule-based procedure under which the trial court would (1) conduct a hearing at the conclusion of trial, and then (2) sign an order based on the results of that hearing.

The subcommittee considered this procedure based on the vote and recommends a narrow rule to implement it as discussed further below. One possible location for such a rule is as part of current Texas Rule of Civil Procedure 306, which already contains a specific provision addressing the contents of a judgment in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

The subcommittee discussed using Rule 306 as the vehicle for any procedure that may be implemented, and moving the first sentence of Rule 306 to Rule 301.

To obtain practical insights on how such a procedure might work and to identify potential pitfalls, the subcommittee reached out to those who have experience handling these cases. Two key pitfalls were identified.

- It is problematic to infer an intent to relinquish parental rights, or to relinquish the right to appeal from a termination order, solely from a terminated parent's absence at trial or periodic absences as a case progresses. Parents subject to termination may "disappear" from a case for periods of time and become unreachable by counsel because they are homeless, or incarcerated, or experiencing domestic violence, or experiencing untreated mental illness, or experiencing the effects of substance abuse. It is not uncommon for parents in these circumstances to re-establish contact with counsel after trial when their circumstances have stabilized and express a desire to challenge a termination order on appeal. For this reason, a rule permitting the trial court to determine an intent not to appeal based solely on the parent's absence from trial, or trial counsel's inability to communicate with a

parent who previously has been participating in the case but has become unreachable, potentially could operate to foreclose the appellate rights of parents who later will express a desire to appeal.

- Parents who are present for trial may be difficult to reach after trial, which counsels in favor of having any hearing and determination with respect to an intent to appeal occur at the close of trial instead of when the judgment is signed.

Based on this input, the subcommittee has reviewed a proposed revision to Rule 306.

Under this proposal, non-appearance at trial would give rise to a permissible inference that the terminated parent does not wish to appeal when a parent (1) is identified as an "alleged" or "presumed" parent; (2) has never been located or involved in the case; and (3) is represented at trial only because the trial court has appointed an attorney ad litem to represent the "alleged" or "presumed" parent at trial.

Discussion of revisions to Rule 306 during the June 19, 2020 full committee meeting generated multiple comments and suggestions aimed at making the revised rule more streamlined and easier to implement at the trial court level. Based on these comments, a new draft of revised Rule 306 is presented for consideration.

[Current] Rule 306 Recitation of Judgment

The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator.

[Draft] Rule 306 Judgment in Suit Affecting the Parent-Child Relationship

1. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator. **[Same as the current rule.]**

2. The following provisions apply in a suit filed by a governmental entity that seeks the termination of the parent-child relationship or appointment of the entity as a child's conservator. The judgment must contain one of the following express statements regarding appointment of an attorney ad litem to pursue a parent's or alleged father's appeal.

a. The attorney ad litem will continue the representation for appellate proceedings; or

b. The attorney ad litem is replaced by another attorney who will continue the representation for appellate proceedings; or

c. The attorney ad litem is discharged without continuing the representation for appellate proceedings based upon a finding of good cause. For purposes of this subpart, "good cause" means either of the following:

i. The parent failed to appear after proper citation; or

ii. The attorney ad litem appointed for the alleged father was unable despite diligent efforts to identify or locate the alleged father.

Explanation of changes:

1. The first sentence of TRCP 306 is moved to TRCP 301.

2. It is assumed that the proposed changes to citation are approved.

3. Under Family Code §107.013 the court must appoint an attorney ad litem for:

   i. An indigent parent who responds to oppose the termination or appointment;
   ii. A parent served by publication;
   iii. An alleged father who failed to register his parenthood under Chap. 160 and whose location is unknown; and,
   iv. A registered alleged father who cannot be located for service.

The attorney ad litem must investigate what the petitioner has done to locate an alleged father and do an independent investigation to find him. Tex. Fam. Code §107.0132(a). If the attorney locates him, he must report the address and locating information to the court and each party. Tex. Fam. Code §107.0132(b). If the attorney ad litem cannot locate him, he shall report his efforts to the court; on receipt of the report, the court must discharge the attorney. Tex. Fam. Code §107.0132(d). If the putative father is adjudicated the parent and is determined to be indigent, the court may continue the appointment

on the same basis as an indigent parent. Tex. Fam. Code §107.0132(c). This suggests that after the putative father appears, he is entitled to continued representation only upon proof of indigency.

4. The attorney ad litem serves until the earliest of:

    i. The date the suit is dismissed;
    ii. The date appeals of a final order are exhausted or waived; or
    iii. The date the attorney is relieved of duties or replaced by another attorney after a finding of good caused rendered on the record.

    Tex. Fam. Code §107.016(3). The Supreme Court has held that once appointed, counsel may withdraw only for good cause, which did not include client disagreement or belief the appeal was meritless. *In the Interest of P.M.*, 520 S.W.3d at 27. Courts have a duty to see that withdrawal not result in foreseeable prejudice to the client; it the court permits withdrawal, it must provide for new counsel. *Id*. However, this was a case where the parent had appeared and actively pursued an appeal. This leaves unresolved whether the court may relieve the attorney ad litem if the parent/putative father never appeared after personal service or service by publication.

    Section 107.0132(d) mandates discharging counsel if the putative father cannot be located. Section 107.0132(c) suggests the putative father who is served is entitled to continued representation on the same basis as a parent who appears. Arguably the *P.M.* decision would permit discharging the attorney ad litem if:

    i. The putative cannot be located;
    ii. The putative father is served, responds, but fails to prove he is indigent;
    iii. The parent is served, responds, but fails to prove indigency.

5. This draft avoids the difficulty of trying to determine whether a party who has never appeared (or has disappeared) wishes to waive the appeal. It focused on determining what is good cause under Texas Family Code section 107.016(3) to relieve the appointed attorney ad litem when the final judgment is signed. It does not address discharging or relieving appointment prior to a final judgment.

This proposal generated substantial discussion within the subcommittee. Additional areas for consideration include (1) is Rule 306 the best place to put such a rule; (2) are there other rules

that could be more readily adapted for this purpose, such as Rule 308a; (3) should all rules of civil procedure governing the parent-child relationship be assembled in one place as part of "Rules Relating to Special Proceedings" in Part VII of the Texas Rules of Civil Procedure.

C. Motions for Extension of Time and Conformity With Revisions to TRAP 4.7

Later subcommittee reports will address issues concerning extensions of time by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed counsel fails to timely pursue an appeal. At this juncture, the subcommittee recommends that any standards or procedures adopted for earlier appellate proceedings be compatible with those ultimately adopted with respect to petitions for review in the Texas Supreme Court. As noted earlier, the subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review.

Tab B(i)

Children's Commission®
SUPREME COURT OF TEXAS PERMANENT JUDICIAL COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Justice Eva Guzman, *Chair*

Jamie Bernstein, *Executive Director*

August 26, 2020

Dear Justice Boyce.

Thank you for the opportunity to review the August 24, 2020 memorandum to the appellate rules subcommittee prior to the Supreme Court Advisory Committee meeting on August 28, 2020. It is evident that the SCAC contributed a tremendous amount of work to examine the recommendations found in the HB 7 Task Force Phase II Report regarding appeals in parental termination cases. In my capacity as Jurist in Residence of the Children's Commission, and in consultation with the Commission staff, there are several issues laid out below for your consideration.

After reviewing the memo, the Children's Commission has some concerns regarding discussion item **B. Showing Authority to Appeal**. As you may recall, HB 7 Task Force developed the Proposed Rules of Appellate Procedure 28.4(c) and 53.2(1) after examining the increase of parental termination appeals in both Texas Appellate Courts and the Supreme Court of Texas. The "phantom appellant" scenario refers to instances where an attorney for a parent appeals the termination of parental rights without having contact with the client, or direction from the client to pursue the appeal, after the termination order is entered. A "phantom appellant" may be a parent who was served and made one appearance at the 14-day adversary hearing without ever contacting their attorney again. Alternatively, a parent who appears at every hearing but disappears on the eve of trial, or a parent who attends the entire trial but is unreachable thereafter could also present as a "phantom appellant." In these scenarios, the threshold issue is whether the attorney who is unable to contact the client and ascertain direction about whether to appeal the termination, between the time the final order is signed and the expiration of subsequent 20 day deadline to file a notice of appeal under Rule 26.1(b), files notice and pursues the appeal despite the lack of contact or direction.

The SCAC subcommittee's outreach to practitioners handling CPS cases identified two concerns. Unfortunately, those concerns do not conform with the concept of the "phantom appellant" laid out above. The first concern was that "[i]t is problematic to infer an intent to relinquish parental rights, or to relinquish the right to appeal from a termination order, solely from a terminated parent's absence at trial or periodic absences as a case progresses." Though this statement is accurate, the crux of the "phantom appellant" issue is the lack of direction on the decision to appeal termination, not the parent's level of participation throughout the case or even at trial. It is also important to note that absent direction from a client, it would be equally problematic to infer a desire to pursue an appeal of termination. A termination appeal is not without substantial emotional cost, both to the parent and the child, as it significantly extends the time they must live with a monumental uncertainty.

Another noted concern was that "[i]t is not uncommon for parents in these circumstances to re-establish contact with counsel after trial when their circumstances have stabilized and express a desire to challenge a termination order on appeal." The Children's Commission is unaware of any study on legal representation in CPS cases either in Texas or nationally that would support this assertion. This assertion also does not fit squarely in the concept of a "phantom appellant" and fails to reflect the intended consequences of classifying CPS termination cases as accelerated appeals.

Classifying CPS cases as accelerated appeals deliberately forecloses the rights of parents who will later express a desire to appeal because the calculation has been made that providing timely permanency for children necessitates a compressed period of time for a parent to decide to appeal. Consider the example of a parent who attends every hearing in their case, attends trial, loses at trial, consults with their attorney post-trial, makes the decision not to appeal, the 20-day notice period of Rule 26.1(b) expires, and the attorney is dismissed. If that parent has a change of heart and later expresses a desire to appeal, that opportunity is foreclosed by design, even if the change of heart occurs a day or two after the deadline to file a notice of appeal. It is unclear why the late desire to appeal of a parent who is absent at a critical juncture deserves more protection that a parent who appears at every stage of the case.

Additionally, under the proposed rule, "non-appearance at trial would give rise to a permissible inference that the terminated parent does not wish to appeal when a parent (1) is identified as an "alleged" or "presumed" parent; (2) has never been located or involved in the case; and (3) is represented at trial only because the trial court has appointed an attorney ad litem to represent the "alleged" or "presumed" parent at trial." This language confounds the legal standing of presumed and alleged fathers. A presumed father is a legally adjudicated father, equivalent to a father whose paternity is adjudicated by a DNA test, unless the presumption is overturned. A presumed father's rights would have to be terminated under Family Code Section 161.001. Someone named by the mother to be the father of the child, who was identified and located, should be adjudicated either through a DNA test or legal acknowledgement as the father before the case goes to trial. If that person cannot be found and adjudicated, they only have the quasi-status of an "alleged father' and there is a separate termination procedure under Family Code Section 161.002. The procedures are based on whether the father's identity is known or unknown, whether he has registered with the paternity registry, and whether the department exercised due diligence in attempting to serve him. Termination under Section 161.002 requires neither an examination of the acts of the parent nor a best interest determination and was not contemplated by HB 7 Task Force when considering the issue of "phantom appellants."

A separate concern was also noted that a parent present for trial may be difficult to reach afterward and therefore the hearing and determination of intent to appeal should be made at the close of trial. One possible solution is developing a post-trial procedure to determine the intent to appeal. This approach avoids any presumptions of an absent parent's intent to appeal or not appeal the termination. The narrow focus of the post-trial procedure would be to determine whether the parent provided direction to appeal rather than the parent's previous level of participation in the case or their status as a father. The timing of any hearing and/or order dismissing counsel for good cause must take into account the 20 day time period between the signing of the final order and the deadline to file notice under Rule 26.1(b) where the parent is entitled to counsel and may reconnect with their attorney and

timely express a desire to appeal. Finally, the procedure should account for possible unintended consequences of conducting a hearing regarding the decision to appeal at the conclusion of trial when the emotions of parties may be at a high point.

Thank you for taking these considerations into account and please call on me and the staff at the Children's Commission if we can be of further assistance.

Respectfully,

Judge Dean Rucker
Jurist in Residence
Children's Commission

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Tab C

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Judicial Administration Subcommittee**

RE: **Mechanisms for Obtaining a Trial Court Ruling**

DATE: **August 24, 2020**

I. Matter Referred

Chief Justice Hecht's September 4, 2019 referral letter and Chairman Babcock's September 6, 2019 letter to the Judicial Administration Subcommittee address the following matter:

> **Procedures to Compel a Ruling.** In the attached letter, Chief Justice Gray points out that litigants, particularly self-represented inmates, are often unable to get trial courts to timely rule on pending motions and proposes rule changes to address the issue. The Committee should consider Chief Justice Gray's proposals and other potential solutions.

II. Background

As requested in the referral, the Judicial Administration Subcommittee has discussed issues related to the difficulty that incarcerated pro se litigants encounter in obtaining rulings on motions. Procedural issues surrounding difficulty in obtaining rulings are not limited to criminal cases.

III. Discussion

The subcommittee identified two threshold questions on which the full committee's input was solicited at the November 2019 meeting to provide direction for the subcommittee's further deliberations.

The first question was whether the discussion should focus solely on specific circumstances involving pro se inmate litigants, or instead should encompass the full range of situations in which a failure to rule may prompt mandamus proceedings.

The second question focused on the optimal approach to use in addressing failures to rule. Multiple potential approaches were identified based on discussions within the subcommittee and informal polling of the chief justices of the intermediate appellate courts.

- Create a universal request-for-a-ruling form, which would start the clock running for purposes of a deemed ruling denying the motion by operation of law occurring a certain number of days after the request is submitted.

- Require the trial court clerk to present a report of all ruling requests to the judge at least once monthly to create a presumption that the trial court had been informed of the motion and request. A litigant could rely upon this presumption in mandamus proceedings to establish that the trial judge had been made aware of the motion or request at issue.

- Reliance on a default rule under which a motion is denied by operation of law a certain number of days after filing. This approach already is used in a number of specific circumstances. *See, e.g.,* Tex. R. Civ. P. 329b(c) (motion for new trial overruled by operation of law 75 days after filing in absence of an express order); Tex. R. App. P. 21.8(c) (motion for new trial in a criminal case is deemed denied 75 days after imposing or suspending sentence in open court); Tex. Civ. Prac. & Rem. Code § 27.008(a) (TCPA motion to dismiss overruled by operation of law if trial court does not rule by 30th day following the date on which the hearing on the motion concludes).

- All Texas judges are under a duty to analyze their dockets and take action to bring overdue or pending matters to a conclusion pursuant to the Rules of Judicial Administration and the Code of Judicial Conduct. In conjunction with these existing duties, judges could be required to provide quarterly reports to the presiding judge of their administrative judicial region (or to the Office of Court Administration) identifying matters submitted for more than a threshold number of days and still awaiting a decision. Presiding judges would bear responsibility to determine the reasons for a failure to rule and would take appropriate follow up steps, perhaps including appointment of visiting judges to address a backlog.

These approaches were discussed at the November 2019 meeting. Additional approaches also were discussed including requiring trial judges to create a mechanism for reviewing motions without an oral hearing; educating trial judges and clerks regarding continuing jurisdiction to rule on motions after a final judgment is signed; creating a reminder mechanism that parties can send to judges; requiring judges to file a response to a failure-to-rule mandamus; and reporting mechanisms to the judicial conduct commission for repeated failures to rule. An additional consideration is that litigants may be reluctant to "remind" judges about long-pending but unresolved motions out of concern for provoking an adverse response.

Discussion at the November 2019 meeting considered whether this issue should be approached solely in a criminal context, or in a civil context as well. After the meeting, the subcommittee received additional guidance from the Court of Criminal Appeals and the Texas Supreme Court about the scope of this inquiry. This guidance indicated that the subcommittee should focus its efforts on circumstances in civil cases rather than criminal cases.

The Texas Supreme Court's guidance asked the subcommittee to consider a civil rule that (1) applies generally, not just to self-represented litigants; (2) focuses on a request-for-a-ruling mechanism to trigger an operation-of-law event; and (3) encompasses a result other than a deemed ruling, such as a presumption that the trial court has been informed of the motion and request.

The subcommittee conferred again after receiving this guidance and reached a consensus that, if used, a request-for-a-ruling mechanism in the civil context should: (1) create a presumption that the trial court is aware of the motion and requested relief, which would establish a basis for seeking mandamus relief to compel a ruling; and (2) exclude any circumstance in which a deadline to rule or a deemed ruling already is provided for under existing rules or statutes, such as motions for new trial and anti-SLAPP motions to dismiss under the TCPA. If a request-for-a-ruling mechanism is used, the subcommittee believes the better course is to create a narrower mechanism limited to creating a presumption of trial court awareness that will allow a mandamus to be filed seeking to compel a ruling, as opposed to creating a deemed denial situation that could result in unintended consequences such as (1) loss of substantive rights from a deemed denial/overruling on the merits; (2) missed appellate deadlines triggered by a request to rule resulting in a deemed denial; and (3) anomalies such as rulings being deemed to have occurred after the trial court has lost plenary power.

IV. Draft Rules

After further discussion this spring, the subcommittee has developed two alternative draft rules for consideration and discussion. The first reflects an administrative reporting approach; the second reflects a request-for-a-ruling mechanism.

The subcommittee did not reach consensus on the approach to be used; therefore, both are set out below for consideration.

Alternative No. 1: Administrative Reporting

Proposed Addition to Texas Rule of Judicial Administration 6.1

(f) Reporting of matters awaiting decision 90 days after submission in civil and family cases.

(1) When a judge has not issued a decision on a matter **[motion]** within 90 days after it was submitted, the judge must send the Office of Court Administration **[and also the Regional Presiding Judge and the Local Administrative Judge?]** a description of the matter and a brief explanation of why it remains pending. The description and explanation may be sent by email, and must be signed by the judge and filed with the papers in the case.

(2) A matter has been submitted when the parties have presented their positions and the judge has not asked for additional argument or information.

Comment

Trial judges are expected to make timely rulings after trials on the merits and after pretrial matters have been submitted to them for decision. Section (f) implements longstanding rules that remind judges to dispose of judicial business promptly and efficiently. *See* Administrative Rule 3e (Regional Presiding Judges "shall . . . (1) determine the existence of . . . (f) cases tried

and awaiting entry of judgment"); Administrative Rule 7a (2) (Trial judges "shall . . . rule on a case within three months after the case is taken under advisement"); and Administrative Rule 9a (Local Administrative Judge is responsible for "the expeditious dispatch of business" in the trial courts). *See also* Code of Judicial Conduct Canon 3-B-(9) ("A judge should dispose of all judicial matters promptly, efficiently and fairly") and 3-C-(3) (A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities").

Section (f) does not apply to matters *filed* but not yet submitted. Nor does it require reports from *all* trial judges. It requires reports (and is a duty under Canon 3 of the Code of Judicial Conduct) *only* for judges who have one or more trials or pretrial matters still awaiting decision 90 days or more *after submission*.

When a matter was heard by a colleague or by an assigned judge instead of the active judge of the court, the requirement applies to the judge who heard the matter.

Alternative No. 2: Request for a Ruling

Tex. R. Civ. P. ___ Notice of Ruling Needed

A party who has filed a motion that has not been ruled on may trigger a time period for the trial court to rule on the motion by filing a Notice Of Ruling Needed, unless the motion has a timeline determined by statute or another rule. A notice under this rule must identify the specific pending motion that has not been ruled upon (and the **[approximate]** date that the motion was filed) and cannot be filed as part of any other document. If the motion identified in the notice has not been ruled upon within **[21/35/60/90]** days after the notice is filed, then the party may file a petition for a writ of mandamus to compel a ruling. If a petition for a writ of mandamus is filed to compel a ruling on the motion the appellate court will presume the trial court is aware of the motion and that sufficient time has passed to rule on the motion unless the record or a response to the mandamus petition evidences why the trial court has not yet ruled or why additional time is needed before a ruling is rendered by the trial court **[alternative phrasing: unless the record or a response to the mandamus rebuts the presumption]**.

Both proposals were discussed and voted on at the full committee's June 2020 meeting, with these results.

- The full committee voted in favor of following the request-for-a-ruling approach (Alternative No. 2) rather than the administrative reporting approach (Alternative No. 1).

- A request-for-a-ruling rule should address only civil actions by prisoners – not criminal matters, and not all civil matters.

- The subcommittee was instructed to explore whether any additional steps can or should be taken by the presiding judge of the administrative judicial region if there is an issue with a particular judge involving a persistent failure to rule.

The subcommittee met again to discuss next steps following these votes.

There was sentiment among members of the subcommittee that it may not be useful to proceed with consideration of a narrowly drawn request-for-a-ruling rule that excludes all criminal matters and most civil matters – including the DNA testing circumstances under Code of Criminal Procedure Chapter 64 that prompted Chief Justice Gray's initial letter to the Texas Supreme Court on this issue. *See In re Jerry Rangel*, 570 S.W.3d 968 (Tex. App.—Waco 2019, orig. proceeding). If a narrowly drawn rule is considered along the lines of the full committee vote at the June 2020 meeting, the following revision would limit its scope.

> **Tex. R. Civ. P. ___ Notice of Ruling Needed**
>
> In an action involving a "claim" by an "inmate" as defined under Chapter 14 of the Civil Practices and Remedies Code, an inmate ~~A party~~ who has filed a motion that has not been ruled on may trigger a time period for the trial court to rule on the motion by filing a Notice of Ruling Needed, unless the motion has a timeline determined by statute or another rule. A notice under this rule must identify the specific pending motion that has not been ruled on (and the **[approximate]** date that the motion was filed) and cannot be filed as part of any other document. If the motion identified in the notice has not been ruled on within **[21/35/60/90]** days after the notice is filed, then the inmate may file a petition for a writ of mandamus to compel a ruling. If a petition for a writ of mandamus is filed to compel a ruling on the motion, the appellate court will presume that the trial court is aware of the motion and that sufficient time has passed to rule on the motion unless the record or a response to the mandamus petition evidences why the trial court has not ruled or why additional time is needed before the trial court rules **[alternative phrasing: unless the record or a response to the mandamus rebuts the presumption]**.

Although this language narrows the proposed rule's scope in line with the full committee vote, the subcommittee has concern that linking the rule to CPRC Chapter 14 involving actions by inmates who have filed an affidavit or unsworn declaration of inability to pay costs could be in tension with section 14.014; this section states as follows: "Notwithstanding Section 22.004, Government

Code, this chapter may not be modified or repeated by a rule adopted by the supreme court." Additional discussion among the subcommittee members focused on where such a rule should be located if it were to be adopted.

The subcommittee also considered ideas raised at the June 2020 meeting concerning additional actions that could be taken by the presiding judge of the administrative judicial region if there is an issue with a particular judge involving a persistent failure to rule. Ideas included authorizing transfer of cases or a mechanism for filing a motion with the presiding judge to obtain a ruling when the trial court judge has failed to do so. The subcommittee's consensus was that further formal procedures involving the presiding judges was not an optimal approach. Judges already have a duty to "dispose of all judicial matters promptly, efficiently, and fairly" under Canon 3(B)(9), and there is concern about creating additional written or rule-based duties directed at presiding judges to address circumstances that often can be handled with informal counseling. The subcommittee recommends outreach to the presiding judges to solicit their views about optimal strategies for addressing persistent failures to rule.

Tab D

AGENDA ITEM: COMPENSATION FOR SUPERVISED PRACTICE

QUESTION REFERRED

Compensation for Supervised Practice. The Court recently updated its supervised practice rules. Rule IX, entitled "Compensation," prohibits a qualified law student or a qualified unlicensed law school graduate from "directly charg[ing] a client for his services." *The Court asks the Committee to consider whether this rule should allow a qualified unlicensed law school graduate to send and collect his or her own bills provided that the supervising attorney also signs the bill.*

CURRENT RULE IX: COMPENSATION

A qualified law student or a qualified unlicensed law school graduate must not directly charge a client for his services or claim or receive a percentage fee, contingency fee, or origination fee; however, nothing in these rules is intended to prevent the qualified law student or qualified unlicensed law school graduate from being paid for his services by his supervising attorney, or to prevent a supervising attorney from charging a fee for the services rendered under his supervision.

QUESTION FOR THE COMMITTEE'S CONSIDERATION:

- Should Rule IX be amended to permit direct billing by a qualified unlicensed law school graduate, if the billing is signed by the supervising attorney?

- The Judicial Administration Subcommittee does not recommend an amendment. The subcommittee's discussion included these considerations:

    - The subcommittee did not want to disincentivize close supervision by the supervising attorney.

    - The subcommittee believes the focus should be on the services provided (and supervision of those services), not on the payment mechanism.

    - The subcommittee is unaware of a problem that needs to be fixed.

- If the Committee nevertheless wants to consider an amendment, here is suggested revised language in italics:

    A qualified law student or a qualified unlicensed law school graduate *may directly charge a client for his services or claim or receive a percentage fee, contingency fee, or origination fee if the fee agreement and invoices are approved in writing by the supervising attorney. Nothing* in these rules is intended to prevent the qualified law student or qualified unlicensed law school graduate from being paid for his services by his supervising attorney, or to prevent a supervising attorney from charging a fee for the services rendered under his supervision.

Tab E

Memorandum

To: **Supreme Court Advisory Committee**

From: **Rules 300-330 Subcommittee**

Date: **August 13, 2020**

Re: **Amending Rule 306a(3) to permit clerk to give notice electronically**

On May 18, 2020, Chief Justice Hecht referred several items to SCAC, and on May 20, Chip Babcock referred the following item to our subcommittee:

> Rule 306a(3) requires clerks to notify parties "by first-class mail" when a final judgment or other appealable order is signed. The Court asks the Committee to consider whether the advent of e-filing has rendered this language outdated and to recommend any necessary changes. A letter from the Judicial Committee on Information Technology [JCIT] is attached.

According to the JCIT letter,

> We have recently learned that court clerks are sending notice of final judgments or other appealable orders electronically pursuant to Texas Rule of Civil Procedure 21(f)(10). However, Rule 306(a)3 requires that such notice occur by first-class mail. Under Rule 306(a)4 a party is bound by actual knowledge of the judgment regardless of the method of delivery and therefore, in most instances the party receiving electronic notice will have actual knowledge. However, to avoid unnecessary confusion JCIT believes Rule 306(a)3 should be amended to provide that the clerk may serve final judgments or other appealable orders electronically or by first class mail.

We also have memos from district clerks who support this change. And one clerk is already sending all notices electronically under authority of TEX.GOV'T CODE §80.002 (2015), which provides as follows:

> A court, justice, judge, magistrate, or clerk may send any notice or document using mail or electronic mail. This section applies to all civil and criminal statutes requiring delivery of a notice of document.

Also, this issue may be addressed further by the 87th Legislature.[1]

At first glance, the fix seems obvious: simply add the words "or electronically" to Rule 306a(3), as follows:

> 3. Notice of judgment. When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail or electronically advising that the judgment or order was signed. . . .

As the JCIT points out, this change would be consistent with Rule 21(f)(10), which reads as follows:

> (10) Electronic Notices From the Court. The clerk may send notices, orders, or other communications about the case to the party electronically. A court seal may be electronic.

In the vast majority of cases, this change will be no problem. All attorneys must file electronically. See Rule 21(f)(1). Similarly, pro se parties can file electronically, although they are not required to do so. See Rule 21(f)(2). And when a document is filed electronically, an "email address . . . must be included in the document." *Id.*[2] Thus, under

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[1] *Cf.* TEX.FAM.CODE §161.209 ("A copy of an order of termination . . . is not required to be mailed to parties as provided by Rules 119a and 239a.").

[2] *See also* RULE 57 (attorney must provide email address and pro se party must provide email address "if available"); TEX.CIV.PRAC.& REM.CODE §§ 30.015(a)&(e) (requiring party to provide "written notice of the party's name and current residence or business address" and imposing $50 fine for noncompliance).

the above proposal, the clerk will have the option of "giv[ing] notice . . . electronically" to all parties who have previously filed electronically.

But pro se litigants do not have to file electronically. And a pro se litigant who files electronically may not provide an email address. How will such parties get notice? One approach would be to continue to give notice via first class mail to such parties. This could be done like this:

> 3. Notice of judgment. When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail or electronically advising that the judgment or order was signed; but if a party that has not previously filed a document electronically, then notice must be given to that party by first class mail. . . .

or like this:

> 3. Notice of judgment. When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail or electronically advising that the judgment or order was signed; but if a party has not provided an email address, then notice must be given to that party by first class mail. . . .

However, our subcommittee did not examine the wording of such an amendment. Rather we disagreed on the larger question: should any litigant be excepted from electronic notice? And this is the issue that we are submitting to the full committee for consideration. There are arguments pro and con.

Pro--some parties require paper notice.

Some people simply do not have email. And, under the current rule, a pro se party who does not file electronically does not have to provide an email address. And even

if a pro se party has provided an email address, he still may overlook an email notice. Such a party will have been filing paper pleadings (if he has been filing at all). Unlike an attorney (or even a pro se party who has been filing electronically) such a party may not be on the lookout for an email from the clerk. Most people receive a lot of unsolicited email; and some ignore email altogether; and few regularly check their spam filters. Moreover, Rule 306a(3), involves notice of a judgment, and of course, a judgment becomes final in 30 days.

Con--requiring paper notice is inefficient.

Under the JCIT proposal clerks will be able to give all notices via email, thereby saving time and postage. But if some parties still have to be served by first class mail, these gains may be lost. While clerks operate under various case management systems, we know of no system that allows the clerk to quickly determine whether, in a given case, there is a party who has not filed electronically. While the clerk could research the file whenever a judgment is signed, this would be time consuming and reduce the efficiency of the JCIT proposal.

Moreover, we are only talking about a handful of litigants. And if a party does not receive actual notice, it still has a remedy under Rule 306a(4) and ultimately via an equitable bill of review.[3] Finally, paper notice may not be all that efficient.

[3] *See, e.g., Marathon Petroleum Co. v. Cherry Moving Co.*, 550 S.W.3d 791 (Tex.App.—Houston [14th Dist.] 2018, no. pet.).

Also, this issue has some history. In 2013, when Rule 21(f) was first promulgated, the predecessor to current Rule 21(f)(10) read as follows:

> (9) Electronic Notices from the Court. If a party files documents electronically, the clerk may send any required notices, orders, or other communications about the case to the party electronically. A court seal may be electronic.

Rule 21(f)(9)(emphasis added) (Misc.Dkt.No.13-9128). But on Dec. 13, 2013, this provision was renumbered as Rule 21(f)(10) and the underlined language was deleted. The result was the current Rule 21(f)(10), which allows the clerk to send all notices electronically.[4]

Other rules require the clerk to mail notice,

Rule 306a(3) is not the only rule provision requiring the clerk to give notice of judgment by mail. Similar provisions are in Rule 119a (divorce decree),[5] Rule 165a (DWOP order), and Rule 239b (default judgment), each of which presently requires notice by mail. Also, under Rules 297 and 298 findings of fact and conclusions of law must "be mailed to each party." [6]

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[4] Also, as originally promulgated, Rule 21a permitted a document to be served electronically "if . . . the party being served has consented to electronic service." Rule 21a(a)(6)(Misc.Dkt.No.13-9128)(Aug.13, 2013). But under the final version, even "[i]f the email address of the party or attorney . . . is not on file with the electronic filing manager," the document may still be served "by email." Rule 21a(a)(2)(Misc.Dkt.No.13-9165) (Dec.13, 2013).

[5] *See, also.* TEX.FAM.CODE § 6.710.

[6] Also, under Rule 246, the clerk must "inform any non-resident attorney of the date of setting" provided such an attorney submits a "request by mail . . . accompanied a return envelope properly addressed and stamped."

If the Court amends Rule 306a(3) to allow the clerk to give notice "electronically," then it should also consider amending these rules as well. Still, each rule will have particular features. For example, DWOP notices under Rule 165a are usually sent out in bulk. And in a default judgment, under Rule 239a, the defendant may not even know that he has been sued.

Finally, the Court Rules Committee of the State Bar of Texas has proposed several rule changes, including allowing email notice for Rules 165a, 239a, 246, 297, 298 and 306a.

Rule 306a Periods to Run from Signing of Judgment

1. ***Beginning of Periods.*** --The date of judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.

2. ***Date to Be Shown.*** --Judges, attorneys and clerks are directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

3. ***Notice of Judgment.*** --When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

4. ***No Notice of Judgment.*** --If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

5. ***Motion, Notice and Hearing.*** --In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the

trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.

6. ***Nunc Pro Tunc Order.*** --When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) of this rule shall run from the date of signing the corrected judgment with respect of any complaint that would not be applicable to the original document.

7. ***When Process Served by Publication.*** --With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

Hon. Rebecca Simmons
Chair, Judicial Committee on Information Technology
P.O. Box 12408 San Antonio, TX 78212

December 6, 2019

Chief Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711
of the Texas Rules of Civil Procedure

Re: Recommendation from JCIT on Rule 306a (3) and Rule 21(f) (10), Texas Rules of Civil Procedure

Dear Chief Justice Hecht,

We have recently learned that court clerks are sending notice of final judgments or other appealable orders electronically pursuant to Texas Rule of Civil Procedure 21(f) (10). However, Rule 306(a) 3 requires that such notice occur by first-class mail. Under Rule 306(a) 4 a party is bound by actual knowledge of the judgment regardless of the method of delivery and therefore, in most instances the party receiving electronic notice will have actual knowledge. However, to avoid unnecessary confusion JCIT believes Rule 306(a) 3 should be amended to provide that the clerk may serve final judgments or other appealable orders electronically or by first class mail.

Sincerely,

Rebecca Simmons

Rebecca Simmons

Chair, Judicial Committee on Information Technology.

cc: Justice Jeffrey S. Boyd

To: Frank Gilstrap

Date: May 26, 2020

Mr. Wilder asked that I forward you the attached information concerning TRCP 306(a) 3. Please let me know if you have any questions or need additional information.

Thank you,

Monica M. Foster
Civil/Family Law Manager
Tarrant County District Clerk's Office
Phone: (817) 884-2575
200 E. Weatherford St.
Fort Worth, TX 76196
MMFoster2@TarrantCounty.com

The District Clerk's office would like to request changes be made to TRCP Rule 306a (3) to allow us to e-mail the final judgment (or notice of final judgment) to attorneys and pro se litigants, rather than sending them out by first class mail. If possible, also require that e-mail addresses be provided for this purpose. This would save the clerks time and the office money for both postage and printing costs. Sending notices via e-mail would also allow us to track what was sent and make it a part of the permanent record for the judge to review.

In State Fiscal Year 2019, there were a total of 42,856 disposed cases in Civil, Tax and Family. In the 8 months of State Fiscal Year 2020, there have been a total of 25,391 cases disposed. This does not take into consideration the number of notices that are required to be sent out in each of these cases. In Civil and Family cases, there are a minimum of 2 notices, however, there could be more. In Civil cases there may be many more than that, since many cases have upwards of 10+ parties.

In addition, our requested change to Rule 306a would eliminate confusion and a seeming conflict with **TRCP RULE 21** (f) (10) which was re-written when e-filing began to read as follows: "Electronic Notices From the Court. The clerk may send notices, orders, or other communications about the case to the party electronically." That rule does not make a distinction between final orders and interim orders.

From: Sharena Gilliland <Sharena.Gilliland@parkercountytx.com>

Sent: Wednesday, May 27, 2020 9:55 AM

To: Frank Gilstrap <fgilstrap@hillgilstrap.com>; LJefferson@jeffersoncano.com; Dorsaneo, William <wdorsane@mail.smu.edu>; rhwallace1009@yahoo.com; watsons@gtlaw.com

Cc: Walker, Marti <mawalker@jw.com>

Subject: RE: Rule 300-330- subcommittee assignment

Good morning all,

I am in agreement with Justice Simmons regarding modifications of Rule 306a(3) to more closely align with Rule 21(f)(10). As Tom Wilder (Tarrant Co. Dist. Clerk) points out in his memo, a lot of time and postage could be saved.

As a courtesy, our office will E-file a copy of all signed orders/judgments to the parties. We are able to note in our case the E-filing envelope number and to whom we sent a copy. (This is not required and not all clerks do this.) If the order/judgment is final or appealable, we also prepare a separate notice and mail it per Rule 306a(3). Our notice is likely similar to what many clerks' send. It states, "Pursuant to Rule 306a(3) of the Texas Rules of Civil Procedure, you are hereby notified that a final judgment or other appealable order was signed on [date]."

Clerks have talked about this Rule. Many would like the option to send notice electronically and be in compliance with the Rule. Some in smaller counties prefer to mail.

I would like to see either a notice or delivery of the signed order/judgment, whether in paper or electronic form, satisfy the requirements and purpose of R.306a. A one page "notice" made sense in a paper world so that clerks did not have to copy and mail the entire order/judgment. But with so many electronic options, sending the full length signed order should suffice as notice. If electronic delivery of the signed order satisfied R.306a(3), this could also help in those situations where clerks are uncertain if an order is appealable.

Mr. Gilstrap noted other rules which might be impacted by a change to Rule 306a(3). Another to add to the list is Rule 119a – Copy of Decree. It states the clerk is to send a copy of the divorce decree or order of dismissal to a party who waived service. However, Family Code §6.710 tweaks Rule 119a and only requires a notice be mailed. A change allowing the option of electronic delivery of the notice or signed order would be helpful.

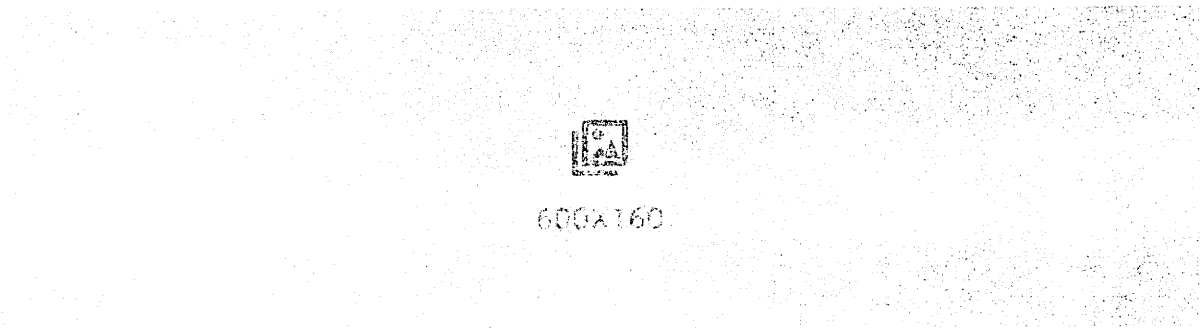
If changes are made to any of the rules providing for electronic delivery of notices or orders, a question that will arise for clerks is what to do with pro se parties who do not include their email addresses on their pleadings. Rule 21(f)(2) requires an email address on pleadings filed electronically but that does not always happen with pro se parties. If some of these rules are changed to allow for electronic notice and if the parties do not have an email address on file, do they not receive notice or does the clerk then have to snail mail notice?

Overall, a change to R. 306a would be a good one but will likely require changes to other rules as well.

Frank Gilstrap

From: Tarrant County District Clerk <dcnewsletter@tarrantcounty.com>
Sent: Wednesday, June 10, 2020 6:04 PM
To: Frank Gilstrap
Subject: Email Notification Change

View online version



Notices Sent Via Electronic Mail

Beginning June 15, 2020, the Tarrant County District Clerk will send all notices and final orders / judgments via electronic mail. We will continue to send via 1st class mail copies to pro se litigants who do not provide an e-mail address.

Pursuant to the Texas Rules of Civil Procedure rule 306(a.)3. and Texas Government Code Sec. 80.002 all notice of final judgement will be sent via electronic mail to the electronic mailbox registered with this office.

As always, your comments and suggestions are appreciated and welcomed.

Best Regards,

Thomas A Wilder

Tarrant County District Clerk

Tom Vandergriff Civil Courts Bldg.

100 N. Calhoun St., 2nd Floor

twilder@tarrantcounty.com

8-16-13

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 13-9128

ORDER ADOPTING TEXAS RULE OF CIVIL PROCEDURE 21c AND AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE 4, 21, 21a, AND 502.1, TEXAS RULES OF APPELLATE PROCEDURE 6 AND 9, AND THE SUPREME COURT ORDER DIRECTING THE FORM OF THE APPELLATE RECORD IN CIVIL CASES

ORDERED that:

1. Pursuant to section 22.004 of the Texas Government Code, and in accordance with Misc. Docket No. 12-9206, as amended by Misc. Docket No. 13-9092, Order Requiring Electronic Filing in Certain Courts, the Supreme Court of Texas adopts Rule of Civil Procedure 21c and amends Rules of Civil Procedure 4, 21, 21a, and 502.1, and Rules of Appellate Procedure 6 and 9, effective January 1, 2014.

2. Pursuant to Texas Rule of Appellate Procedure 34.4, the Supreme Court orders that the appellate record in civil cases be in the form specified as attached.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

4. These amendments may be changed in response to public comments received before October 31, 2013. Any interested party may submit written comments directed to Marisa Secco, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or rulescomments@txcourts.gov.

Dated: August 16, 2013.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Eva M. Guzman, Justice

Debra H. Lehrmann, Justice

Jeffrey S. Boyd, Justice

John P. Devine, Justice

Amendments to Rule 4, Texas Rule of Civil Procedure

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules ~~21 and~~ 21a, extending other periods by three days when service is made electronically, by registered or certified mail, or by telephonic document transfer. ~~, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.~~

Amendments to Rule 21, Texas Rule of Civil Procedure

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

(a) *Filing and Service Required.* Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, ~~shall~~ must be filed with the clerk of the court in writing, ~~shall~~ must state the grounds therefore, ~~shall~~ must set forth the relief or order sought, and at the same time a true copy ~~shall~~ must be served on all other parties, and ~~shall~~ must be noted on the docket.

(b) *Service of Notice of Hearing.* An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, ~~shall~~ must be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

(c) *Multiple Parties.* If there is more than one other party represented by different attorneys, one copy of each ~~such~~ pleading ~~shall~~ must be served on ~~delivered or mailed to~~ each attorney in charge.

(d) *Certificate of Service.* The party or attorney of record, ~~shall~~ must certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.

(e) *Additional Copies.* After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

(f) *Electronic Filing.*

(1) Requirement. Except in juvenile cases, attorneys must electronically file documents in courts where electronic filing has been mandated. Attorneys practicing in courts where electronic filing is available but not mandated and unrepresented parties may electronically file documents, but it is not required.

(2) Email Address. The email address of an attorney or unrepresented party who electronically files a document must be included on the document.

(3) Mechanism and Confirmation. Electronic filing must be done through TexFile, the electronic filing manager established by the Office of Court Administration. TexFile will send a filing confirmation notice to the filing party.

(4) Exceptions.

(A) The following documents are not required to be filed electronically:

(i) wills; and

(ii) documents to be presented to a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents.

(B) The following documents must not be filed electronically:

(i) documents sealed pursuant to Tex.R.Civ. P. 76a; and

(ii) documents to which access is otherwise restricted by law or court order.

(C) For good cause, a court may permit a party to file other documents in paper form in a particular case.

(5) Timely Filing. A document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An

electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, except:

(A) if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and

(B) if a document requires a motion and an order allowing its filing, it is deemed filed on the date the motion is granted.

If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court.

(6) Electronic Signatures. A document that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes:

(A) a "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized, sworn, or requires the signature of opposing counsel; or

(B) an electronic image or scanned image of the signature.

(7) Format. An electronically filed document must:

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

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

(C) not be locked; and

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

(8) Paper Copies. No paper copies of an electronically filed document must be filed unless otherwise required by local rule.

(9) Electronic Notices From the Court. If a party files documents electronically, the clerk may send any required notices, orders, or other communications about the case to the party electronically. A court seal may be electronic.

(10) Non-Conforming Documents. If a document fails to conform with this rule, the court may strike the document, identify the error to be corrected, and state a deadline for the party to resubmit the document in a conforming format. The substitute document must be deemed filed on the same day as the document that was struck.

(11) Official Record. The clerk may designate an electronically filed document or a scanned paper document as the official court record. The clerk is not required to keep both paper and electronic versions of the same document.

Comment to 2013 Change: Rule 21 is revised to incorporate rules for electronic filing, in accordance with the Supreme Court's order – Misc. Docket No. 12-9206, amended by Misc. Docket No. 13-9092 – mandating electronic filing in civil cases beginning on January 1, 2014. The mandate will be implemented according to the schedule in the order and will be complete by July 1, 2016. The revisions reflect the fact that the mandate will only apply to a subset of Texas courts until that date.

Amendments to Rule 21a, Texas Rule of Civil Procedure

RULE 21a. METHODS OF SERVICE

(a) *Methods of Service.* Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record~~, as the case may be, either~~:

(1) in person; ~~or~~

(2) by agent; ~~or~~

(3) by courier receipted delivery; ~~or~~

(4) by certified or registered mail, to the party's last known address; ~~, or~~

(5) by telephonic document transfer to the recipient's current telecopier number;;

(6) electronically through TexFile using a certified electronic service provider, if the court allows electronic filing and the party being served has consented to electronic service with the party's electronic service provider; or

(7) by such other manner as the court in its discretion may direct.

(b) *Consent to Electronic Service.* Attorneys required to electronically file documents in a court must consent to electronic service.

(c) *When Complete.*

(1) Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.

(2) Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day.

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. TexFile will send confirmation of service to the serving party.

(d) *Time for Action After Service.* Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, electronically, or by telephonic document transfer, three days shall be added to the prescribed period.

(e) *Who May Serve.* Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(f) *Proof of Service.* The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a postoffice or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(g) *Procedures Cumulative.* The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

. . .

Comment to 2013 Change: Rule 21a is revised to incorporate rules for electronic service in accordance with the Supreme Court's order – Misc. Docket No. 12-9206, amended by Misc. Docket No. 13-9092 – mandating electronic filing in civil cases beginning on January 1, 2014.

New Rule 21c, Texas Rules of Civil Procedure

RULE 21c. PRIVACY PROTECTION FOR FILED DOCUMENTS.

(a) *Sensitive Data Defined.* Sensitive data consists of:

(1) a social security or other taxpayer-identification number, except for the last three digits or characters;

(2) numbers of bank accounts and other financial accounts, including credit cards, except for the last three digits or characters; and

(3) identification numbers on driver's licenses, passports, and other similar government-issued personal identification cards, except for the last three digits or characters.

(b) *Filing of Documents Containing Sensitive Data Prohibited.* Unless the inclusion of unredacted sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents sealed pursuant to Rule 76a, containing sensitive data may not be filed with a court unless the sensitive data is redacted.

(c) *Redaction of Sensitive Data; Retention Requirement.* Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

12-13-13

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 13-9165

ORDER ADOPTING TEXAS RULE OF CIVIL PROCEDURE 21c AND AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE 4, 21, 21a, 45, 57, AND 502; TEXAS RULES OF APPELLATE PROCEDURE 6, 9, AND 48; AND THE SUPREME COURT ORDER DIRECTING THE FORM OF THE APPELLATE RECORD

ORDERED that:

1. Pursuant to section 22.004 of the Texas Government Code, and in accordance with Misc. Docket No. 12-9206, as amended by Misc. Docket Nos. 13-9092 and 13-9164, Order Requiring Electronic Filing in Certain Courts, the Supreme Court of Texas adopts Rule of Civil Procedure 21c and amends Rules of Civil Procedure 4, 21, 21a, 45, 57, and 502 and Rules of Appellate Procedure 6, 9, and 48.

2. Pursuant to Texas Rule of Appellate Procedure 34.4, the Supreme Court orders that the appellate record be in the form attached as Appendix C.

3. By order dated August 16, 2013, in Misc. Docket No. 13-9128, the Court proposed the adoption of Rule of Civil Procedure 21c and amendments to Rules of Civil Procedure 4, 21, 21a, and 502; Rules of Appellate Procedure 6 and 9; and Appendix C to the Rules of Appellate Procedure. The Court also invited public comment. Following public comment, the Court made revisions to the rules and to the appendix. This order incorporates those revisions and contains the final version of the rules and appendix, effective January 1, 2014.

4. These rules supersede all local rules and templates on electronic filing, including all county and district court local rules based on e-filing templates; the justice court e-filing rules, approved in Misc. Docket No. 07-9200; the Supreme Court e-filing rules, approved in Misc. Docket No. 11-9152; the appellate e-filing templates, approved in Misc. Docket 11-9118; and local rules of courts of appeals based on those templates.

5. The Clerk is directed to:

a. file a copy of this order with the Secretary of State;

b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

c. send a copy of this order to each elected member of the Legislature; and

d. submit a copy of the order for publication in the *Texas Register*.

Dated: December 13th, 2013.

Nathan L. Hecht, Chief Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Eva M. Guzman, Justice

Debra H. Lehrmann, Justice

Jeffrey S. Boyd, Justice

John P. Devine, Justice

Jeffrey V. Brown, Justice

Amendments to Rule 4, Texas Rule of Civil Procedure

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by ~~registered or certified~~ mail. ~~or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.~~

Amendments to Rule 21, Texas Rule of Civil Procedure

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

(a) *Filing and Service Required.* Every pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, unless presented during a hearing or trial, ~~shall~~ must be filed with the clerk of the court in writing, ~~shall~~ must state the grounds therefor, ~~shall~~ must set forth the relief or order sought, and at the same time a true copy ~~shall~~ must be served on all other parties, and ~~shall~~ must be noted on the docket.

(b) *Service of Notice of Hearing.* An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, ~~shall~~ must be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

(c) *Multiple Parties.* If there is more than one other party represented by different attorneys, one copy of each ~~such~~ pleading ~~shall~~ must be served on ~~delivered or mailed to~~ each attorney in charge.

(d) *Certificate of Service.* The party or attorney of record, ~~shall~~ must certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion, or application.

(e) *Additional Copies.* After one copy is served on a party, that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

(f) *Electronic Filing.*

(1) Requirement. Except in juvenile cases under Title 3 of the Family Code, attorneys must electronically file documents in courts where electronic filing has been mandated. Attorneys practicing in courts where electronic filing is available but not mandated and unrepresented parties may electronically file documents, but it is not required.

(2) Email Address. The email address of an attorney or unrepresented party who electronically files a document must be included on the document.

(3) Mechanism. Electronic filing must be done through the electronic filing manager established by the Office of Court Administration and an electronic filing service provider certified by the Office of Court Administration.

(4) Exceptions.

(A) Wills are not required to be filed electronically.

(B) The following documents must not be filed electronically:

(i) documents filed under seal or presented to the court in camera; and

(ii) documents to which access is otherwise restricted by law or court order.

(C) For good cause, a court may permit a party to file other documents in paper form in a particular case.

(5) Timely Filing. Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, except:

(A) if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and

(B) if a document requires a motion and an order allowing its filing, the document is deemed filed on the date that the motion is granted.

(6) Technical Failure. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing.

(7) Electronic Signatures. A document that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes:

(A) a "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or

(B) an electronic image or scanned image of the signature.

(8) Format. An electronically filed document must:

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

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

(C) not be locked; and

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

(9) Paper Copies. Unless required by local rule, a party need not file a paper copy of an electronically filed document.

(10) Electronic Notices From the Court. The clerk may send notices, orders, or other communications about the case to the party electronically. A court seal may be electronic.

(11) Non-Conforming Documents. The clerk may not refuse to file a document that fails to conform with this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format.

(12) Original Wills. When a party electronically files an application to probate a document as an original will, the original will must be filed with the clerk within three business days after the application is filed.

(13) Official Record. The clerk may designate an electronically filed document or a scanned paper document as the official court record. The clerk is not required to keep both paper and electronic versions of the same document unless otherwise required by local rule. But the clerk must retain an original will filed for probate in a numbered file folder.

Comment to 2013 Change: Rule 21 is revised to incorporate rules for electronic filing, in accordance with the Supreme Court's order – Misc. Docket No. 12-9206, amended by Misc. Docket Nos. 13-9092 and 13-9164 – mandating electronic filing in civil cases beginning on January 1, 2014. The mandate will be implemented according to the schedule in the order and will be completed by July 1, 2016. The revisions reflect the fact that the mandate will only apply to a subset of Texas courts until that date.

Amendments to Rule 21a, Texas Rule of Civil Procedure

RULE 21a. METHODS OF SERVICE

(a) *Methods of Service.* Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record~~, as the case may be, either~~ in the manner specified below:

(1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents Not Filed Electronically. A document not filed electronically may be served ~~either~~ in person, ~~or by agent or by courier receipted delivery or by certified or registered~~ mail~~, to the party's last known address~~, by commercial delivery service, ~~or~~ by fax, ~~telephonic document transfer to the recipient's current telecopier number,~~ by email, or by such other manner as the court in its discretion may direct.

(b) *When Complete.*

(1) Service by mail or commercial delivery service shall be complete upon deposit of the ~~paper~~ document, postpaid and properly addressed, in the mail or with a commercial

delivery service.~~, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.~~

(2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(c) *Time for Action After Service.* Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, ~~or by telephonic document transfer,~~ three days shall be added to the prescribed period.

(d) *Who May Serve.* Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) *Proof of Service.* The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document ~~notice or instrument~~ was not received, or, if service was by mail, that ~~it~~ the document was not received within three days from the date that it was deposited ~~of deposit~~ in the mail~~a postoffice or official depository under the care and custody of the United States Postal Service~~, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) *Procedures Cumulative.* These provisions ~~hereof relating to the method of service of notice~~ are cumulative of all other methods of service prescribed by these rules.

. . .

Comment to 2013 Change: Rule 21a is revised to incorporate rules for electronic service in accordance with the Supreme Court's order – Misc. Docket No. 12-9206, amended by Misc. Docket Nos. 13-9092 and 13-9164 – mandating electronic filing in civil cases beginning on January 1, 2014.

THE ORTIZ LAW FIRM

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May 11, 2020

Chief Justice Nathan L. Hecht
Supreme Court of Texas
PO Box 12248
Austin, Texas 78711

VIA EMAIL nathan.hecht@txcourts.gov

Justice Jane Bland
Supreme Court of Texas
PO Box 12248
Austin, Texas 78711

VIA EMAIL jane.bland@txcourts.gov

Dear Chief Justice Hecht and Justice Bland:

I hope this communication finds the Court well. On behalf of the State Bar of Texas Court Rules Committee, I am pleased to submit the attached proposals:

1. Attachment 1: Proposed Amendment to Texas Rule of Appellate Procedure 34.5 to provide a timeline for provision of any omitted items which are considered mandatory under TRAP 34.5(a) or which have been timely requested under Rule 34.5(b), as well as to add supersedeas bond to mandatory items under TRAP 34.5(a);

2. Attachment 2: Proposed Amendment to suite of Texas Rules of Civil Procedure to provide that certain notices and orders from the court must be sent to parties electronically; and

3. Attachment 3: Proposed Amendment to TRCP 106 to provide that service by certified mail must be accompanied by a return receipt.

We hope that you will not hesitate to contact the Committee if we can be of assistance regarding the attached proposals, or any other matter.

Sincerely,

/s/ Giana Ortiz

Giana Ortiz

1304 West Abram
Arlington, Texas 76013
Local 817-861-7984
Metro 817-261-8880
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ATTACHMENT 2

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULES OF CIVIL PROCEDURE 165a

I. Exact Language of Existing Rule

RULE 165a. DISMISSAL FOR WANT OF PROSECUTION

1. Failure to Appear. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service.

.II. Proposed Amendments to Existing Rule

RULE 165a. DISMISSAL FOR WANT OF PROSECUTION

1. Failure to Appear. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, **to the email address on file with the electronic filing manager,** and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, ~~by posting same in the United States Postal Service.~~ **By email or first-class mail if no email address is on file with the court.**

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

As electronic filing and provision of an email address by attorneys is now mandatory, the Committee believes that service of notice of dispositive settings is effectively, timely, and efficiently provided by email and/or electronic service. This will also reduce the workload on the various clerks' offices and reduce the cost of postage expended on notices by the courts.

STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO

TEXAS RULES OF CIVIL PROCEDURE 239a

I. Exact Language of Existing Rule

RULE 239a. NOTICE OF DEFAULT JUDGMENT

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

.II. Proposed Amendments to Existing Rule

RULE 239a. NOTICE OF DEFAULT JUDGMENT

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address**, and if known email address,** of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall ~~mail~~ **send** written notice thereof to the party against whom the judgment was rendered at the **mailing** address and **email address** shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

As electronic filing and provision of an email address by attorneys is now mandatory, the Committee believes that service of notice of dispositive rulings is effectively, timely, and efficiently provided by email and/or electronic service. Moreover, where parties may be self-represented, the abundance of electronic communication by email may ensure easier and more effective access to the dispositive ruling.

STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO

TEXAS RULES OF CIVIL PROCEDURE 246

I. Exact Language of Existing Rule

RULE 246. CLERK TO GIVE NOTICE OF SETTINGS

The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

.II. Proposed Amendments to Existing Rule

RULE 246. CLERK TO GIVE NOTICE OF SETTINGS

The clerk shall keep a record ~~in his office~~ of all cases set for trial, and it shall be ~~his~~ **the clerk's** duty to inform any ~~non-resident attorney~~ **party or attorney** of the date of setting of any case upon request by mail **or email.** ~~from such attorney~~**. The request for notice of setting shall state the email address or mailing address where the notice should be sent.** ~~accompanied by a return envelope properly addressed and stamped.~~ Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the **party or** attorney from preparing or presenting his claim or defense.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

As electronic filing and provision of an email address by attorneys is now mandatory, the Committee believes that service of notice of dispositive settings is effectively, timely, and efficiently provided by email and/or e-service. This will also reduce the workload on the various clerks' offices and reduce the cost of postage expended on notices by the courts. Additionally, the rule is broadened from "non-resident attorney" to any party or attorney.

STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO

TEXAS RULES OF CIVIL PROCEDURE 297

I. Exact Language of Existing Rule

RULE 297. TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit. If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21a a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

.II. Proposed Amendments to Existing Rule

RULE 297. TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be ~~mailed to each party in the suit~~ **sent by email to all parties and attorneys of record** ~~in the suit.~~**, or by mail if no email address is on file with the court.** If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21a a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

As electronic filing and provision of an email address by attorneys is now mandatory, the Committee believes that service of notice of dispositive rulings is effectively, timely, and efficiently provided by email and/or e-service.

STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO

TEXAS RULES OF CIVIL PROCEDURE 298

I. Exact Language of Existing Rule

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ten days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a. The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be mailed to each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

.II. Proposed Amendments to Existing Rule

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ten days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a. The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be **sent by email to all parties and attorneys of record, or by mail if no email address is on file with the court.** ~~mailed to each party to the suit.~~ No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

As electronic filing and provision of an email address by attorneys is now mandatory, the Committee believes that service of notice of dispositive rulings is effectively, timely, and efficiently provided by email and/or e-service.

STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO

TEXAS RULES OF CIVIL PROCEDURE 298

I. Exact Language of Existing Rule

RULE 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT

3. Notice of Judgment. When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

.II. Proposed Amendments to Existing Rule

RULE 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT

3. Notice of Judgment. When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice **of such judgment or order** ~~to parties or their attorneys~~ **to all parties and attorneys of record by email, or by mail if no email address is on file with the court** ~~of record by first-class mail advising that the judgment or order was signed~~. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

As electronic filing and provision of an email address by attorneys is now mandatory, the Committee believes that service of notice of dispositive rulings is effectively, timely, and efficiently provided by email and/or e-service.

Tab F

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 15, 2020

Re: May 18 Referral Relating to TRAP 24.1(b)(2) Approval of Supersedeas Bond

I. Matter referred to subcommittee

The Court's May 18, 2020 referral letter and Chairman Babcock's May 20 letter refer the following matter to our committee:

> **Texas Rule of Appellate Procedure 24.1(b)(2).** Rule 24.1(b)(2) requires a supersedeas bond to "be approved by the trial court clerk." Some practitioners have reported issues getting clerks to approve supersedeas bonds, and some clerks have reported that it is not clear how to determine whether a bond should be approved. Please draft appropriate amendments for the Court's consideration.

II. Relevant rules

TRAPs 24.1 governs the filing of a supersedeas bond and is quoted in full in Appendix A. The Court's referral letter is directed to TRAP 24.1(b)(2), which requires the trial court clerk to approve a supersedeas bond for it to be effective:

> **24.1. Suspension of Enforcement**
>
> (b) *Bonds.*
> (1) A bond must be:
> (A) in the amount required by 24.2;
> (B) payable to the judgment creditor;
> (C) signed by the judgment debtor or the debtor's agent;
> (D) signed by a sufficient surety or sureties as obligors; and
> (E) conditioned as required by (d).
> (2) **To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.**

III. Recommendation

For a number of reasons discussed more fully in this memo, the subcommittee recommends that the rule be amended as follow:

24.1. Suspension of Enforcement

(b) *Bonds.*
(1) A bond must be:
(A) in the amount required by 24.2;
(B) payable to the judgment creditor;
(C) signed by the judgment debtor or the debtor's agent;
(D) signed by a sufficient surety or sureties as obligors; and
(E) conditioned as required by (d).
(2) ~~To be effective a bond must be approved by the trial court clerk~~ A bond is effective upon filing. On motion of any party, the trial court will review the bond.

IV. Relevant materials

No materials were provided with the referral. The subcommittee contacted Jaclyn Daumerie, the court rules attorney, to get more information on the source of comments from practitioners and clerks on the topic.

She referred the subcommittee to appellate practitioner Reagan Simpson at Yetter Coleman, who was very helpful and submitted a letter outlining problems he has encountered in getting supersedeas bonds approved in rural counties. A copy of Reagan's letter is attached as Appendix B. In the letter, Reagan describes some of the difficulties he has encountered in getting bonds timely approved by clerks in rural counties that have delayed prompt issuance of the bond, such as requesting two bonds rather than one, delaying approval until the clerk first conferenced with the trial court, and even having to threaten mandamus action. He offered two alternative suggestions for resolving the problem: requiring the trial court rather than the clerk to approve the bond, as is the practice in federal courts; or no longer require approval by the clerk and instead have the bond effective upon receipt.

Jaclyn also shared with the subcommittee emails from Sharena Gilliland, SCAC member and District Clerk of Parker County, and from Nancy Rister, District Clerk of Williamson County. Those emails are attached as Appendix C. Ms. Gilliland, in response to an email from the court rules attorney, questioned whether clerk approval is necessary: "Is there any reason the bond has to be approved? Honestly, there is not really a good method other than a Google search to see if the surety is real. Is it sufficient if the bond is filed with the clerk and no approval by anyone necessary?" Ms. Rister added to the discussion: "On surety bonds our judge approves. We accept cash for them but no one looks up info on the sureties. Wording [of rule] should be changed. How about 'accepted' not 'approved'?" In

a reply email, Ms. Gilliland agreed with the approach that a supersedeas bond could be effective on filing, leaving it to the lawyers to advocate to the trial court, if necessary, that the bond is not compliant.

The subcommittee also was able to obtain, with the kind assistance of Justice Tracy Christopher, a copy of the written procedures the district clerk's office in Harris County follows in approving supersedeas bonds. The procedures are attached as Appendix D. The procedures are very detailed, but there are 8 key steps listed for the approval part of the process:

> A. Approve the bond by ensuring that the following information is included and correct:
> 1. Signature of attorney-in-fact (attorney that signed the bond) representing the surety.
> 2. Power of Attorney page with attorney-in-fact listed as having the authority to execute on behalf of the surety company.
> 3. Signature of officer affixing the corporate seal of surety on the Power of Attorney page.
> 4. Signature of the notary public.
> 5. Seals (raised or printed) for both the signature page of surety bond and the Power of Attorney page.
> 6. Approved licensed Surety: Note: Check in the Federal Register's Department of the Treasury's Listing of Approved Sureties (Department Circular 570) to see if the company is listed to cover the amount and is licensed to do business in the State of Texas. If the amount of the bond is in excess of 10 percent of the surety's company capital, written certification will be required from a re-insurer that is authorized to do business in the State of Texas.
> 7. Bond amount - if no Court order setting the bond, bond will be calculated based on the judgment. When the judgment is for money, the amount of the bond must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration for the appeal (1 year), and costs awarded in the judgment. The interest rate of 5% is used unless the judgment specifies a specific rate. Refer to calculation formula located in the G:\Supersedeas formula. Do not approve the bond if the amount is insufficient.
> 8. Upon approval, stamp "Approved" stamp on signature page.

The reference to the G formula is a spreadsheet that adds the components of compensatory damages and calculates on year of interest. The G formula worksheet is attached as part of Appendix D.

Not all clerk's office throughout the state have detailed procedures like those in Harris County. Many appear to rely solely on the rules and statutes for guidance.

V. Discussion

Approval of supersedeas bonds has been the responsibility of the clerk since the late 1800s. *See* Tex. Rev. Civ. Stat. art. 2270 (Vernon 1936, citing predecessor 1892 General Law) ("An appellant or plaintiff in error, desiring to suspend the execution of the judgment may do so by giving a good and

sufficient bond to be approved by the clerk..."). These historical statutes "have been interpreted as vesting in the court clerk the discretion of judicial character in passing on the sufficiency of a supersedeas bond, which includes passing on the financial worth of the sureties." *Ruiz v. Watkins*, 701 S.W.2d 688, 690 (Tex. App.—Amarillo 1985, no writ) (citations omitted).

The "discretion of judicial character" vested in the clerk is not unlimited. The clerk has a ministerial duty to approve a compliant supersedeas bond. *Miller v. Kennedy & Minshew, P.C.*, 80 S.W.3d 161, 165 (Tex. App.—Fort Worth 2002, pet. denied). Mandamus will issue when the clerk has abused that discretion in refusing to approve a compliant bond. *Ruiz*, 701 S.W.2d at 691. Cases analyzing whether the clerk's discretion was abused show the difficulties clerks face in fulfilling their judicial function. *Compare id.* at 691 (clerk clearly abused discretion in refusing to approve bond when verified documents "clearly and unequivocally" demonstrated the sufficiency of the sureties), *with In re Moore*, No. 07-06-00046-CV (Tex. App.—Amarillo 2006) (clerk did not abuse discretion in refusing to approve bond when documents provided did not clearly establish sufficiency of sureties).

The input from District Clerks Gilliland and Rister reflect that the clerks may be uncomfortable with being vested with discretion of a judicial character in approving a supersedeas bond. App. C. They suggest that the clerk should merely accept the bond rather than approve it, leaving any objections about the amount or sufficiency of the sureties for the parties to subsequently present to the trial court for determination. That procedure is already in place when a party files a net-worth affidavit to establish the amount of the bond. TRAP 24.2(c). The clerk must accept and file the affidavit; any contest must be presented to the trial court. *Id.* It should also be noted that when a party files a cash deposit in lieu of bond, there is no similar requirement that the clerk "approve" the deposit. TRAP 24.1(c).

But having all bonds be effective upon filing may give rise to gamesmanship where a party files what is essentially a "junk" bond to buy time to move assets and avoid execution. That is already a risk when a "junk" net worth affidavit is filed. Rule 24.2(d) provides that a judgment creditor may seek an injunction to bar the judgment debtor from dissipating or transferring assets outside the ordinary course of business to evade satisfaction of the judgment. There remains a question of whether the risk of "junk" bond filings is an acceptable risk, and whether additional safeguards – like sanctions – should be put in place to deter a party's abuse of the procedure.

Reagan Simpson proposes that the supersedeas bond approval process be by the trial court in all cases, which is the practice in federal court. But the problems he has encountered in a few counties appear to be the exception rather than the rule. The approval process is certainly working smoothly in large counties like Harris County. The trial courts should not be burdened with approving bonds in all cases to cure a few outliers. Plus, depending on the trial court's schedule, obtaining a hearing and approval may further slow some of the bonds. Rather than having the trial court approve all bonds, maybe the rule could be altered to permit the party filing the bond – at its option – to obtain approval from the trial court rather than the clerk.

Another route would be to state more clearly in the rule the clerk's obligations to review the bond and what specifically is needed for approval. The rule could track the steps set out in the Harris County guidelines. This would eliminate the judicial nature of the clerk's discretion and make the practice uniform across the state.

VI. Alternatives

There are a number of options:

- Leave the rule as is because it is working in most cases.
- Amend the rule to require the trial court judge to approve the bond in all cases.
- Amend the rule to permit the party filing the bond at its option to skip clerk approval and ask the trial court to approve the bond.
- Amend the rule so that the clerk "accepts" rather than "approves" the bond so that all bonds are effective upon filing; any complaints go to the trial court.
- Amend the rule so that clerk accepts but add a new sanction for bad-faith bonds.
- Amend the rule to delineate the specific items required for bond approval similar to those in Harris County.

VII. Subcommittee Discussion and Recommendation

The subcommittee discussed the pros and cons of each of the options listed above. The subcommittee members agreed that supersedeas bond practice should be uniform across all the districts and counties of the state. Because the practice is not currently uniform, the subcommittee believes the rule should be changed. The subcommittee did not think the trial court should have to approve all supersedeas bonds because of the additional time and work involved. The subcommittee recommends that the rule be changed to make bonds effective on filing with the judgment creditor able to take any challenges to the trial court judge because:

(1) trial court clerks should not be exercising judicial discretion;
(2) file and challenge is currently the method for cash deposits and net worth affidavits;
(3) the practice would be simple and uniform; and
(4) in those cases involving gamesmanship, judgment creditors have other options available to protect the ability to collect on the judgment. :

The subcommittee further discussed whether an additional sanctions rule should be drafted and made part of TRAP 24.1. The subcommittee was reluctant to invite ancillary litigation over sanctions but agreed that issue should be revisited if the rule change results in abuse of the supersedeas bond process.

The subcommittee recommends that the rule be amended as follow:

24.1. Suspension of Enforcement

(b) *Bonds.*

(1) A bond must be:

(A) in the amount required by 24.2;

(B) payable to the judgment creditor;

(C) signed by the judgment debtor or the debtor's agent;

(D) signed by a sufficient surety or sureties as obligors; and

(E) conditioned as required by (d).

(2) ~~To be effective a bond must be approved by the trial court clerk~~ A bond is effective upon filing. On motion of any party, the trial court will review the bond.

Appendix A: TRAP 24.1

24.1. Suspension of Enforcement

(a) *Methods.* Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;
(2) filing with the trial court clerk a good and sufficient bond;
(3) making a deposit with the trial court clerk in lieu of a bond; or
(4) providing alternate security ordered by the court.

(b) *Bonds.*

(1) A bond must be:
  (A) in the amount required by 24.2;
  (B) payable to the judgment creditor;
  (C) signed by the judgment debtor or the debtor's agent;
  (D) signed by a sufficient surety or sureties as obligors; and
  (E) conditioned as required by (d).
(2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.

(c) *Deposit in Lieu of Bond.*

(1) Types of Deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk:
  (A) cash;
  (B) a cashier's check payable to the clerk, drawn on any federally insured and federally or state- chartered bank or savings-and-loan association; or
  (C) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state- chartered bank or savings-and-loan association.
(2) Amount of Deposit. The deposit must be in the amount required by 24.2.
(3) Clerk's Duties; Interest. The clerk must promptly deposit any cash or a cashier's check in accordance with law. The clerk must hold the deposit until the conditions of liability in (d) are extinguished. The clerk must then release any remaining funds in the deposit to the judgment debtor.

(d) *Conditions of Liability.* The surety or sureties on a bond, any deposit in lieu of a bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor — up to the amount of the bond, deposit, or security — if:

(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment;

(2) the debtor does not perform an adverse judgment final on appeal; or
(3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.

(e) *Orders of Trial Court.* The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.

(f) *Effect of Supersedeas.* Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas.

Appendix B

YetterColeman LLP

July 10, 2020

Via Email Only to psbaron@baroncounsel.com

Re: Approval Process of Supersedeas Bonds

Pamela Stanton Baron
Chair, Subcommittee on Appellate Rules
Supreme Court Advisory Committee

Dear Pam:

I appreciate the opportunity to express to the Rules Subcommittee my concerns about the current process for approving supersedeas bonds.

To summarize why I recommend a change in the procedure, in rural counties, district clerks may not be familiar with the bond-approval process, and their unfamiliarity can pose problems for a party attempting to prevent execution by filing a timely supersedeas bond. As you know, not filing a timely bond can result in the execution on the property of an individual or a business. I am aware of examples of late-filed bonds that led to seizures of property of businesses that seriously disrupted their operations.

I have myself experienced several problems with the process of filing and getting approval of supersedeas bonds in rural counties. I will not identify the district clerks who have created problems for me and my clients, because they are all hard-working clerks who simply are not aware of the procedures. Unlike metropolitan clerks, they rarely confront supersedeas bond issues and almost never deal with multi-million-dollar bonds like the ones I have filed.

In one county, the clerk insisted that we post two good and sufficient supersedeas bonds, apparently in reliance on the procedures for posting bonds to support temporary relief. Texas Rule of Civil Procedure 684 states, with emphasis added: "Before the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with *two or more good and sufficient sureties*, to be approved by the clerk, in the sum fixed by the judge." I happen to know that two sureties will not sign the same bond, which then leads to a requirement of two bonds if Rule 684 is followed. I also know that at least one metropolitan district clerk, aware of that fact, requires only one bond to support temporary relief.

In the case where the district clerk was requiring two supersedeas bonds, the judgment was in excess of the $25 million maximum for supersedeas bonds, so I was being asked to file two $25 million bonds. Filing $50 million in bonds was, of course, contrary to the bonding cap set by the Legislature, and my client was a Fortune 100 company that could easily pay the full judgment. I was never able to talk with the clerk herself about this. When her deputy clerks kept insisting on two bonds, I got an extension of time to file the bond from the opposing party. Ultimately, I had to threaten a mandamus proceeding before the clerk relented and signed the bond.

That situation illustrates another problem with resting the approval process in the district clerk's office. Understandably, in some district clerk offices, it is hard to get an audience with *the* district clerk. Deputy clerks, I am sure, are instructed to handle normal operations, and the elected clerk does not have time to deal with all such issues. Thus, while I can always get a hearing before a judge, it is not always easy to talk to the elected district clerk.

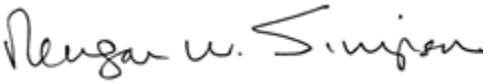
The other problem I have experienced is the belief by district clerks that the bond should be approved by the judge. Very recently, I experienced that problem in a very small county that I am sure had never seen a judgment of the size I was appealing for a client. Without going into details, mis-delivery of the bond caused a time crunch for me. The judgment was against a relatively small company that had substantial physical assets necessary to its operations. The clerk said she had to get approval from the judge, who was in trial in another county. I sent her a copy of the rule showing that the approval came from the clerk, but that did not solve the problem. Fortunately, after several calls to the clerk's office, the clerk was able to get in touch with the judge and get his approval to the bond in time, the amount of which had been approved by the opposing appellate lawyer in a document I had filed early on.

I had another less difficult situation in a mid-size county. Again, I spoke with deputy clerks who thought the bond approval was a matter for the judge. In this case, I was dealing with a small company that had a judgment against it far above its insurance limits and far above its net worth. We filed a net worth affidavit, which may have been a novel issue for the clerk's office. After many calls, I finally got the clerk to sign the bond, although I would not be surprised if the clerk actually sought approval from the trial judge.

To my way of thinking, lawyers should not face such obstacles in this important process. One solution might be to put the approval process in the hands of the trial judge. Lawyers can always get hearings before a judge. Another solution would be to do away with the approval process altogether. Allow the bond to be effective upon filing, with any complaint about the bond to be raised by motion filed by the judgment creditor with the trial court and decided on an expedited basis.

Thank you again for considering these recommendations. If I can provide any further information or answer any questions, please do not hesitate to let me know.

Very truly yours,



Reagan W. Simpson

RWS/

1002,882

Appendix

RE: Rules Complaint- Supersedeas Bonds (TRAP 24)

Nancy Rister <nrister@wilco.org>
Thu 11/14/2019 10:42 AM

To: Sharena Gilliland <Sharena.Gilliland@parkercountytx.com>; Jaclyn Daumerie <Jaclyn.Daumerie@txcourts.gov>

On surety bonds our judge approves. We accept cash for them but no one looks up info on sureties. Wording should be changed. How about “accepted” not “approved”?

(2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.

Nancy E. Rister
Williamson County Clerk
405 MLK Suite 203
Georgetown TX 78626

A thousand may fall at your side and ten thousand at your right hand, but it shall not approach you. Psalm 91:7
No evil will befall you, nor will any plague come near your tent. For He will give His angels charge concerning you,
to guard you in all your ways. Psalm 91:10-11

From: Sharena Gilliland <Sharena.Gilliland@parkercountytx.com>
Sent: Wednesday, November 13, 2019 4:59 PM
To: Jaclyn Daumerie <Jaclyn.Daumerie@txcourts.gov>; Nancy Rister <nrister@wilco.org>
Subject: RE: Rules Complaint- Supersedeas Bonds (TRAP 24)

RE: Rules Complaint- Supersedeas Bonds (TRAP 24)

Sharena Gilliland <Sharena.Gilliland@parkercountytx.com>
Thu 11/14/2019 10:59 AM

To: Jaclyn Daumerie <Jaclyn.Daumerie@txcourts.gov>; Nancy Rister <nrister@wilco.org>

Yes, as to your last question. I was pondering whether a file-marked copy would be sufficient to stop the execution of a judgment.

If not, are they needing a formal certification from the clerk that they can use to show law enforcement, etc. who might otherwise have received writs of execution? Sometimes people want a formal certificate that spells out the party checked all of the boxes. And if a certification is wanted that says judgment debtor posted a bond in compliance with TRAP 24, does it need to also spell out the judgment creditor cannot continue with execution?

Sharena Gilliland
Parker County District Clerk
117 Fort Worth Highway
Weatherford, Texas 76086
(817) 598-6114
(817) 598-6131 - Fax
Sharena.Gilliland@Parkercountytx.com

From: Jaclyn Daumerie [mailto:Jaclyn.Daumerie@txcourts.gov]
Sent: Thursday, November 14, 2019 10:47 AM
To: Sharena Gilliland; Nancy Rister
Subject: RE: Rules Complaint- Supersedeas Bonds (TRAP 24)

Thanks for your thoughtful comments, Sharena. I agree with you regarding "approve." I admittedly have no real experience with supersedeas, and "approve" caused me pause. How does a clerk approve—by signature, stamp, etc.? How does a clerk know to approve? Some research led me to *Miller v. Kennedy & Minshew, P.C.*, where the Fort Worth COA held that a "district clerk possess a ministerial duty to approve a supersedeas bond that complies with rule 24.1(b)." But it would certainly be easier if we spelled it out.

I also think you raised an interesting question about whether approval is even necessary. Are you thinking, as an alternative approach, that perhaps a supersedeas bond could be effective on filing, then we leave it up to the lawyers to advocate, if necessary, why it shouldn't be?

Jackie

From: Sharena Gilliland [mailto:Sharena.Gilliland@parkercountytx.com]
Sent: Thursday, November 14, 2019 10:07 AM
To: Jaclyn Daumerie <Jaclyn.Daumerie@txcourts.gov>; Nancy Rister <nrister@wilco.org>
Subject: RE: Rules Complaint- Supersedeas Bonds (TRAP 24)

Good morning,

I was thinking about this issue last night.

If the party is needing something to show that they have posted a supersedeas bond and stop any efforts at collection, I understand the need for the clerk to issue immediately rather than wait for the judge to have time to review it.

I still think the problem lies with the word "approve." I'm wondering if a change is needed, if something along the lines of a certification by the clerk that the bond meets the requirements of 24.1(b) would help move things along more quickly.

Sharena Gilliland
Parker County District Clerk
117 Fort Worth Highway
Weatherford, Texas 76086
(817) 598-6114
(817) 598-6131 - Fax
Sharena.Gilliland@Parkercountytx.com

From: Jaclyn Daumerie [mailto:Jaclyn.Daumerie@txcourts.gov]
Sent: Wednesday, November 13, 2019 4:53 PM
To: Sharena Gilliland; Nancy Rister
Subject: Rules Complaint- Supersedeas Bonds (TRAP 24)

Good evening, Sharena and Nancy,

I got a call from an attorney with a rules complaint, and I'd like to get your take.

The attorney has had problems getting clerks—specifically clerks in rural counties—to do what they're supposed to do to approve a supersedeas bond. In the most recent instance, the judge said she can't sign the bond unless the clerk approves. And, in the past, the attorney has had to threaten mandamus to get a clerk to approve a bond. Anyway, he says he's constantly worried about this because his clients' property could be seized if he can't get approval, and he thinks there should be a rules change. Specifically, he thinks the judge should be the one approving the bond.

I'd appreciate any thoughts you have on this suggestion.

Best,

Jackie Daumerie
Rules Attorney
Supreme Court of Texas
512.463.1353
jaclyn.daumerie@txcourts.gov

Very interesting. I've heard clerks question how do they know if they should approve the bond. TRAP 24.1(b)(2) does say on motion of any party the trial court can review the bond. But that may be the process that takes too long if the party has already requested the clerk approve and the clerk delays.

Is there any reason the bond has to be approved? Honestly, there is not really a good method other than a Google search to see if the surety is real.

Is it sufficient if the bond is filed with the clerk and no approval by anyone necessary?

Sharena Gilliland
Parker County District Clerk
117 Fort Worth Highway
Weatherford, Texas 76086
(817) 598-6114
(817) 598-6131 - Fax
Sharena.Gilliland@Parkercountytx.com

From: Jaclyn Daumerie [mailto:Jaclyn.Daumerie@txcourts.gov]
Sent: Wednesday, November 13, 2019 4:53 PM
To: Sharena Gilliland; Nancy Rister
Subject: Rules Complaint- Supersedeas Bonds (TRAP 24)

Good evening, Sharena and Nancy,

I got a call from an attorney with a rules complaint, and I'd like to get your take.

The attorney has had problems getting clerks—specifically clerks in rural counties—to do what they're supposed to do to approve a supersedeas bond. In the most recent instance, the judge said she can't sign the bond unless the clerk approves. And, in the past, the attorney has had to threaten mandamus to get a clerk to approve a bond. Anyway, he says he's constantly worried about this because his clients' property could be seized if he can't get approval, and he thinks there should be a rules change. Specifically, he thinks the judge should be the one approving the bond.

I'd appreciate any thoughts you have on this suggestion.

Best,

Jackie Daumerie
Rules Attorney
Supreme Court of Texas
512.463.1353
jaclyn.daumerie@txcourts.gov

Appendix D

HARRIS COUNTY DISTRICT CLERK

STANDARD OPERATING PROCEDURES

Section: Civil Post Judgment	**Date Issued:** 08/22/97	**Effective Date:** 09/01/97	**Procedure Number:** 323/6.01
Category: Appeals	**Date Revised:** 5/1/06	**Revision Number:** 5	**Page Number:** 1 of 6
Subject: Supersedeas bonds			

Overview - When an appeal has been perfected or a Writ of Execution has been issued and the party wants to suspend execution of the judgment, a Supersedeas bond must be filed by the party and approved by the clerk. A judgment debtor may supersede the judgment by filling a Surety Bond (a prepared bond from a surety corporation which is insured to cover the bond for the entire judgment, plus interest and cost), Cash Deposit in lieu of a Surety bond (cash, a cashier's check or money order payable to the clerk for the entire judgment amount, interest and cost), or negotiable obligation (a negotiable obligation of the federal government or of any federally insured and federally or state-chartered bank or savings-and-loan association). When a judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. **The supersedeas bond should not be accepted and approved if the amount is insufficient.**

Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If a Writ of Execution or Order of Sale has been issued, the clerk will promptly issue a Writ of Supersedeas. See SOP323/6.02

Procedure: Process the bond according to the type, as follows:

I. **Surety Bond**
   A. Approve the bond by ensuring that the following information is included and correct:
      1. Signature of attorney-in-fact (attorney that signed the bond) representing the surety.
      2. Power of Attorney page with attorney-in-fact listed as having the authority to execute on behalf of the surety company.
      3. Signature of officer affixing the corporate seal of surety on the Power of Attorney page.
      4. Signature of the notary public.
      5. Seals (raised or printed) for both the signature page of surety bond and the Power of Attorney page.

Reference: Rule 24. Suspension of Enforcement of Judgment Pending Appeal In Civil Cases of the Texas Rules of Appellate Procedure. Art. 7.19-1. Bond of Surety Company, Insurance Code; Rule 52.001 Civil Practice & Remedies Code; Insurance Code Chapter 3503.

6. Approved licensed Surety: Note: Check in the Federal Register's Department of the Treasury's Listing of Approved Sureties (Department Circular 570) to see if the company is listed to cover the amount and is licensed to do business in the State of Texas. If the amount of the bond is in excess of 10 percent of the surety's company capital, written certification will be required from a re-insurer that is authorized to do business in the State of Texas.
7. Bond amount – if no Court order setting the bond, bond will be calculated based on the judgment. When the judgment is for money, the amount of the bond must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration for the appeal (1 year), and costs awarded in the judgment. The interest rate of 5% is used unless the judgment specifies a specific rate. Refer to calculation formula located in the G:\Supersedeas formula. **Do not approve the bond if the amount is insufficient.**
8. Upon approval, stamp "Approved" stamp on signature page.

B. File mark bond

C. Clerk will verify a bond approval fee has been pd. If not, clerk will assess fees in CATS, using fee code 116 for a $4 bond approval fee. Have transaction validated and forward receipt to customer.

D. Enter the bond on PST50.10 to the correct case number, completing the following fields:
1. Bond File Date – file date of bond
2. Bond Type – H (Supersedeas) or T(amended sum of Supersedeas bond)
3. Filed By–attorney bar number Note: If prose, indicate a Y in the PNO field
4. Bond Amount – dollar amount of bond
5. Bond Class Code –S (Surety)
6. Surety – name of surety, if applicable
7. Bond Approval Clerk – logon ID of approval clerk
8. Bond Approval Date – date bond was approved

E. Make one copy of bond and forward to person filing bond.

F. Code Original Bond in top right corner, indicating the following:
1. "Super"
2. P- (number of pages)

G. Forward original bond to Imaging.

H. Clerk will check INT71 and PST30.82 to ensure no Writ of Execution or Order of Sale has been requested or prepared. If one has been requested, it should be refunded and canceled. If one has been prepared, you will be required to prepare a Writ of Supersedeas, (SOP 323/6.02).

Reference: Rule 24. Suspension of Enforcement of Judgment Pending Appeal In Civil Cases of the Texas Rules of Appellate Procedure. Art. 7.19-1. Bond of Surety Company, Insurance Code; Rule 52.001 Civil Practice & Remedies Code;

II. Cash Deposit In Lieu of Bond –

A. Determine the bond amount – if no Court order setting the bond, bond will be calculated based on the judgment. When the judgment is for money, the amount of the bond must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration for the appeal (1 year), and costs awarded in the judgment. The interest rate of 10% is used unless the judgment specifies a specific rate. Refer to calculation formula located in the G:\Supersedeas formula.

B. Clerk will prepare the Clerk's Certificate of Cash Deposit In Lieu of Supersedeas Bond by accessing the PJ-27 form, located in the G:\ drive, completing the following information: (See attached Appendix 1) and saving to the H drive.
   1. Cause Number.
   2. Full name of Appellant (the party who takes an appeal from the trial court to the appellate court).
   3. Full name of Appellee (the party in a case against whom an appeal is taken)
   4. Court of Jurisdiction.
   5. Written dollar amount of cash bond.
   6. Numeric dollar amount of cash bond
   7. Check number, if applicable. Note: If more than one check, include all check numbers)
   8. Name of Attorney or Party tendering the bond.
   9. Name of Appellant.
   10. Day bond is filed.
   11. Month bond is filed
   12. Day form prepared
   13. Month form prepared
   14. Name of deputy preparing the clerk's certificate.
   15. Appeal Court of Jurisdiction., if applicable
   16. Name and Address of Party filing the bond.

C. Print, sign and seal Certificate

D. Ensure the proper amount of cash is received

E. Clerk will verify a bond approval fee has been pd. If not, clerk will assess fees in CATS, using fee code 116 for a $4 bond approval fee. Have transaction validated and forward receipt to customer.

F. Enter the bond on PST50.10 to the correct case number, completing the following fields:
   1. Bond File Date – file date of bond
   2. Bond Type – H (Supersedeas) or T(amended sum of Supersedeas)
   3. Filed By–attorney bar number Note: If prose, indicate a Y in the PNO field
   4. Bond Amount – dollar amount of bond
   5. Bond Class Code – C (Cash)
   6. Bond Approval Clerk – logon ID of approval clerk

Reference: Rule 24. Suspension of Enforcement of Judgment Pending Appeal In Civil Cases of the Texas Rules of Appellate Procedure. Art. 7.19-1. Bond of Surety Company, Insurance Code; Rule 52.001 Civil Practice & Remedies Code;

7. Bond Approval Date – date bond was approved

G. Make two copies of the Certificate of Cash Deposit In Lieu of Supersedeas Bond.
   1. One to be delivered to the person filing bond
   2. Second copy to be delivered to Court Registry

H. Deliver the cash money and copy of Certificate to the Registry of the Courts, where you will sign the money over to that department. **For all cash, money orders, or cashier's check it will be imperative that you complete the bond log and have accounting sign for receipt of the monies.** The log book is maintained with the supersedeas bonds in the file room.

I. Code Original Certificate, in the top right, corner indicating the following:
   1. "Super"
   2. P- (number of pages)

J. Forward the Original Certificate of Cash Deposit In Lieu of Supersedeas Bond to Imaging.

K. Clerk will check INT71 and PST30.82 to ensure no Writ of Execution or Order of Sale has been requested or prepared. If one has been requested, it should be refunded and canceled. If one has been prepared, you will be required to prepare a Writ of Supersedeas, (SOP 323/6.02).

III. **Negotiable Obligation**

A. Receive negotiable obligation along with a Court order directing the deposit of these items as a Supersedeas Bond.

B. Filemark negotiable obligation and Court order.

C. Clerk will verify on INT62 or CATS that the $4 bond-filing fee has been paid at intake. If not, direct requesting party to Intake for payment.

D. Enter the bond on PST50.10 to the correct case number, completing the following fields:
   1. Bond File Date – file date of bond
   2. Bond Type – H (Supersedeas) or T(amended sum of Supersedeas)
   3. Filed By – attorney bar number Note: If prose, indicate a Y in the PNO field
   4. Bond Amount – dollar amount of bond
   5. Bond Class Code –O (Other)
   6. Surety – name of negotiable obligator, if applicable
   7. Bond Approval Clerk – logon ID of approval clerk
   8. Bond Approval Date – date bond was approved

E. Make two copies of the Negotiable obligation and Court Order.

F. Deliver the original negotiable obligation and one copy of the court order to the Registry of the Courts, where you will sign the documents over to that department.

Reference: Rule 24. Suspension of Enforcement of Judgment Pending Appeal In Civil Cases of the Texas Rules of Appellate Procedure. Art. 7.19-1. Bond of Surety Company, Insurance Code; Rule 52.001 Civil Practice & Remedies Code;

G. Attach a copy of the negotiable obligation to the original court order and code the order, in the top right corner indicating the following:
   1. "Super"
   2. P- (number of pages)

H. Forward the coded documents to Imaging.

I. Clerk will check INT71 and PST30.82 to ensure no Writ of Execution or Order of Sale has been requested or prepared. If one has been requested, it should be refunded and canceled. If one has been prepared, you will be required to prepare a Writ of Supersedeas, (SOP 323/6.02).

Reference: Rule 24. Suspension of Enforcement of Judgment Pending Appeal In Civil Cases of the Texas Rules of Appellate Procedure. Art. 7.19-1. Bond of Surety Company, Insurance Code; Rule 52.001 Civil Practice & Remedies Code;

Harris County G Formula

10% Interest Rate	Case Number:	
Compensatory damages		
Compensatory damages		
Compensatory damages		
Costs		
subtotal		$0.00
interest at 10% for one year		$0.00
Total		**$0.00**

UNLESS OTHERWISE SPECIFIED ALL CALCULATIONS PRIOR TO JUNE 20, 2003 SHOULD USE 10% INTEREST RATE

5% Interest Rate	Case Number:	
Compensatory damages		
Compensatory damages		
Compensatory damages		
Costs		
subtotal		$0.00
interest at 5% for one year		$0.00
Total		**$0.00**

UNLESS OTHERWISE SPECIFIED ALL CALCULATIONS AFTER JUNE 20, 2003 SHOULD USE 5% INTEREST RATE

Tab G

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 13, 2020

Re: May 18 Referral Relating to TRAP 34.5(a) Contents of Clerk's Record on Appeal

I. Matter referred to subcommittee

The Court's May 18, 2020 referral letter and Chairman Babcock's May 20 letter refer the following matter to our committee:

> **Texas Rule of Appellate Procedure 34.5(a).** In the attached email, Ben Taylor recommends amending Rule 34.5(a) to require the trial court clerk to automatically include any supersedeas bond in the clerk's record. The Committee should review and make recommendations.

A copy of Ben Taylor's email is attached as Appendix A.

II. Subcommittee Recommendation

Amend TRAP 34.5(a) to add a new subsection to require the trial court clerk to automatically include any supersedeas bond in the clerk's record.

III. Background

Ben Taylor's email states the following reasons for requesting the change:

> As appellee's counsel our clients repeatedly have had to mess with supplementing clerk's records to get supersedeas bond or deposit information added in supplemental clerk's records (and charged for it too). It seems to me that in any appealed case there is no reason why the trial court clerk should not AUTOMATICALLY be required to include this hugely important document in the ORIGINAL clerk's record, since the appellate court certainly needs it in the event the trial court's judgment is affirmed (TRAP 43.5).

Currently TRAP 34.5(a) provides for the following items to be automatically included in the clerk's record on appeal without special designation by a party:

(1) in civil cases, all pleadings on which the trial was held;
(2) in criminal cases, the indictment or information, any special plea or defense motion that was presented to the court and overruled, any written waiver, any written stipulation, and, in cases in which a plea of guilty or nolo contendere has been entered, any documents executed for the plea;
(3) the court's docket sheet;
(4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;
(5) the court's judgment or other order that is being appealed;
(6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;
(7) the notice of appeal;
(8) any formal bill of exception;
(9) any request for a reporter's record, including any statement of points or issues under Rule 34.6(c);
(10) any request for preparation of the clerk's record;
(11) in civil cases, a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made;
(12) in criminal cases, the trial court's certification of the defendant's right of appeal under Rule 25.2; and
(13) subject to (b), any filing that a party designates to have included in the record.

Appellate courts need information about any supersedeas bond to formulate a judgment in certain cases. If the court of appeals affirms a judgment or modifies and renders judgment against the appellant, it must also render judgment against the sureties for the judgment and any costs assessed against the appellant. TRAP 43.5. The Supreme Court is similarly required to render judgment against sureties in affirming, modifying, or rendering a judgment against a party that was appellant in the court of appeals. TRAP 60.5. Judgment must also be rendered against any surety when the appellate court denies habeas relief to a relator who has been released on bond. TRAP 52.8. Copies of each of these rules is attached as Appendix B.

The supersedeas bond information is similar to a certified bill of costs which is also needed to prepare the judgment on appeal. The bill of costs is automatically included in the clerk's record, likely for that reason.

The subcommittee asked for input from Blake Hawthorne, clerk of the Supreme Court of Texas, and Michael Cruz, clerk of the Fourth Court of Appeals in San Antonio. Both agreed that inclusion of the supersedeas bond in the clerk's record would be helpful. Michael Cruz observed that its absence does slow down formulation of a judgment.

IV. Proposed amendment to TRAP 34.5(a)

The subcommittee recommends that TRAP 34.5(a) be amended as follows to require that any supersedeas bond be automatically included in the clerk's record on appeal without special designation by a party:

34.5. Clerk's Record

(a) *Contents.* Unless the parties designate the filings in the appellate record by agreement under Rule 34.2, the record must include copies of the following:

(1) in civil cases, all pleadings on which the trial was held;
(2) in criminal cases, the indictment or information, any special plea or defense motion that was presented to the court and overruled, any written waiver, any written stipulation, and, in cases in which a plea of guilty or nolo contendere has been entered, any documents executed for the plea;
(3) the court's docket sheet;
(4) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;
(5) the court's judgment or other order that is being appealed;
(6) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;
(7) the notice of appeal;
(8) any formal bill of exception;
(9) any request for a reporter's record, including any statement of points or issues under Rule 34.6(c);
(10) any request for preparation of the clerk's record;
(11) in civil cases, a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made;
(12) in criminal cases, the trial court's certification of the defendant's right of appeal under Rule 25.2; ~~and~~
(13) in civil cases, any supersedeas bond; and
(14) subject to (b), any filing that a party designates to have included in the record.

Appendix A

From: Taylor, Ben
Sent: Thursday, February 14, 2013 11:59 AM
To: Nathan L. Hecht (nlhecht@att.net)
Cc: Elaine Carlson (elainecarlson@comcast.net)
Subject: Default Clerk's Record / Supersedeas Suggestion
Importance: Low

Dear Justice Hecht,

At Elaine Carson's suggestion, I am writing you in your capacity as the Court's rules liason.

I wish the Court would consider amending TRAP 34.5(a) requiring trial court clerks AUTOMATICALLY to include any supersedeas bond or certificate of deposit in lieu of bond. As appellee's counsel our clients repeatedly have had to mess with supplementing clerk's records to get supedeas bond or deposit information added in supplemental clerk's records (and charged for it too). It seems to me that in any appealed case there is no reason why the trial court clerk should not AUTOMATICALLY be required to include this hugely important document in the ORIGINAL clerk's record, since the appellate court certainly needs it in the event the trial court's judgment is affirmed (TRAP 43.5).

Thanks for your consideration.

Respectfully, Bt

Appendix B. TRAP Rules Relating to Judgments Against Sureties

43.5. Judgment Against Sureties in Civil Cases

When a court of appeals affirms the trial court judgment, or modifies that judgment and renders judgment against the appellant, the court of appeals must render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant.

52.8. Action on Petition

(a) Relief Denied. If the court determines from the petition and any response and reply that the relator is not entitled to the relief sought, the court must deny the petition. If the relator in a habeas corpus proceeding has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond to be forfeited and render judgment against the surety.

60.5. Judgment Against Sureties

When affirming, modifying, or rendering a judgment against the party who was the appellant in the court of appeals, the Supreme Court must render judgment against the sureties on that party's supersedeas bond, if any, for the performance of the judgment. If the Supreme Court taxes costs against the party who was the appellant in the court of appeals, the Court must render judgment for those costs against the sureties on that party's supersedeas bond, if any.

Tab H

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 20, 2020

Re: May 18 Referral Relating to Appellate Briefing Practice

I. Matter referred to subcommittee

The Court's May 18, 2020 referral letter and Chairman Babcock's May 20 letter refer the following matter to our committee:

> **Briefing Rules.** The Court asks the Committee to consider whether changes are needed to improve appellate briefing practice and specifically asks the Committee to consider whether to:
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> - remove paper-copy requirements;
> - remove the requirement to include the court of appeals judgment in the petition appendix;
> - add a reasons-to-grant section in the petition and brief;
> - remove or limit the statement of jurisdiction in the petition and brief;
> - create a standardized record citation format to allow for automated hyperlinking;
> - add a requirement to include argument-preservation citations; and
> - maintain the certificate-of-service requirement for e-filed documents.

No materials were provided with the referral.

II. Relevant rules

The items for consideration in the referral implicate several of the Rules of Appellate Procedure. TRAP 9.3(b) imposes the paper copy requirement for document electronically filed with the Texas Supreme Court and the Court of Criminal Appeals. TRAP 9.5(d) and (e) govern certificates of service in appellate courts. TRAP 53.2 mandates the contents of a petition for review and appendix. TRAP 55.2 sets out the contents of a petitioner's brief on the merits. The full text of these provisions is provided in Appendix A.

III. Discussion and Recommendation

The referred items will be addressed in a different order than listed in the referral letter. Four of the items involve the mechanics of filings and will be addressed first. The remaining three items address the substance of filings and will be addressed last.

A. Whether to remove paper-copy requirements.

TRAP 9.3(b)(2) requires a party e-filing documents in the Supreme Court and Court of Criminal Appeals to also file paper copies with those courts: "Paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand-delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within three business days after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of the Supreme Court or the Court of Criminal Appeals." In contrast, TRAP 9.3(a)(2) states that paper copies of e-filed documents are not generally required in the court of appeals: "Unless required by local rule, a party need not file a paper copy of an electronically filed document."

Blake Hawthorne, Clerk of the Supreme Court, has confirmed that the Court no longer requires paper copies of e-filed documents. In an email, Blake stated: "We no longer require paper copies, so I think the rule needs to be updated. People still call and are confused because the rule hasn't changed." Blake also volunteered to contact the Court of Criminal Appeals to see whether they still require paper copies and, if so, whether they want to continue.

Recommendation. According to Blake, the Court of Criminal Appeals is considering whether it still wants paper copies, no final determination has been made, but it seems likely the court will want to continue to receive paper copies. So here are two alternative recommendations:

Assuming the Court of Criminal Appeals wants to continue receiving paper copies, amend TRAP 9.3(b)(2) to delete the requirement to file paper copies of e-filed documents only in the Supreme Court and to parallel TRAP 9.3(a)(2) applicable to the courts of appeals, as follows:

9.3. Number of Copies

(b) Supreme Court and Court of Criminal Appeals.

(1) Document Filed in Paper Form. If a document is not electronically filed, a party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a

motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronically Filed Document. Paper copies of each document that is electronically filed with the ~~Supreme Court or the~~ Court of Criminal Appeals must be mailed or hand-delivered to the ~~Supreme Court or the~~ Court of Criminal Appeals~~, as appropriate,~~ within three business days after the document is electronically filed. The number of paper copies required shall be determined~~, respectively,~~ by order of the ~~Supreme Court or the~~ Court of Criminal Appeals. A party need not file a paper copy of an electronically filed document in the Supreme Court.

Assuming instead the Court of Criminal Appeals no longer wants paper copies, amend TRAP 9.3(b)(2) to delete the requirement to file paper copies of e-filed documents and to parallel TRAP 9.3(a)(2) applicable to the courts of appeals, as follows:

9.3. Number of Copies

(b) Supreme Court and Court of Criminal Appeals.

(1) Document Filed in Paper Form. If a document is not electronically filed, a party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronically Filed Document. ~~Paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand-delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within three business days after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of the Supreme Court or the Court of Criminal Appeals.~~ A party need not file a paper copy of an electronically filed document.

B. Whether to remove the requirement to include the court of appeals' judgment in the petition appendix.

TRAP 53.2(k)(1)(C) requires that the appendix to the petition for review contain "the opinion and judgment of the court of appeals." While petitioners routinely include the court of appeals' opinion in the appendix, they not infrequently omit the court of appeals' judgment, which is a separate document. Because the judgment is required, petitions are returned for

correction when not included. While a return for correction does not affect the date of filing, it does slow down the processing of the petition.

The subcommittee asked for input from Blake Hawthorne, Clerk of the Supreme Court, who stated that: "Court of appeals judgments are almost always available online and staff attorneys say they no longer need it in the petition. It causes a lot of returns for corrections because many non-appellate practitioners and their staff don't understand the difference between the opinion and the judgment."

If the rule were changed to delete the mandatory inclusion of the court of appeals' judgment in the appendix, petitioners would always be free to include it as optional content under TRAP 53.2(k)(2) ("Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.").

Pragmatically, then, it makes sense to no longer mandate inclusion of the court of appeals' judgment in the appendix. The subcommittee was unanimous on this. But some members of the subcommittee did express regret at its passing. As subcommittee member Evan Young observed, "But it really is the judgment that is the basis for the appeal, not the opinion; there is something discordant to me about omitting the judgment in a petition whose whole purpose is to review that very judgment. I nonetheless do not oppose the recommendation to exclude it as a mandatory part of the appendix given the foregoing."

Recommendation. Amend TRAP 53.2(k)(1) to delete the required inclusion of the court of appeals' judgment in the appendix to the petition for review, as follows:

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(k) Appendix.

(C) the opinion ~~and judgment~~ of the court of appeals; and

C. Whether to maintain the certificate-of-service requirement for e-filed documents.

TRAP 9.5(d) and (e) mandate proof of service and specify the contents of a certificate of service for all appellate court filings. Many Texas appellate courts are using the automated certificate of service generated by the e-filing system. The automated certificates shows who has been served

through the e-filing portal. The automatic certificate of service has been turned on by most Texas appellate courts and an increasing number of trial courts, including:

- Supreme Court
- Criminal Court of Appeals
- 1st, 3rd, 4th, 5th, 6th,7th, 8th, 9th, 11th, 13th, 14th Courts of Appeals
- Collin DC
- Bowie DC
- Nolan DC
- Mitchell DC
- Fisher DC
- Williamson CC/DC
- Brewster DC
- Culberson DC
- Jeff Davis DC
- Hudspeth DC
- Presidio DC
- Travis DC
- Dallas CC/DC

The subcommittee asked for input from Blake Hawthorne, Clerk of the Supreme Court. Blake confirmed that the automated certificate of service accurately states who has been served through the efiling system and is working well:

> You may have seen my tweets promoting this idea. I took this idea through the Judicial Committee on Information Technology and that group signed off on the it before the technology was deployed. Almost all of the appellate courts have turned on the automated certificate of service and it is working well. A page is simply inserted at the end of each document filed. It is also included on documents that are served, but not filed, through eFileTX. It lists the name and the email address of each person actually served. Future improvements will include a hyperlink that shows the online report with the status of delivery (i.e. you'll actually be able to see if and when the document was opened by clicking on the hyperlink).
>
> One thing that the automated certificate has demonstrated is that the certificates that attorneys include are often not accurate. They say they served everyone when in fact they did not serve anyone. Or they say they served all counsel when in fact they did not. The automated certificate is more accurate and will be more convenient if attorneys no longer have to create a certificate. The federal courts have already made this change.

Recommendation. Amend TRAP 9.5(d) and (e) to delete the certificate of service requirement for e-filed documents, as follows:

9.5. Service

(d) Proof of Service and Certificate of Service.

(1) Documents Served Electronically. Proof of service and a certificate of service are not required for a document filed electronically in an appellate court and served electronically.

(2) Documents Not Served Electronically.

(A) A document ~~presented for filing~~ not served electronically must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be affixed to the filed document. The clerk may permit a document to be filed without proof of service, but will require the proof to be filed promptly.

~~(e)~~ (B) Certificate Requirements. A certificate of service must be signed by the person who made the service and must state:

(~~1~~i) the date and manner of service;

(~~2~~ii) the name and address of each person served; and

(~~3~~iii) if the person served is a party's attorney, the name of the party represented by that attorney.

D. Whether to create a standardized record citation format to allow for automated hyperlinking.

The Fifth Circuit requires that all filings use a uniform citation to the appellate record to permit automatic hyperlinking using the court's technology. Unlike in Texas appeals, the appellate record in the Fifth Circuit combines both the clerk's record and the reporter's record in a single file with pages consecutively numbered.

The appellate record in Texas consist of multiple volumes of the reporter's transcript and also multiple volumes of the clerk's documents. In Texas appellate courts, there is no standard record citation form, and briefs use a wide variety of citation approaches. Currently, there is no state court technology for automatic hyperlinking to the record. A party must manually add hyperlinks and record excerpts, and hyperlinking to the record is optional.

The subcommittee asked for input from Blake Hawthorne, Clerk of the Supreme Court, who confirmed that automatic hyperlinking is not currently feasible:

> I think [one of the justices] suggested the standardized record citation format thinking that was all that was needed for us to be able to hyperlink to the record like the 5th Circuit does. The trouble is that the technological solution doesn't exist yet. So while this would need to be done to be able to hyperlink, we still won't be able to do this even when there is a standard format. I'm certainly not opposed to it though as it will eventually need to be done in order to create hyperlinks. I just wish there was some work going on on the technology side of this.

So, while the TRAPs could impose a uniform record citation requirement, there would be two problems: (1) it would not permit hyperlinking at this time because there is no technology to support it; and (2) it is unclear whether any uniform format instituted now would be compatible with whatever technology is eventually developed. It might be useful to the appellate courts to have consistent record citations in briefs notwithstanding these issues. If a uniform record citation were adopted, the format should not include spaces that would increase the word count of a document. For example, 2.CR.24 or 2CR24 counts as one word but 2 CR 24 counts as three words. However, any format developed now might have to be changed when the technology is in place to automatically hyperlink to the record.

Recommendation. The subcommittee agreed that it would be better to wait for technology to catch up. The subcommittee urges the Office of Court Administration to explore options for developing the technology necessary for Texas appellate courts to be able to automatically hyperlink to the record and further encourages OCA to launch a pilot project to further that goal.

E. Whether to remove or limit the statement of jurisdiction in the petition and brief.

TRAP 53.2(e) and TRAP 55.2(e) require that the petition for review and petitioner's brief on the merits include a Statement of Jurisdiction that states "without argument, the basis of the Court's jurisdiction."

The Court's jurisdictional statutes were amended in 2017. The bases for the Court's jurisdiction are much simpler now than they were at the time TRAP 53.2 and 55.2 were adopted. The Court's primary jurisdictional statute, Tex. Gov't Code § 22.001, which previously listed multiple grounds for the Court's jurisdiction, such as dissent and conflict, now only contains a single basis – the case presents an issue of importance to the jurisprudence of the State. In addition, former Tex. Gov't Code § 22.225 made certain cases final in the court of appeals, including appeals from interlocutory trial court orders. Those limitations were deleted from Section 22.225 in 2017 and the Supreme Court may exercise jurisdiction under the 22.001 importance standard. There remain a handful of special statutes that grant the Court jurisdiction in other situations – such as direct appeals from the trial court and original jurisdiction over some types of cases. These appeals are governed by TRAP 57, which sets out the procedures for the parties to brief the basis for the Court accepting (or rejecting) jurisdiction.

The effect of the 2017 amendments to the Court's jurisdictional statutes thus made traditional appeals from a court of appeals within the Court's discretionary jurisdiction. Because there is only one basis for jurisdiction, and that basis is discretionary, the issue is not whether the Court has jurisdiction. It does. The question is whether it will accept discretionary jurisdiction over the case based on importance of the issues.

Many practitioners use the Statement of Jurisdiction to argue whether the issues are in fact important and whether the Court should accept the case. The Statement of Jurisdiction is not included when determining the document's word count for purposes of the limits in TRAP 9.4. So it is like a Free Space in Bingo.

Recommendation. The Statement of Jurisdiction is no longer necessary and should be deleted as a requirement. TRAP 53.2(e) and 55.2(e) should be deleted and subsequent sections re-lettered. The reference to Statement of Jurisdiction should also be deleted from respondents' filings – the response to the petition for review and respondent's brief on the merits. TRAP 53.3(d) and TRAP 55.3(d) provide that "a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction." Those sections should be deleted and subsequent sections re-lettered.

F. Whether to add a reasons-to-grant section in the petition and brief.

The most critical function of a petition for review is to convince the Supreme Court to exercise its discretionary jurisdiction and grant review because the issue is of importance to the State. Nothing, however, in TRAP 53.2 requires the petition to expressly make that argument.

Experienced practitioners routinely do this. As an example, some practitioners have replaced the heading "Summary of Argument" with "Summary of the Argument: Review is Warranted" or "Summary of the Argument: The Court Should Grant Review" or have added an "Introduction" section at the beginning of the brief for that purpose. Similarly, some practitioners representing respondents use the heading "Summary of the Argument: Review is Not Warranted" or a responsive "Introduction" section for that purpose.

The subcommittee discussed a variety of options. The consensus was that a "Reasons to Grant" section would be very useful in the petition for review. But the subcommittee viewed a discussion of reasons to grant review as largely duplicative of the summary of the argument. It would also add more words to the word count. The subcommittee also agreed that the summary of the argument is not that useful if there is already a summary in the Reasons to Grant and also because the petition is quite short, the headings provide a summary, and the summary of the argument is largely repetitive.

The subcommittee further agreed that the new reasons to grant section should be included only in the petition and not merits briefing because they should have different focuses. While the petition for review focuses on whether the issues in the case are grantworthy, the briefing should be more focused on the merits of the substantive arguments.

Recommendations: (1) Delete the requirement for a summary of argument in TRAP 53.2(h); (2) add a new introduction section on reasons to grant and retitle the argument section; (3) as previously recommended, delete the statement of jurisdiction; (4) re-letter as needed; (5) add new exception in TRAP 53.3 to require respondent to include a response to the reasons to grant section; and (6) change TRAP 55.2 only to delete the statement of jurisdiction..

TRAP 53.2 would be amended as follows:

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

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

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

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion; and

(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

(e) ~~*Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.~~

~~(f)~~ *Issues Presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(f) *Introduction and Statement of Reasons to Grant.* The petition must contain an introduction stating the reasons the court should grant review.

(g) *Statement of Facts.* The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

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

(i) *Reasons to Grant*~~Argument~~. The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.

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

(k) *Appendix.*

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

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;
(C) the opinion ~~and judgment~~ of the court of appeals; and
(D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

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

The subcommittee further recommends a new exception for respondents in TRAP 53.3 with subsequent sections re-lettered:

(c) include a statement of the reasons the Court should deny review;

Finally, TRAP 55.2(e), statement of jurisdiction, should be deleted and following sections re-lettered.

G. Whether to add a requirement to include argument-preservation citations.

In the subcommittee's experience, preservation is not an issue in most cases in the Supreme Court and, when it is, the Court is very liberal in finding preservation. Citations to the record to show where an issue was preserved is not that simple. The obligation to preserve varies depending on the burden of proof, the nature of the trial court judgment (jnov vs. non-jnov, for example), whether the party was appellant or appellee in the court of appeals, whether the issue in the court of appeals was a responsive issue or a separate attack on the judgment, etc. So the citation standing alone or the absence of a citation may not provide that much information without knowing all of that context. Currently, if there is a preservation issue, it is the obligation of the respondent to point it out. That seems more efficient than requiring the information in every case when it is rarely an issue. The subcommittee also thought that adding this section would invite more (and mostly unnecessary) disputes about preservation.

Recommendation. No change. If, however, a change is made to require citation to where the issue was preserved, add that requirement to the issues statement to exclude it from the word count.

Appendix A: Relevant Rules

9.3. Number of Copies

(b) *Supreme Court and Court of Criminal Appeals.*

(1) Document Filed in Paper Form. If a document is not electronically filed, a party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronically Filed Document. Paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand- delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within three business days after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of the Supreme Court or the Court of Criminal Appeals.

9.5. Service

9.5. Service

(a) *Service of All Documents Required*. At or before the time of a document's filing, the filing party must serve a copy on all parties to the proceeding. Service on a party represented by counsel must be made on that party's lead counsel. Except in original proceedings, a party need not serve a copy of the record.

(b) *Manner of Service*.

(1) Documents Filed Electronically. A document filed electronically under Rule 9.2 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents Not Filed Electronically. A document that is not filed electronically may be served in person, by mail, by commercial delivery service, by fax, or by email. Personal service includes delivery to any responsible person at the office of the lead counsel for the party served.

(c) *When Complete*.

(1) Service by mail is complete on mailing.

(2) Service by commercial delivery service is complete when the document is placed in the control of the delivery service.

(3) Service by fax is complete on receipt.

(4) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(d) *Proof of Service*. A document presented for filing must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be affixed to the filed document. The clerk may permit a document to be filed without proof of service, but will require the proof to be filed promptly.

(e) *Certificate Requirements*. A certificate of service must be signed by the person who made the service and must state:

(1) the date and manner of service;

(2) the name and address of each person served; and

(3) if the person served is a party's attorney, the name of the party represented by that attorney.

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

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

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

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion; and
(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

(e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(g) *Statement of Facts.* The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

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

(i) *Argument.* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.

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

(k) *Appendix.*

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

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;
(C) the opinion and judgment of the court of appeals; and
(D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

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

55.2. Petitioner's Brief on the Merits

The petitioner's brief on the merits must be confined to the issues or points stated in the petition for review and must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

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

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

(d) *Statement of the Case.* The brief must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; and
(9) the disposition of the case by the court of appeals.

(e) *Statement of Jurisdiction.* The brief must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.

(g) *Statement of Facts.* The brief must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The brief must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

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

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

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

Tab I

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 13, 2020

Re: May 18 Referral Relating to TRAP 56.2 Vacating Courts of Appeals' Opinions in Moot Cases

I. Matter referred to subcommittee

The Court's May 18, 2020 referral letter and Chairman Babcock's May 20 letter refer the following matter to our committee:

> **Vacating Opinions.** The Court asks the Committee to draft a rule addressing vacatur of the court of appeals' opinion when a case becomes moot on appeal. *Morath v. Lewis*, 2020 WL 1898537 (Tex. Apr. 17, 2020) (per curiam), may inform the Committee's work.

A copy of the Court's per curiam opinion in *Morath v. Lewis* is attached.

II. Subcommittee recommendation

Amend TRAP 56.2 to recognize that the Court, at its option, may vacate the court of appeals' opinion when dismissing a case as moot as follows:

> **56.2. Moot Cases**
>
> If a case is moot, the Supreme Court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal. The Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion to dismiss cannot be conditioned on vacating the court of appeals' opinion.

III. Relevant rules

TRAPs 56.2 and 56.3 govern the Texas Supreme Court's actions in moot and settled cases. Only the settlement rule addresses vacating the court of appeals' opinion:

56.2. Moot Cases

If a case is moot, the Supreme Court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal.

56.3. Settled Cases

If a case is settled by agreement of the parties and the parties so move, the Supreme Court may grant the petition if it has not already been granted and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. The Supreme Court's action may include setting aside the judgment of the court of appeals or the trial court without regard to the merits and remanding the case to the trial court for rendition of a judgment in accordance with the agreement. The Supreme Court may abate the case until the lower court's proceedings to effectuate the agreement are complete. A severable portion of the proceeding may be disposed of if it will not prejudice the remaining parties. **In any event, the Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the court of appeals' opinion.**

(Emphasis added). TRAP 60.6 recognizes the Supreme Court may make other orders appropriate to a case:

60.6. Other Orders

The Supreme Court may make any other appropriate order required by the law and the nature of the case.

IV. Discussion

The Texas Supreme Court recently and directly addressed its authority to vacate a court of appeals' opinion when a case becomes moot on appeal. In *Morath v. Lewis*, ** S.W.3d ** (Tex. 2020) (per curiam), a group of parents of Texas public school students sued the Commissioner of the Texas Education Agency alleging that the TEA administered the 2015-2016 STAAR exams in violation of the governing statutes. The trial court denied the Commissioner's plea to the jurisdiction and the Third Court of Appeals in Austin affirmed, holding that the plaintiffs had adequately pleaded *ultra vires* claims. The Commissioner appealed to the Texas Supreme Court. After the Court requested full briefing on the merits, the plaintiffs filed a notice of nonsuit and a motion to dismiss the appeal as moot. The Commissioner opposed the nonsuit and dismissal, but alternatively asserted that, if the Court dismissed the appeal as moot, it should vacate the court of appeals' opinion in addition to vacating the court of appeals' judgment.

The Supreme Court held that the plaintiffs were entitled to nonsuit and dismissal. In dismissing the appeal as moot, however, the Court ordered that the court of appeals' opinion should be vacated. The key portions of the Court's reasoning were:

- Although the Court has been reluctant to vacate court of appeals' opinions in the past, it was not because of a lack of authority to do so;
- While Rule 56.2 does not specifically authorize vacatur of an opinion (unlike Rule 56.3), it does not foreclose such an action
- Rule 56.2 sets no parameters for the Court's order dismissing a case as moot, and Rule 60.6 authorizes any other appropriate order;
- The purpose of vacatur is to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences;
- The Court should carefully scrutinize voluntary actions by a party that preclude the opponent from seeking review of an adverse outcome; and
- When the Court vacates the court of appeals' judgment, but not the opinion, the opinion carries the precedential weight of a "writ dismissed" case and is binding within the court of appeals' district; in contrast, a vacated opinion carries no precedential value but may still be cited as persuasive authority.

Slip op. at 7-10.

Based on these considerations, the Court held that **"we will approach vacatur of a court of appeals opinion in a moot case as a discretionary equitable remedy available only when the Court 'concludes that the public interest would be served by a vacatur.'"** Slip op. at 10-11 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994)). The Court determined that the public interest would be served by vacating the court of appeals' opinion because (1) mootness was wholly the result of voluntary action by the party who prevailed in the court of appeals; (2) the legal issue had broad impact for schools across the State and to the government's defense of *ultra vires* claims in other contexts; and (3) the nonsuit came only after at least three justices had decided the case merited closer examination through full briefing. Slip op. at 11.

Thus, in *Morath*, the Court determined it had authority to vacate the court of appeals' opinion in a moot case, set public interest as the standard for when to vacate, and explained the reasons the facts of the particular case met the public interest standard.

It will be helpful to parties in future cases for the appellate rules to expressly state that the Court has the authority delineated in *Morath.*

V. Proposed amendment to TRAP 56.2

The subcommittee recommends that TRAP 56.2 be amended to provide that the Supreme Court's order dismissing a case as moot may also vacate the court of appeals' opinion. For consistency, the subcommittee recommends that 56.2 should track the same language used in 56.3. To promote simplicity, the rule should not attempt to include the *Morath* standard but leave the standard to the Court's case law as it develops.

56.2. Moot Cases

If a case is moot, the Supreme Court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal. **The Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion to dismiss cannot be conditioned on vacating the court of appeals' opinion.**

IN THE SUPREME COURT OF TEXAS

NO. 18-0555

MIKE MORATH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS EDUCATION AGENCY, PETITIONER,

v.

VIRGINIA DIANE LEWIS, INDIVIDUALLY AND AS NEXT FRIEND TO C.J.L., ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

PER CURIAM

This case comes before the Court on the plaintiff-Respondents' "Motion to Dismiss Appeal as Moot." For the reasons explained below, we grant that motion. We also grant the petition for review, dismiss the case as moot, and vacate both the judgment and the opinion of the court of appeals without respect to the merits.

I. Background

A group of parents of Texas public school students sued Mike Morath in his official capacity as the Commissioner of the Texas Education Agency. The suit alleges TEA administered the 2015–2016 standardized STAAR exams in violation of the governing statutes. Morath filed a plea to the jurisdiction, arguing that the plaintiffs' *ultra vires* claims could not proceed for several reasons, including that the plaintiffs lack standing and that TEA did not violate the law in

administering the test. The trial court denied the plea to the jurisdiction. Morath appealed, and the court of appeals affirmed, holding that the plaintiffs adequately pleaded *ultra vires* claims under *City of El Paso v. Heinrich* and related decisions. *Morath v. Lewis*, No. 03-16-00603-CV, 2018 WL 1527875, at *3–4 (Tex. App.—Austin, Mar. 29, 2018, pet. granted) (mem. op.).

Morath petitioned for review. His PFR alleges that the plaintiffs lack standing, that the court of appeals misconstrued the relevant statutes, and that the court of appeals' opinion improperly expands the availability of *ultra vires* relief by requiring TEA to spend funds not appropriated by the Legislature. This Court requested a response to the petition. After receiving that response and a reply, the Court requested merits briefs. After Morath filed his merits brief, Respondents decided to cease pursuing their claims. They filed in this Court a "Notice of Nonsuit Without Prejudice" and moved to dismiss the appeal as moot. Morath opposes the motion to dismiss. He argues that a non-suit in this procedural posture is ineffective and that, even if the non-suit were effective, the appeal should not be dismissed because it "involves a matter of public concern." He also argues that, if the motion to dismiss is granted, this Court should vacate the court of appeals' opinion in addition to its usual practice, in moot cases, of vacating the court of appeals' judgment. Respondents filed a reply, re-urging their arguments for dismissal of the appeal without addressing the State's request to vacate the court of appeals' opinion. As explained below, the Court grants Respondents' motion to dismiss and grants the State's request to vacate the court of appeals' opinion.

II. Effectiveness of the Non-suit

"At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the

minutes." TEX. R. CIV. P. 162. The State argues that Respondents' non-suit, filed directly in this Court, is procedurally defective and should be given no effect. As the State sees it, Rule 162 applies only in trial courts, and there is currently a stay of all trial court proceedings during this interlocutory appeal, so the plaintiffs cannot file a non-suit in the trial court. Moreover, the State argues, there is no mechanism in the appellate rules for a non-suit filed directly in the Supreme Court. In the State's view, there is no procedural vehicle by which the plaintiff may accomplish a unilateral non-suit at this juncture, and Respondents may only achieve dismissal with the State's agreement. This is incorrect.

"The plaintiff's right to take a nonsuit is *unqualified and absolute* as long as the defendant has not made a claim for affirmative relief." *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990). Contrary to the State's position, a plaintiff's right to abandon its claims does not disappear when trial court proceedings are stayed pending interlocutory appeal. In precisely this procedural posture—appeal of the denial of the government's plea to the jurisdiction, with all trial court proceedings stayed—this Court previously recognized a plaintiff's "absolute right to take a non-suit *in this Court* because he took it before he presented all his evidence and rested his case in chief." *Houston Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007) (emphasis added). This Court's prior decisions also suggest that, even during an interlocutory appeal, Rule 162 remains the appropriate procedural mechanism for such a non-suit. *See Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam) ("Rule 162 applies in this case because Shultz filed the nonsuit while this matter was pending on interlocutory appeal from UTMB's pretrial plea to the jurisdiction.").

Here, Respondents filed a "Notice of Nonsuit Without Prejudice" directly in this Court, citing Rule 162. We have accepted Rule 162 non-suits directly in this Court before, and we do so again in this case. Giving effect to such filings comports with our previous decisions in *Ferrell* and *Estate of Blackmon*. More importantly, it acknowledges the limits on our jurisdiction. In *Ferrell*, as in this case, the plaintiff-respondent non-suited its case "in this Court" in response to the defendant's Supreme Court briefing. We accepted Ferrell's non-suit, "noting that it moots his case, not merely his appeal." *Ferrell*, 248 S.W.3d at 157 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71–72 (1997)). We have also held that "[u]nder these circumstances, the nonsuit *extinguishes a case or controversy* from the moment the motion is filed . . . ." *Estate of Blackmon*, 195 S.W.3d at 100 (emphasis added). Because the plaintiff's non-suit "moots his case" by "extinguish[ing] a case or controversy," the non-suit is not merely the end of the case. It is the end of the Court's power to decide the case, assuming there are no claims for relief against the non-suiting party. *Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010) (holding that after non-suit in the trial court, "there was no live controversy for the court of appeals to decide"). Whether or not Rule 162 formally applies in the Supreme Court, a case is generally moot once the plaintiff declares its abandonment of all claims for relief. *Id.* ("[N]on-suit typically moots the case or controversy from the moment of its filing or pronouncement in open court."). The plaintiffs did so here, the case is now moot, and we are therefore obligated in the absence of jurisdiction to dismiss the case one way or another.[1]

[1] The consequences of a plaintiff's abandonment of its claims, for purposes of res judicata or otherwise, may vary depending on the stage of the case at which the abandonment occurs. But once all claims for relief are unconditionally abandoned, no justiciable case or controversy remains. *See Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016).

The State argues that the automatic stay of trial court proceedings precludes a Rule 162 non-suit filed in the trial court. Because we accept the plaintiff's non-suit filed directly in this Court, we need not consider whether a non-suit could be filed in the trial court during a section 51.014 stay. We note, however, that neither a statutory stay of trial court proceedings nor any other statute could vest this Court or any other with authority to decide moot cases in violation of the constitutional limitations on our jurisdiction. However it is achieved procedurally, the plaintiffs' total abandonment of their claims for relief "extinguishes" jurisdiction. *Estate of Blackmon*, 195 S.W.3d at 100. We are obligated to consider our jurisdiction at all times, and we will not ignore the obvious cessation of it merely because the rules of appellate procedure do not explicitly designate a procedural mechanism for non-suits during interlocutory appeals. *See, e.g.*, *In re City of Dallas*, 501 S.W.3d 71, 73 (Tex. 2016) (per curiam); *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam).

The State further argues that even if the non-suit is procedurally effective, we should nevertheless require Respondents to continue to litigate a case they have abandoned because the case involves "a matter of public concern." The State contends this Court previously required as much in *City of Pasadena v. State ex rel. City of Houston*, 442 S.W.2d 325 (Tex. 1969). But that case bears little resemblance to this one. In *City of Pasadena*, the parties settled their dispute after the Court issued its opinion but while a rehearing motion remained pending. *Id.* at 331. They jointly asked the Court to withdraw its opinion and dismiss the application for writ of error. *Id.* The Court declined, instead issuing a substitute opinion on rehearing, in part because of the public importance of the legal issues involved. *Id.* Assuming for the sake of argument that *City of Pasadena* recognized a "matter-of-public-concern" exception to mootness, it did so very narrowly in

response to the parties' attempt at the rehearing stage to force the withdrawal of a previously issued opinion of the Court. *Id. City of Pasadena* certainly did not require a plaintiff to continue litigating an appeal despite its desire to abandon its claims, as the State suggests we should do here.

We do not have power to decide moot cases, whether they "involve a matter of public concern" or not. *See City of Krum v. Rice*, 543 S.W.3d 747, 750 (Tex. 2017) (per curiam). Indeed, the need for courts to mind their jurisdictional bounds is perhaps at its greatest in cases involving questions of public importance, where the potential for undue interference with the other two branches of government is most acute. If courts were empowered to ignore the usual limits on their jurisdiction, such as mootness, when matters of public concern are at stake, then we would no longer have a judiciary with limited power to decide genuine cases and controversies. We would have a judiciary with unbridled power to decide any question it deems important to the public. That is not the role assigned to the courts by our constitution. *See* TEX. CONST. art. II, § 1; *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 886 (Tex. 2016); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995). The State points to no case where this Court or any other has required a party to continue litigating claims it has abandoned merely because there is public interest in the outcome. We will not do so here.

III. Vacatur of the Court of Appeals' Opinion

The State requests, in the alternative, that we vacate the opinion of the court of appeals in addition to our usual practice of vacating the court of appeals' judgment when cases become moot on appeal to this Court. For the reasons explained below, we grant the State's request.

"The rule has long been established in this court that when a case becomes moot on appeal, all previous orders are set aside by the appellate court and the case is dismissed." *Tex. Foundries v. Int'l Moulders & Foundry Workers' Union*, 248 S.W.2d 460, 461 (Tex. 1952). Historically, however, vacatur of "all previous orders" upon mootness has not often included vacatur of the court of appeals' opinion. *See, e.g.*, *Houston Cable TV, Inc. v. Inwood W. Civic Ass'n*, 860 S.W.2d 72, 73–74 (Tex. 1993) (vacating court of appeals' judgment in response to mootness caused by settlement but declining to vacate the court of appeals' opinion). Unlike in federal practice, where vacatur of the appellate judgment entails vacatur of the written judicial opinion supporting the judgment, Texas practice contemplates that a court of appeals' judgment may be vacated without also vacating the corresponding opinion. *See id.*; *accord Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999).

Our reluctance to vacate court of appeals opinions in the past has never been because of concern that we lack the power to do so. The rules of appellate procedure and our prior decisions contemplate that this Court has the power to vacate court of appeals opinions in moot cases, though that power has seldom been exercised. *See* TEX. R. APP. P. 56; *Houston Cable TV*, 860 S.W.2d at 73. Rule 56.2, governing our handling of moot cases, does not mention vacatur of lower court judgments or opinions. *See* TEX. R. APP. P. 56.2. It provides only that when a case becomes moot on appeal, this Court may "grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal." *Id.* Rule 56.2 sets no parameters at all for the content of this Court's order "dismiss[ing] the case" in response to mootness. *Id.* And Rule 60.6 generally authorizes "any other appropriate order required by the law and nature of the case." TEX. R. APP. P. 60.6. This broad authority to issue "any other appropriate

order" includes the authority to vacate court of appeals opinions in conjunction with Rule 56.2 dismissal orders where appropriate.

While no rules of procedure *specifically* authorize this Court to vacate court of appeals opinions in moot cases, certainly no rule forecloses it. Indeed, the rules are written under the assumption the Court may do so. Rule 56.3, governing settlements, authorizes this Court to effectuate a settlement by "setting aside the judgment of the court of appeals." *See* TEX. R. APP. P. 56.3. Far from restricting this Court's authority to also set aside the court of appeals' opinion, however, the rule provides that the Court's "order does not vacate the court of appeals opinion *unless the order specifically provides otherwise*." *Id.* (emphasis added). Thus, Rule 56.3 contemplates that this Court *can* vacate court of appeals opinions in response to mootness when it chooses to do so. The rule simply provides a default presumption against vacatur of the opinion for cases that have been mooted by settlement.

Our prior cases declining to vacate court of appeals opinions further confirm we may do so in an appropriate case. In *Houston Cable*, we declined to vacate the opinion because to do so in response to settlement would have allowed "a private agreement between litigants [to] operate to vacate a court's writing on matters of public importance." 860 S.W.2d at 73. Absent such a concern, *Houston Cable* contemplates that vacatur of the opinion could be the appropriate response to mootness in some cases. *See id.*

We agree with the State that this is one such case. As the United States Supreme Court has recognized, "when a civil case becomes moot pending appellate adjudication . . . [v]acatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans*, 520 U.S. at 71 (citing *United States v. Munsingwear, Inc.*, 340 U. S. 36,

39–40 (1950)). The purpose of vacatur in this context is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. The Supreme Court has acknowledged, as we did in *Houston Cable*, that courts should carefully scrutinize parties' attempts to manipulate judicial precedent by settlement. *See United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27–28 (1994). Rule 56.3 codifies this concern by establishing a presumption that settlements do not result in vacatur of court of appeals opinions. But there is no settlement in this case. Instead, the party who succeeded in the court of appeals voluntarily dropped its claims, precluding the opposing party from seeking review of an adverse outcome in the court of appeals. Where, as here, "mootness results from unilateral action of the party who prevailed below," the case for preventing the unreviewable decision "from spawning any legal consequences" is at its strongest. *Id.* at 25; *Munsingwear*, 340 U.S. at 41.

Vacatur of the judgment alone may in most cases satisfy the petitioner's desire to be free from the consequences of an unreviewable outcome in the court of appeals. But that is not always the case, and it is not the case here. The State is a frequent litigant. An adverse precedent in the court of appeals district where most suits against state officials are brought carries undeniable consequences for future litigation involving the State. We held in *Houston Cable* that "the precedential authority of a court of appeals opinion which is not vacated under these circumstances is equivalent to a 'writ dismissed' case." 860 S.W.2d at 73 n.3. Despite the history notation accompanying it, an unvacated court of appeals opinion in such a case plainly has some meaningful precedential value. The State contends, plausibly, that the opinion in this case, if not vacated, is likely to be treated as binding by courts and litigants throughout the Third District. In other words, vacating the judgment alone will not truly "clear[] the path for future relitigation" because the

outcome of future relitigation would be heavily influenced by an opinion the State was prevented from challenging by no fault of its own. We agree.

Of course, future litigants and courts are free to consult a vacated opinion and to rely on it if they find it persuasive. In vacating the court of appeals' opinion without respect to the merits, we make no comment on its correctness. Vacatur removes the opinion's binding precedential nature but does not strike it from case reporters or foreclose litigants and courts in future cases from relying on it as persuasive authority. Thus, while we use the term "vacated" to describe the court of appeals' opinion in this case, the practical effect of today's action is to remove from the opinion any formal precedential effect. Again, we previously compared the precedential status of a court of appeals opinion after the judgment has been vacated to a case bearing the notation "writ dismissed." *Id.* Whatever the precise import of that notation, "vacating" such an opinion simply eliminates any binding precedential effect it may have. This ensures the path is truly clear for relitigation by indicating to lower courts and future panels of the court of appeals that they are under no obligation to follow the opinion in future cases. It does not, however, eliminate altogether "the public nature of the court of appeals opinion." *Id.* at 73. The opinion has been vacated without respect to the merits, and it remains available as guidance to litigants and courts who find it persuasive.

Similar to the way the U.S. Supreme Court approaches vacatur of judgments, we will approach vacatur of a court of appeals opinion in a moot case as a discretionary equitable remedy available only when the Court "concludes that the public interest would be served by a vacatur."

See Bancorp, 513 U.S. at 26 (internal citations omitted).[2] That is the case here. Given all the circumstances of this case, declining to vacate the court of appeals opinion despite the State's inability to challenge it would be an inequitable result that would not serve the public interest. First, mootness is wholly the result of voluntary action by the party who prevailed below. Second, the legal issues involved are potentially of consequence to schools across Texas and to the government's defense of *ultra vires* claims in other contexts. Third, the non-suit came only after at least three judges of this Court decided the case was sufficiently worthy of further examination to request merits briefs. We do not suggest Respondents in this case non-suited in hopes of preserving a favorable appellate precedent after this Court showed interest in reviewing it. But we cannot be blind to the possibility for such gamesmanship if court of appeals opinions on issues of public importance can be insulated from Supreme Court review by strategically timed non-suits.

For the foregoing reasons, we grant Respondents' motion to dismiss, grant the petition in part, dismiss the case, and vacate the court of appeals' judgment and opinion without respect to the merits.

OPINION DELIVERED: April 17, 2020

[2] The factors the U.S. Supreme Court considers when deciding whether to vacate a *judgment* are helpful, as applied to Texas practice, when this Court is asked to vacate an *opinion*. We do not suggest those same considerations must be taken into account when we are asked to vacate a judgment in a moot case. Rule 56 and our precedent provide for vacatur of *judgments* in moot cases without close consideration of the equities. That longstanding practice of this Court is not at issue here and is not affected by this opinion.