SCAC MEETING AGENDA-AMENDED
Friday, February 4, 2022
Via ZOOM

I. WELCOME (C. BABCOCK)

II. 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 October 8, 2021 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP & OUT OF TIME APPEALS IN PARENTAL RIGHTS TERMINATION CASES [Stage 1(b) & Stage 2 still pending]

Appellate Sub-Committee Members:
Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Richard Phillips
Scott Stolley
Charles Watson

A. February 3, 2022 Report from Appellate Rules Subcommittee
B. V.T.C.A., Family Code § 161.211

V. REMOTE PROCEEDINGS RULES – PROPOSED CHANGES TO TRCP 21D, 500.2(G); TRCP 18C, 21, 176 AND 500.8; TRAP 14, 39, 59; JUDICIAL ADMIN 12

Task Force to present to committee for comment:
Keenon Wooten
Lisa Hobbs Hon.
Tracy Christopher
Guest Speaker: Quentin Smith, Partner V&E

C. December 14, 2021 Referral Letter

VI. ***PROBLEMS WITH EXISTING LOCAL RULES APPROVAL PROCESS***

Judicial Sub-Committee Members:

Hon. Bill Boyce – Chair
Keenon Wooten – Vice Chair
Nina Cortell
Hon. Tom Gray
Michael Hatchell
Prof. Lonny Hoffman
Hon. David Newell
Hon. David Peeples
Hon. Maria Salas-Mendoza

D. February 2, 2022 Memo from Judicial Administration Subcommittee

1. Ex 1 – SCAC Local Rule Memo
2. Ex 2 – TRCP 3a Amendments – Version 1
3. Ex 3 – TRCP 3a – Version 2

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **February 3, 2022**

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3, 2019 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. Issues Presented by Referral

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

The full committee already has addressed recommendations regarding form of citation to provide notice of the right to appeal and representation, showing authority to appeal. These votes are summarized in the subcommittee's October 5, 2021 memo.

III. Current Issue: Ineffective Assistance of Counsel

The Texas case law addressing the right to effective assistance to counsel is set out in the subcommittee's memo dated October 5, 2021.

The HB7 Task Force recommended a proposed rule to provide an opportunity for the limited abatement of an appeal to hold an evidentiary hearing in support of an ineffective assistance claim. The proposed rule would be part of Texas Rule of Appellate Procedure 28.4 and provide as follows:

> (d) *Remand for Evidentiary Hearing*. For good cause shown by written motion filed no later than 20 days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may order a remand for the limited purpose of holding an evidentiary hearing concerning an allegation of ineffective assistance of counsel. The appellate court must rule on the motion for remand within three days; otherwise, it will be denied by operation of law. The trial court shall begin the evidentiary hearing no later than the seventh day after the abatement order. The hearing shall be recorded by a court reporter and the trial court shall make findings of fact as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a

> result. No later than 20 days from the date of the abatement order the court reporter shall file a supplemental court reporter's record of the hearing and the district clerk shall file a supplemental clerk's record, including the trial court's findings of fact, and the appeal shall be reinstated. The deadline in Rule 6.2(a) of the Rules of Judicial Administration shall be tolled for no more than 20 days pending an abatement ordered under this rule.

The subcommittee is in general agreement with the Task Force's proposed approach via rule to address ineffective assistance claims in the parental termination context, with modifications discussed below.

IV. The Subcommittee's Proposed Rule and Recommendation Regarding IAC

The subcommittee proposes the following addition of Texas Rule of Appellate Procedure 28.4(d):

> (d) *Referral for Evidentiary Hearing*. Upon a showing of a **[plausible] [colorable] [prima facie]** claim for ineffective assistance of counsel by written motion filed no later than __ days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may refer an allegation of ineffective assistance of counsel to the trial court with instructions to make findings of fact and conclusions of law and report them to the appellate court. The appellate court must **[rule on]** the motion within **___** days; **[otherwise, it will be denied by operation of law]**. The trial court must begin the evidentiary hearing no later than the **[___]** day after the referral order is signed. The hearing must be recorded by a court reporter. The trial court must make findings of fact and conclusions of law as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a result **[within ___ days after the hearing is concluded]**. No later than ___ days from the date of the trial court's order, the court reporter must file a supplemental court reporter's record of the hearing and the district clerk must file a supplemental clerk's record, including the trial court's findings of fact and conclusions of law. [**The deadline in Rule 6.2(a) of the Rules of Judicial Administration is tolled for no more than 20 days pending a referral ordered under this rule**.]

Under this approach, the merits appeal would proceed; the trial court would make findings and conclusions as to IAC; and then the appellate court would address both the merits and, if necessary, the IAC claim at one time. The merits appeal would not be abated. The rule could provide for abatement if the court of appeals deemed it necessary after receiving the trial court's input on ineffective counsel.

The options shown in the first sentence reflect Chief Justice Christopher's comments at the October 8, 2021 meeting regarding concern that a "good cause" standard is too ill-defined. Options for alternative standards that already are referenced in case law are provided for the full committee's consideration. Similarly, concern was voiced at the October 8, 2021 meeting that using the word "recommendations" could cause confusion with regard to (1) the standard of review, and (2) whether the court of appeals is being authorized to make fact findings in the first

instance as opposed to reviewing a trial court's findings of fact. The use of familiar "findings of fact and conclusions of law" language is aimed at avoiding those issues. The following question also was raised in subcommittee discussions: What is the appellant's remedy, if any, if the court of appeals denies a motion seeking referral for a trial court hearing on IAC?

Recommendation: The subcommittee recommends approval of proposed Texas Rule of Appellate Procedure 28.4(d) in the form set forth above, once the full committee has voted on the alternative choices identified in bold and time limits. The subcommittee makes this recommendation on grounds that the proposed rule appropriately balances the competing considerations involved in this inquiry while avoiding (insofar as possible) additional delays and procedural quagmires.

V.T.C.A., Family Code § 161.211

§ 161.211. Direct or Collateral Attack on Termination Order

Currentness

(a) Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who has been personally served or who has executed an affidavit of relinquishment of parental rights or an affidavit of waiver of interest in a child or whose rights have been terminated under Section 161.002(b) is not subject to collateral or direct attack after the sixth month after the date the order was signed.

(b) Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed.

(c) A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit.

Credits

Added by Acts 1997, 75th Leg., ch. 600, § 1, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 601, § 2, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 1390, § 19, eff. Sept. 1, 1999.

Notes of Decisions (59)

O'CONNOR'S ANNOTATIONS

In re D.S., 602 S.W.3d 504, 509 (Tex.2020). "We hold §161.211(c)'s plain language forecloses a collateral attack premised on an erroneous home-state determination even if that determination implicates a trial court's subject-matter jurisdiction. ... By enacting §161.211(c), our Legislature made a clear policy choice: when parents choose to relinquish their parental rights in accordance with the 'exacting' and 'detailed' statutory requirements for doing so, a collateral attack is limited to specific

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grounds relating to whether the relinquishment was knowing and voluntary. Chapter 152 jurisdictional defects are not one of the enumerated grounds for challenging an order effectuating a voluntary termination of parental rights."

In re K.S.L., 538 S.W.3d 107, 111 (Tex.2017). "The parents contend [Fam. Code] §161.211(c) should only apply to challenges to the *affidavit*, rather than all challenges to the *order* of termination. We cannot agree because the plain wording of the statute applies to attacks on any 'order terminating parental rights' and is not limited only to attacks on the affidavit on which the order is based. *At 113:* The parents, in signing the affidavits of relinquishment, voluntarily and knowingly waived their parental rights. We have recognized that '[w]hile a parental rights termination proceeding encumbers a value far more precious than any property right, this right may be waived through statutes such as … [Fam. Code] §161.103.' *At 115:* [T]here are many safeguards included in the statutory elements for an affidavit of relinquishment, and the affidavit is itself strong evidence that termination is in the child's best interest. In addition, the parent may appeal on grounds that the affidavit was secured by fraud, duress, or coercion as provided by §161.211(c), grounds directed at whether the parent's waiver of parental rights was knowing and voluntary. We cannot say that the Legislature, in setting out these detailed procedures that are intended to ensure that terminations are knowing and voluntary, while also addressing the need for finality and promptness in these proceedings, has imposed a procedure that violates federal due process."

In re E.R., 385 S.W.3d 552, 566 (Tex.2012). "A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. … Accordingly, [§161.211] cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled. Despite the Legislature's intent to expedite termination proceedings, it cannot do so at the expense of a parent's constitutional right to notice."

In re J.H., 486 S.W.3d 190, 198 (Tex.App.--Dallas 2016, no pet.). Mother "challenges whether sufficient evidence supports the trial court's finding that terminating Mother's parental rights was in the children's best interest. [F]amily code §161.211(c) bars Mother's argument. [¶] The order terminating Mother's parental rights is based on her relinquishment affidavit. Accordingly, Mother cannot make any arguments on appeal except arguments relating to fraud, duress, or coercion in the execution of the affidavit. Mother's [argument] does not relate to fraud, duress, or coercion in the execution of the affidavit. Accordingly, §161.211(c) defeats her [argument] on appeal."

In re K.D., 471 S.W.3d 147, 160 (Tex.App.--Texarkana 2015, no pet.). "Mother … argues that the Affidavit [executed pursuant to Fam. Code §161.103] was obtained via constructive fraud…. [C]onstructive fraud requires proof of a fiduciary or confidential relationship between the parties. Neither the Department, nor its agents, nor the child's ad litem occupy a confidential or fiduciary relationship with a parent in a parental-rights termination case. While the Department may provide services to parents as part of a family service plan, the Department acts to secure the best interests of the child rather than the parent."

Moore v. Brown, 408 S.W.3d 423, 433 (Tex.App.--Austin 2013, pet. denied). Birth parents' "central contention … is that … they executed their affidavits relinquishing parental rights less than 48 hours after the child's birth, and contrary to the requirements of [Fam. Code] §161.103. [Birth parents] urge that this defect not only negates the sole statutory ground for the district court's termination order, but renders the affidavit a 'nullity' or 'void' for all purposes and effectively returns the parties to the status quo that existed before the affidavits were executed. *At 436:* Although [birth parents] insist that the phrase 'person who has executed an affidavit of relinquishment of parental rights' [under Fam. Code §161.211(a)] presumes and requires 'an affidavit of relinquishment of parental rights' that complies with each of the requirements of §161.103, subsection (a) does not actually say this…. *At 438:* [Further, §161.211(c)'s] limitation of … 'issues relating to fraud, duress, or coercion in the execution of the affidavit' proscribes challenges based solely on a complaint that the affidavit violated one of §161.103's requirements. Subsection (c) thus bars … claims seeking to invalidate or set aside the termination order on the ground that [the] affidavits of relinquishment were executed within the 48-hour waiting period. *At 439:* [Consequently,] we have concluded that [birth parents'] waivers of their parental rights to [child] must be given effect." *See also* ***In re C.O.G.***, No. 13-12-00577-CV, 2013 WL 6583971 (Tex.App.--Corpus Christi 2013, no pet.) (memo op.; 12-12-13) (termination order could not be challenged on the basis that it didn't comply with §161.103's two-credible-witnesses requirement).

In re Bullock, 146 S.W.3d 783, 790-91 (Tex.App.--Beaumont 2004, orig. proceeding). "Essentially, §161.211's six month limitation on attacks on termination rulings is an affirmative defense…. The defense of limitations does not bar a plaintiff from filing a lawsuit. As such, [mother] was required to plead and present the affirmative defense of limitations, but failed to

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do so. Coupled with our finding that §161.211 is not a jurisdictional prerequisite to suit, the procedural default by [mother] at the … bill of review hearing results in our concluding that [mother and stepfather] have failed to establish 'that the facts and law permit the trial court to make but one decision.'" *See also* ***In re M.Y.W.***, No. 14-06-00185-CV, 2006 WL 3360482 (Tex.App.--Houston [14th Dist.] 2006, pet. denied) (memo op.; 11-21-06). *But see* ***In re C.T.C.***, 365 S.W.3d 853, 858 (Tex.App.--Dallas 2012, pet. granted, judgment vacated w.r.m.) (six-month deadline in §161.211(a) is bar to or preclusion of challenge to termination order more than six months after termination order is signed; it is not plea in avoidance).

V. T. C. A., Family Code § 161.211, TX FAMILY § 161.211
Current through the end of the 2021 Regular Session and Chapters 1 to 6 of the Second Called Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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The Supreme Court of Texas

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December 14, 2021

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

Re: Referral of Rules Issues

Dear Chip:

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

Remote Proceedings Rules. In the attached report, the Remote Proceedings Task Force proposes new Rules of Civil Procedure 21d, 500.2(g), and 500.10; amendments to Rules of Civil Procedure 18c, 21, 176, and 500.8; amendments to Rules of Appellate Procedure 14, 39, and 59; and amendments to Rule of Judicial Administration 12. The Committee should review and make recommendations.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

Justices
KEN WISE
KEVIN D. JEWELL
FRANCES BOURLIOT
JERRY ZIMMERER
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November 17, 2021

Chief Justice Nathan Hecht
(sent via email)

Re: Remote Proceedings Task Force Report of November 17, 2021

Dear Chief Justice Hecht,

Pursuant to the Supreme Court's Remote Proceedings Rules Plan, our task force split into three subcommittees to review our civil rules. Our goal was to propose rules that will accommodate remote proceedings in the future. Our Task Force received numerous emails in support of continued remote proceedings and met with other interested stakeholders. We had input from members of the State Bar Rules Committee as well.

Subcommittee 1, chaired by Lisa Hobbs, reviewed the Rules of Judicial Administration, the Rules of Appellate Procedure, and Texas Rule of Civil Procedure 18c, concerning recording and broadcasting of court proceedings. The committee has proposed a substantially revised rule 18c, changes to various appellate rules and to administrative rule12. The report is attached as Exhibit A.

Subcommittee 2, chaired by Kennon Wooten, has proposed a new rule of civil procedure for notice of hearings and for remote appearances at court proceedings. The subcommittee also worked with the Justice Court Working Group to similarly revise those rules. The report is attached as Exhibit B

Subcommittee 3, chaired by Quentin Smith, discussed and prepared changes to Rule 176 to accommodate subpoenas to remote depositions or hearings and a few other minor rule changes. The report is attached as Exhibit C.

We have enjoyed working on the preliminary drafting assignments and stand ready to assist the court in any further review or drafting.

Sincerely, *Tracy Christopher*
Tracy Christopher

November 9, 2021

To: Remote Proceedings Task Force

From: Lisa Hobbs, chair, Subcommittee 1

Re: Subcommittee 1's Report and Recommendations

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

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

Task 1: Recording and Broadcasting Rules

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

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

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

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

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

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

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

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

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

Task 2: TRAP recommendations

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

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

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

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

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

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

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

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

Task 3: Rule of Judicial Administration 12

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

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

EXHIBIT A

New Texas Rule of Civil Procedure 18c:

Recording and Broadcasting of Court Proceedings

18c.1. Recording and Broadcasting Permitted

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

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

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

18c.3 Procedure Upon Request

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

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

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

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

18c.4. Decision of the Court

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

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

18c.5 Official Record

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

18c.6 Violations of Rule

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

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

Proposed Revisions to Texas Rules of Appellate Procedure 14:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

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

14.2. Recording and Broadcasting as a Matter of Course

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

14.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding.*

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

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

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

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

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

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

Proposed Revisions to Texas Rules of Appellate Procedure 39:

Rule 39. Oral Argument; Decision Without Argument

****

39.8. Remote Argument

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

39.9 Clerk's Notice

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

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

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

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

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

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

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

Proposed Revisions to Texas Rules of Appellate Procedure 59:

Rule 59. Submission and Argument

59.2. Submission With Argument

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

12.3 Applicability. This rule does not apply to:

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

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

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

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

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

(3) the Code of Judicial Conduct;

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

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

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

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

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

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

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

EXHIBIT B

Texas Rules of Civil Procedure 18c provides:

Recording and Broadcasting of Court Proceedings

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

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

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

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

Texas Rules of Appellate Procedure 14 provides:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

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

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

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

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

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

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

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

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

EXHIBIT C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 92-0068

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

ORDERED:

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

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

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

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

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

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

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

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

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

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

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

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

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

3. Media coverage permitted.

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

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

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

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

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

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

(a) the type of case involved;

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

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

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

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

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

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

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

4. Media coverage prohibited

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

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

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

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

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

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

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

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

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

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

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

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
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P.O. BOX 12248 AUSTIN, TEXAS 78711
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CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 22, 1992

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

Dear Ms. Mendoza,

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

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

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

Hon. Joseph H. Hart
126th District Court

County Clerk

Mr. Ray Judice
Office of Court Admin

State Law Library

Chmn Supreme Ct Adv Committee

JOSEPH H. HART
DISTRICT JUDGE
126TH JUDICIAL DISTRICT COURT

P. O. BOX 1748
AUSTIN, TEXAS 78767

April 17, 1992

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

Dear Justice Hecht:

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

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

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

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

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

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

Very truly yours,

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

JHH/bjv

MEMORANDUM

TO: Chief Justice Tracy Christopher – Chair of Remote Proceedings Task Force

FROM: Subcommittee 2 of Task Force & Members of Justice Court Working Group

IN RE: Proposals Relating to Remote Hearings

DATE: November 8, 2021

I. Background Information

In a letter to you dated September 2, 2021, Chief Justice Nathan Hecht conveyed the Supreme Court of Texas's request that the Remote Proceedings Task Force (the "Task Force") "begin drafting rule amendments to remove impediments to and support the use of remote proceedings, starting with the Texas Rules of Civil Procedure." **Ex. 1**. He recognized that this is "a sizeable project that must be informed by many perspectives and experiences, as well as vision." *Id.* He then proposed a division of labor among many groups, including the Task Force and the Justice Court Working Group (the "Working Group"), but he noted that "the Task Force has the laboring oar." *Id.* Finally, he enclosed with his letter an outline of an envisioned work flow. *See id.* (enclosure).

In a memo dated September 9, 2021, you asked Subcommittee 2 of the Task Force to analyze hearings. You addressed the possibility of a global rule about hearings and suggested consideration of codification of submission-docket procedures. **Ex. 2**. You also stated that Subcommittee 2's proposal should cover witnesses appearing by remote means in a hearing or trial. You suggested generation of a draft in 60 days, if possible. *Id.*

After receiving your letter, the Chair of Subcommittee 2 (Kennon Wooten) and the Chair of the Working Group (Judge Nicholas Chu) decided that collaborative discussions among members of their respective groups would be beneficial to the rule-drafting process. Accordingly, they formed a team comprised of the following members: Ms. Wooten, Judge Chu, Judge Robert Hofmann, Judge Emily Miskel, Judge Larry Phillips, Nelson Mock, Judge Amy Tarno, Judge Kyle Hartmann, Trish McAllister, Briana Stone, Amber Myers, and Craig Noack (collectively referred to herein as the "Combined Team").[1] Subsequently, the Chair of the State Bar of Texas Court Rules Committee (Cynthia Timms) met with you and chairs of the Task Force's subcommittees to offer the Court Rules Committee's assistance with the drafting process. That discussion led to the addition of Chad Baruch as a member of the Combined Team.

The Combined Team met twice—on September 29 and October 18. In addition, a subset of the Combined Team met twice—on October 7 and October 15—to work on developing proposed rule language for consideration by the full Combined Team. Judge Miskel, Judge Chu, and Ms. Wooten also worked on drafting proposed rule language between meetings, in order to make meetings more efficient. All meetings occurred remotely, via Zoom. The Rules Attorney, Jaclyn Daumerie, joined meetings to the extent possible. She also provided guidance between meetings as to what the Supreme Court of Texas may want to see in rules relating to remote proceedings. Her guidance, combined with guidance set forth in Exhibits 1 and 2, shaped the Combined Team's discussions.

The Combined Team's proposal for rules of practice in district and county courts was finalized on October 18. That proposal is set forth in **Exhibit 3**. The Working Group, in turn, considered that proposal when developing a comparable proposal for rules of practice in justice courts. The Working Group's proposal is set forth in **Exhibit 4** and tracks the Combined Team's proposal, with some modifications needed for justice-court proceedings.

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[1] Judge Chu and Nelson Mock are members of Subcommittee 2 and of the Working Group.

II. Explanation of Considerations and Proposals

A. Judicial Discretion

The Combined Team had a robust discussion about whether to require or allow remote proceedings and, relatedly, whether to give parties the ability to opt out of remote proceedings in favor of in-person proceedings. Some members believed that judges should have the discretion to decide how to conduct court proceedings. Reasons in favor of judicial discretion included the following: (1) if allowed to opt in, some parties may not consent to remote participation, even when it is more efficient and cost-effective than in-person participation; and (2) the availability of remote proceedings during the pandemic has revealed that they increase party participation (over the baseline measured before the pandemic), which suggests that they increase access to justice. Members in favor of allowing parties to opt in to remote proceedings focused primarily on the following considerations: (1) some people do not have the technology needed to participate remotely; (2) some people have disabilities that preclude them from participating remotely; and (3) some proceedings are not well-suited for remote participation.

Considering the aforementioned guidance and the need to increase access to justice, among other factors, the Combined Team decided to let courts require or allow participants to appear at a court proceeding in person or remotely. Rather than trying to define the concept of "a remote proceeding," the Combined Team addressed what it means to appear in person or remotely.[2] Mindful that courts may feel restricted by statutes requiring in-person participation, the Combined Team included the following provision in proposed Rule 21d: "A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances." Otherwise, the Combined Team was intentionally neutral, in relation to in-person versus remote participation, understanding there is not a one-size-fits-all approach for court proceedings, courts, or participants.

B. Objection Procedure and Standard

Although the Combined Team decided to give courts the discretion to decide whether participants appear in person or remotely, the Combined Team also decided to give parties the ability to object to a designated method of appearance, regardless of whether the method was chosen initially by another party or by the court itself. The Combined Team discussed whether to impose a particular deadline for asserting an objection, but decided against that approach, understanding that the need for an objection may not arise until the day of the proceeding at hand. That said, the Combined Team also wanted to guard against the possibility of a party sitting on an objection, which could lead to unnecessary delay or postponement of proceedings. In an effort to strike the right balance, the Combined Team decided to require a party to make an objection within a reasonable time after the party identifies the need for the objection. The Combined Team also decided to require the court to rule on any objection asserted, but to allow the objection to be decided on submission rather than requiring a hearing for resolution.

Under proposed Rule 21d, an objection to a method of appearance must be supported by good cause. Rather than simply allowing the concept of "good cause" to develop through case law over time, the Combined Team provided a non-exhaustive list of examples of good cause in a draft comment for the proposed rule. This approach is not novel; it is modeled after the approach taken for comment 3 regarding the 2013 adoption of the

[2] The language addressing remote participation is phrased broadly to withstand the test of time. It states that an individual can participate remotely "by audio, video, or other technological means." When the Supreme Court of Texas is deciding which standard to use here, it should consider whether there is a need to revisit and modify the current standards for remote depositions. *See* Tex. R. Civ. P. 199.1(b) ("A party may take an oral deposition *by telephone or other remote electronic means* if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken *by telephone or other remote electronic means* is considered as having been taken in the district and at the place where the witness is located when answering the questions.") (emphasis added); Tex. R. Civ. P. 199.5(a)(2) ("If a deposition is taken *by telephone or other remote electronic means*, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear *by telephone or other remote electronic means* if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.") (emphasis added).

expedited-actions process set forth in Rule 169 of the Texas Rules of Civil Procedure. What is novel, however, are the good-cause examples provided in the comment for proposed Rule 21d. The Combined Team strived to ensure that courts have guidance that will help them to be sufficiently sensitive to participants' abilities and needs. Of note, representatives of the Texas Access to Justice Commission were instrumental in drafting this comment.

C. Notice Requirements

Existing Rule 21(b) addresses the service of notice for a hearing. Considering that proposed Rule 21d addresses court proceedings generally, the Combined Team changed the term "hearing" to "court proceeding" or "proceeding" throughout. Retained in Rule 21(b), however, is the provision recognizing that the period of notice may be modified by the court or, for particular types of proceedings, by other Texas Rules of Civil Procedure.

A lot of discussion was dedicated to the content of a notice. Several questions arose. Should the content vary depending on whether the notice is coming from a party or from the court? Should the notice include a phone number for the court, so that participants can contact the court readily if the need to do so arises? How much technological detail should the notice include when remote participation is required? Should instructions for submitting evidence be in a notice for remote participation only, or for remote *and* in-person participation?

Ultimately, the Combined Team decided to require any notice of proceeding to "contain all information needed to participate in the proceeding" and provided a non-exhaustive explanation of notice content: "the location of the proceeding or instructions for joining the proceeding remotely, the court's designated contact information, and instructions for submitting evidence to be considered in the proceeding." The Combined Team also included a comment recommending that a court "post or otherwise provide the information needed for notices of its proceeding." This approach will enable each court to dictate the information participants receive for its proceedings. Such flexibility reflects the reality that systems and abilities vary among courts in the 254 counties. Ideally, there will be more uniformity over time. But we are not there yet and must meet courts where they are.

D. Unique Standards for Rules of Practice in Justice Courts

The Working Group's proposal set forth in Exhibit 4 mirrors language in the Combined Team's proposal set forth in Exhibit 3 while also maintaining unique aspects of the rules in Part V of the Texas Rules of Civil Procedure, which applies to justice-court proceedings. With some exceptions, other Texas Rules of Civil Procedure (in parts other than Part V) do not apply to justice-court proceedings. *See* Tex. R. Civ. P. 500.1(e).

The Working Group's proposal adds a definition of "court proceeding" as a new Rule 500.2(g), in line with Part V's approach of defining terms of art to make Part V more accessible to self-represented litigants.

The Working Group's proposal also adds new Rule 500.10, which largely tracks new Rule 21d in Exhibit 3, with three changes. First, in Rule 500.10(b), the Working Group added the phrase "and timely communicate the ruling to the parties" after the provision mandating the court to rule on an objection to the designated method of appearance. This addition stems from the Working Group's concern that, without a requirement of timely communication, a participant might not have enough time to make arrangements to appear as ordered by the court. Second, Rule 500.10(c) incorporates the proposed changes to Rule 21(b), but focuses solely on notices generated by the justice court. This modification is based on the fact that, in justice-court proceedings, only the court can generate a notice of a setting. A party may not give notice to any other participant of a justice-court setting.

Lastly, the Working Group thought it was necessary to supplement the Combined Team's proposed comment by adding that the court's contact information in a notice should be specific enough to enable people to use that information to contact the court about an issue regarding participating in a proceeding and that people should expect a reasonably timely response from the court. In justice courts, many participants in proceedings are interacting with a court for the first time in their lives. Some people may not be familiar with the justice court, or may confuse the justice court with another court or clerk's office if left to research a way to contact the court.

Ensuring the expectation that using the court's designated contact information will result in a prompt response is designed to allow participants to troubleshoot issues with appearances quickly and, therefore, to ensure access to justice in proceedings when a participant may be new or unfamiliar with remote-proceeding technology.

E. Content Excluded From Proposed Rules

Technology standards (e.g., for remote attendance and remote submission of evidence) are excluded from the proposed rules. These standards will evolve over time, sometimes rapidly, and are better-suited for placement outside rules and development by the Judicial Committee on Information Technology ("JCIT") or a similar body. For one potential home, see the Technology Standards at https://www.txcourts.gov/jcit/technology-standards/. Wherever the standards are placed, it will be critical to educate courts and participants about them. If they are placed outside the Texas Rules of Civil Procedure, they should be referenced in comments to the amended rules. The Combined Team also suggests the creation of training videos, for courts and participants, and the placement of such videos on publicly available websites, such as Texas Law Help (at https://www.texaslawhelp.org/).

Submission-docket procedures are also excluded from the proposed rules. The approaches to and perceptions of submission dockets vary from court to court in Texas. The courts have been handling submission dockets without statewide rules for years. There does not appear to be a compelling need to regulate them.

EXHIBIT 1

The Supreme Court of Texas

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

Chambers of
THE CHIEF JUSTICE

September 2, 2021

Hon. Tracy Christopher
Chief Justice
Court of Appeals for the
Fourteenth District of Texas
Houston, TX

via email

Re: Remote Proceedings

Dear Chief Justice Christopher:

Thank you for your leadership as Chair of the Remote Proceeding Task Force and for the truly superb job that you and the Task Force members did on your reports submitted this spring. I know it was a Herculean task in a short amount of time.

The Court requests the Task Force to begin drafting rule amendments to remove impediments to and support the use of remote proceedings, starting with the Texas Rules of Civil Procedure. This is obviously a sizeable project that must be informed by many perspectives and experiences, as well as vision. We propose to divide the work among several groups—the Task Force, the Supreme Court Advisory Committee, the Justice Court Working Group, the Municipal Courts Education Center, and the Texas Judicial Council—though the Task Force has the laboring oar. The enclosure outlines the workflow we envision, but we encourage your feedback.

You are welcome to contact me or the Court's rules attorney, Jackie Daumerie, at any time. As always, thank you for your expert work and wise counsel.

Cordially,

Nathan L. Hecht
Chief Justice

Remote Proceedings Rules Plan

Preliminary Drafting Assignments

Rule	Group	Notes
Rules of Judicial Administration		
RJA 7	SCAC	Referred June 2021
Updates to other existing rules	Remote Proceedings TF	RPTF Access Subcommittee report suggests updates to RJA 12
Draft any necessary rules to preserve remote proceedings in criminal cases	TMCEC JP Working Group	
Rules of Civil Procedure		
TRCP 3a	Court	Already under consideration at Court.
TRCP 216-236	SCAC	
TRCP Part V	JP Working Group	
Draft any necessary rules for civil municipal court cases	TMCEC	TMCEC/MC judges are already working on civil rules more generally, and we can ask that they specifically think about remote proceeding needs.
Updates to other existing rules, including TRCP 18c, and drafting of any necessary rules	Remote Proceedings TF	RPTF Access Subcommittee report suggests updates to TRCP 176. RPTF Civil Subcommittee report has long list of other potential updates.

		Over the course of the pandemic, we've received consistent feedback that we need to (1) update the broadcasting rule and provide more guidance on public access; (2) implement procedures for requesting remote proceedings and objecting to and ruling on those requests; (3) add requirements, like citation and notice requirements, to inform SRLs and others about remote proceedings; and (4) draft rules about the exchange of evidence.
Rules of Appellate Procedure	Remote Proceedings TF	RPTF Civil Subcommittee report has list of potential updates.
Rules of Evidence	SBOT AREC	RPTF Civil Subcommittee report has list of potential updates. Over the course of the pandemic, we've received consistent feedback that we need to provide more guidance on Rule 614 (exclusion of witnesses) in the context of remote proceedings.
Best Practices/Mechanical "How To" Guides	Judicial Council	

Workflow

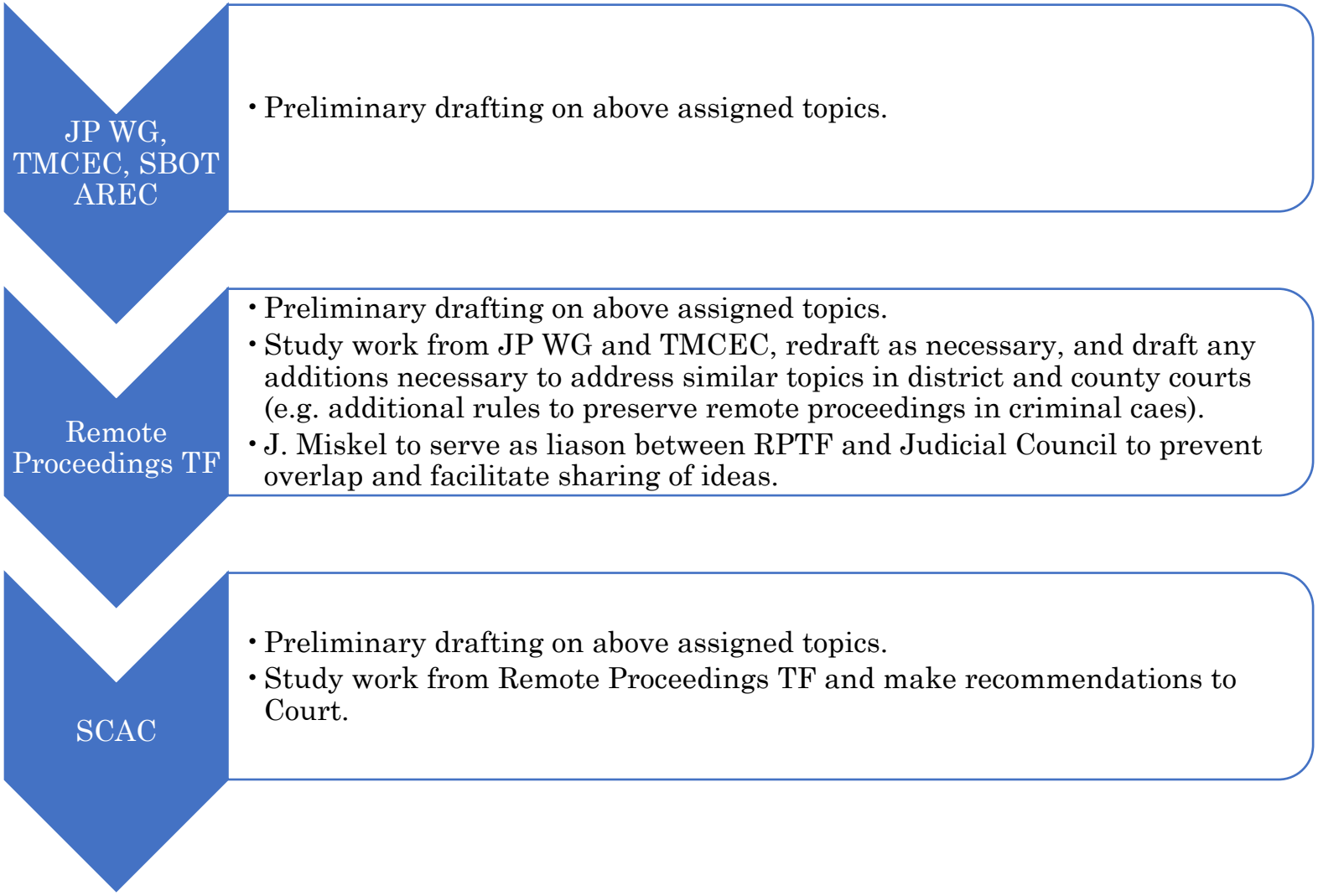
JP WG, TMCEC, SBOT AREC
• Preliminary drafting on above assigned topics.
Remote Proceedings TF
• Preliminary drafting on above assigned topics.
• Study work from JP WG and TMCEC, redraft as necessary, and draft any additions necessary to address similar topics in district and county courts (e.g. additional rules to preserve remote proceedings in criminal caes).
• J. Miskel to serve as liason between RPTF and Judicial Council to prevent overlap and facilitate sharing of ideas.
SCAC
• Preliminary drafting on above assigned topics.
• Study work from Remote Proceedings TF and make recommendations to Court.

EXHIBIT 2

Memorandum

To: Remote Proceedings Task Force

From: Tracy Christopher

Date: September 9, 2021

Re: September 2021 referral from Chief Justice Hecht

I have decided to combine committees 1 and 2 and I have switched out the chairs for all subcommittees. I have asked CJ Hecht for a timeline but he did not have one in mind. I suggest a draft in 60 days if possible.

Subcommittee 1

Rules of Judicial Administration–12 (any others? 7 is revised)

TRCP 18c (consider best practices for sensitive information and broadcasting)

Rules of Appellate Procedure (coordinate on the broadcasting rules with subcommittee one)

Members:
Lisa Hobbs–chair
Judge Roy Ferguson
Chief Justice Rebecca Martinez
John Browning
Courtney Perez
Chris Prine
Marcy Greer

Subcommittee 2

Hearings–this would potentially be a global rule about hearings. Surprisingly when you look through TRCP, how and when a court has a hearing is not well defined–other than the 3 day notice rule. As many civil and family courts in the state now use a submission docket (by local rule) I suggest considering a codification of that process too. 2 supreme court cases on the submission docket. *Martin v. Martin, Martin & Richards, Inc*., 989 S.W.2d 357, 359 (Tex. 1998) (per

curiam) (motion for summary judgment hearing). *Contra Gulf Coast Inv. Corp. Nasa 1 Business Center*, 754 S.W.2d 152 (Tex. 1988) (per curiam) (language of rule 165a requires an oral hearing rather than submission).

It should also cover witnesses appearing by remote means in a hearing or trial.

Members:
Kennon Wooten–chair
Judge Robert Hofmann
Judge Emily Miskel
Judge Larry Phillips
Nicholas Chu
Nelson Mock

Subcommittee 3

TRCP 176–subpoenas

Members:
Quentin Smith-chair
Teri Workman
Judge Mollee Westfall
Dean Stanzione
Chief Justice Tracy Christopher

EXHIBIT 3

Proposed Rule Language
Draft Date: October 18, 2021

Proposed Amended 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, must be filed with the clerk of the court in writing, must state the grounds therefor, must set forth the relief or order sought, and at the same time a true copy must be served on all other parties, and must be noted on the docket.

(b) *Service of Notice of Court Proceeding.* An application to the court for an order and notice of any court proceeding thereon, not presented during a proceeding, must be served upon all other parties not less than three days before the time specified for the proceeding, unless otherwise provided by these rules or shortened by the court. A notice must contain all information needed to participate in the proceeding, including the location of the proceeding or instructions for joining the proceeding remotely, the court's designated contact information, and instructions for submitting evidence to be considered in the proceeding.

. . . .

Comment to 2021 Change: The Rule 21(b) amendments clarify requirements for notices. A court should post or otherwise provide the information needed for notices of its proceedings.

Proposed New Rule 21d. Appearances at Court Proceedings

(a) *Method.* A court may allow or require a participant to appear at a court proceeding in person—by being physically present in the courtroom—or remotely by audio, video, or other technological means. A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances.

(b) *Objection.* An objection to a method of appearance must be made within a reasonable time after a party identifies the need for the objection. The court must rule on the objection. The court is not required to hold a hearing on the objection before ruling and may grant the objection if it was timely filed and is supported by good cause.

Comment to 2021 Change: Rule 21d clarifies procedures for appearances at court proceedings. Subpart (b) addresses good-cause objections to a method of appearance. Examples of good cause include (1) an inability to appear remotely due to a lack of access to the needed technology or a lack of proficiency in technology that would prevent meaningful participation in a proceeding; (2) an inability to appear in person without compromising one's health or safety; and (3) the inability of the court to provide language access services for a person with limited English proficiency or to provide a reasonable accommodation for a person with a disability to participate in a proceeding.

EXHIBIT 4

Proposed New Rule 500.2(g)

(g) "Court proceeding" is an appearance before the court, such as a hearing or a trial.

[Note: Subsequent subparts or Rule 500.2 will be relettered, starting with subpart (h).]

Proposed New Rule 500.10 Appearances at Court Proceedings

(a) *Method.* A court may allow or require a participant to appear at a court proceeding in person—by being physically present in the courtroom—or remotely by audio, video, or other technological means. A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances.

(b) *Objection.* An objection to a method of appearance must be made within a reasonable time after a party identifies the need for the objection. The court must rule on the objection and timely communicate the ruling to the parties. The court is not required to hold a hearing on the objection before ruling and may grant the objection if it was timely filed and is supported by good cause.

(c) *Notice.* Any notice for a court proceeding must contain all information needed to participate in the proceeding, including the location of the proceeding or instructions for joining the proceeding remotely, the court's designated contact information, and instructions for submitting evidence to be considered in the proceeding.

Comment to 2021 Change: New Rule 500.10 clarifies procedures for appearances at court proceedings. Subpart (b) addresses good-cause objections to a method of appearance. Examples of good cause include (1) an inability to appear remotely due to a lack of access to the needed technology or a lack of proficiency in technology that would prevent meaningful participation in a proceeding; (2) an inability to appear in person without compromising one's health or safety; and (3) the inability of the court to provide language access services for a person with limited English proficiency or to provide a reasonable accommodation for a person with a disability to participate in a proceeding. Subpart (c) requires the court's contact information to be included in a notice of a court proceeding. A participant should be able to use that information to receive a reasonably timely response regarding any issues concerning participating by being physically present in the courtroom or remotely.

Memorandum

Date: October 28, 2021

To: Remote Proceedings Task Force

From: **Subcommittee on Subpoenas**
Chief Justice Tracy Christopher
Mr. Quentin Smith – Chair
Hon. Mollee B. Westfall
Ms. Teri Workman

Re:

The Remote Proceedings Task Force asked our subcommittee to analyze how to make discovery from third parties by subpoenas more amenable to a remote environment, and, in doing so, address rules or obstacles that may be altered to promote that goal. In conducting our review, we primarily analyzed Texas Rules of Civil Procedure 176, 199, 205, and 500.8. We also analyzed Texas Civil Practice & Remedies Code Section 22.002.

This memorandum addresses our findings and attaches as Appendix A, proposed alterations to certain rules in the Texas Rules of Civil Procedure to make discovery from third parties by subpoenas more amenable to remote proceedings. After our discussions, our subcommittee identified four main areas that we needed to consider in this undertaking: (1) the 150-mile limitation on subpoenas; (2) the notice and appearance requirements at depositions, hearings, and trials; document production at a remote deposition; (3) document production in connection with a remote proceeding subpoena; and (4) enforcing compliance of remote proceeding subpoenas and electronic service.

1. The 150-Mile Limitation on Subpoenas

Allowing subpoenas for remote proceedings to be effective beyond 150 miles of the court would help promote the use of remote proceedings. Given that a remote proceeding should not require any party to travel (or at least travel less than 150 miles), there is not an undue burden placed on the person subject to a subpoena for a remote proceeding. Allowing parties to subpoena people more than 150 miles away would require a modification of Rule 176.3. Our proposed change is to carve out remote proceedings from the 150-mile limitation by stipulating that the place for compliance is in the county where the subpoenaed

person resides.[1] We propose limiting the applicability of subpoenas for remote proceedings to those persons who are in the State of Texas at the time of service.

2. The Notice and Appearance requirements at Depositions, Hearings, and Trials

Rule 176.2 does not prohibit subpoenas for remote proceedings or expressly state that attendance must be in person. Nonetheless, for the sake of clarity, we suggested a modification to Rule 176.2(a) to expressly allow for remote depositions and, if a court permits, remote appearances at a hearing or trial.

3. Document Production and Remote Proceedings

One of the key issues that arose is the production of documents at a virtual deposition. After discussing several ways to address this by rule, we realized that there is no perfect solution. Instead, we decided not to propose an alteration to any rule to specifically address documents at a virtual deposition, despite potential problems, because this is currently an issue that parties appear to be addressing without additional clarity in the rules. Our rationale in reaching this conclusion is that it is difficult to address the production of electronic documents at an in-person deposition under the current rules and people have been having virtual depositions throughout the COVID-19 pandemic seemingly without a rule addressing document production. Moreover, production of electronic documents is also an issue at in-person depositions and no rule addresses that dilemma. Therefore, our recommendation would be to stay silent and allow the parties to work together to reach a solution. To the extent the parties are unable to resolve a particular issue, trial court judges are more than capable of providing a solution for the parties.

4. Remote Subpoena Enforceability and Electronic Service

Two open items that remain in making subpoenas more amenable to remote proceedings relate to service of subpoenas. Rule 176.5 requires in-person service. Therefore, it does not allow for electronic service of subpoenas or service by certified mail. To make this possible, we would need to modify Rule 176.5 to be consistent with the recently amended rules that allow service of a petition by electronic mail and social media. We have not currently made this suggested revision because it is unclear whether it would be good policy to allow litigants to serve subpoenas on third parties by electronic means. Nonetheless, even if electronic service is not adopted, we do believe that parties should be allowed to serve subpoenas by certified mail.

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[1] We also note that Tex. Civ. Prac. & Rem. Code § 22.002 references the 150-mile limitation; however, the language of that statute is more permissive rather than limiting. *See id.* ("A witness who is represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed in the suit.").

Related to service is the requirement that a party pay a subpoenaed person $10 with the subpoena to make it enforceable. If a party does not pay $10 to the subpoenaed person at the time of service, then the serving party cannot enforce the subpoena under Rule 1786.8(b). Even if the rules change to permit electronic service or service by certified mail, we believe that the rules addressing the payment of the fee for enforcement should remain unchanged. Our view is that it is best to let entrepreneurial litigants figure out how to solve that particular compliance issue rather than alter existing rules, which may create other unintended consequences. Additionally, altering the payment requirement could potentially require a change to a statute, Section 22.001 of the Texas Civil Practice & Remedies Code.[2]

[2] Tex. Civ. Prac. & Rem. Code § 22.001(a) ("Except as provided by Section 22.002, a witness is entitled to 10 dollars for each day the witness attends court. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled."); Tex. Civ. Prac. & Rem. Code § 22.001(b) ("The party who summons the witness shall pay that witness's fee for one day, as provided by this section, at the time the subpoena is served on the witness.").

Appendix A

RULE 176

176.1 Form.

Every subpoena must be issued in the name of "The State of Texas" and must:

(a) state the style of the suit and its cause number;

(b) state the court in which the suit is pending;

(c) state the date on which the subpoena is issued;

(d) identify the person to whom the subpoena is directed;

(e) state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2;

(f) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;

(g) state the text of Rule 176.8(a); and

(h) be signed by the person issuing the subpoena.

176.2 Required Actions.

A subpoena must command the person to whom it is directed to do either or both of the following:

(a) attend and give testimony at a deposition, hearing, or trial, which attendance may be in person, by telephone, or by other remote means at a deposition and, with court permission, at a hearing or trial;

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

176.3 Limitations.

(a) Range. A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2). Notwithstanding anything else in this Rule, a person required to appear by telephone or other remote means is deemed to be appearing in the county where the subpoenaed person resides.

(b) Use for discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

176.4 Who May Issue.

A subpoena may be issued by:

(a) the clerk of the appropriate district, county, or justice court, who must provide the party requesting the subpoena with an original and a copy for each witness to be completed by the party;

(b) an attorney authorized to practice in the State of Texas, as an officer of the court; or

(c) an officer authorized to take depositions in this State, who must issue the subpoena immediately on a request accompanied by a notice to take a deposition under Rules 199 or 200, or a notice under Rule 205.3, and who may also serve the notice with the subpoena.

176.5 Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.

(b) Proof of service. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the ~~place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena - before the time specified for compliance - written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

176.5 Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.

(b) Proof of service. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

Commented [TC1]: During the pandemic people did not want to open the door to a person serving a subpoena.
Should we consider an alternative to personal service?
We can now serve lawsuits by email–why not a subpoena?
Future discussion?

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at in ~~the place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena - before the time specified for compliance - written objections to producing any or all of the designated materials.

A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

(e) Protective orders. A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b)--before the time specified for compliance--either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

(f) Trial subpoenas. A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, may object or move for protective order before the court at the time and place specified for compliance, rather than under paragraphs (d) and (e).

176.7 Protection of Person from Undue Burden and Expense.

A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

176.8 Enforcement of Subpoena.

(a) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

(b) Proof of payment of fees required for fine or attachment. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

199.1 Oral Examination; Alternative Methods of Conducting or Recording.

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

(b) Depositions by telephone or other remote electronic means. A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions.

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

199.2 Procedure for Noticing Oral Depositions.

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

(b) Content of notice.

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

(2) Time and place. The notice must state a reasonable time and place for the oral deposition. The place may be in:

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

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

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

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

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

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

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

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

199.3 Compelling Witness to Attend.

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

199.4 Objections to Time and Place of Oral Deposition.

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

199.5 Examination, Objection, and Conduct During Oral Depositions.

(a) Attendance.

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

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

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

(b) Oath; examination. Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.

(c) Time limitation. No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation.

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

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

(f) Instructions not to answer. An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer

must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(g) Suspending the deposition. If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

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

199.6 Hearing on Objections.

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

RULE 205

205.1 Forms of Discovery; Subpoena Requirement.

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

(a) an oral deposition;

(b) a deposition on written questions;

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

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

205.2 Notice.

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery.

A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

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

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

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

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

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

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

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

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

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

RULE 500.8. SUBPOENAS

(a) Use. A subpoena may be used by a party or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in person in a county that is more than 150 miles from where the person resides or is served.

(b) Who Can Issue. A subpoena may be issued by the clerk of the justice court or an attorney authorized to practice in the State of Texas, as an officer of the court.

(c) Form. Every subpoena must be issued in the name of the “State of Texas” and must:

(1) state the style of the suit and its case number;

(2) state the court in which the suit is pending;

(3) state the date on which the subpoena is issued;

(4) identify the person to whom the subpoena is directed;

(5) state the date, time, place, and nature of the action required by the person to whom the subpoena is directed;

(6) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;

(7) state that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena is issued and may be punished by fine or confinement, or both"; and

(8) be signed by the person issuing the subpoena.

(d) Service: Where, By Whom, How. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or by any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

(e) Compliance Required. A person commanded by subpoena to appear and give testimony must remain at the hearing or trial from day to day until discharged by the court or by the party summoning the witness. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(f) Objection. A person commanded to attend and give testimony at a hearing or trial may object or move for a protective order before the court at or before the time and place specified for compliance. A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

(g) Enforcement. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or of a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof of service and proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Judicial Administration Subcommittee**

RE: **Review of Local Rules**

DATE: **February 2, 2022**

I. Matter Referred to Subcommittee

The subcommittee has been asked to revisit a topic that was the subject of a previous discussion in 2018 regarding the mechanism for reviewing and approving trial court local rules pursuant to Texas Rule of Civil Procedure 3a and Texas Rule of Judicial Administration 10. ***See* Ex. 1.**

The problem identified in the earlier referral focuses on the proliferation of local rules and the requirement for approval of such rules by the Supreme Court of Texas. The need outpaces the resources available for review and approval, and delays are the consequence. *See id.* The matter for consideration is how the review process for trial court local rules should be modified to (1) account for resource limitations, and (2) expedite review.

II. Potential Approaches to the Local Rule Review Process

The subcommittee solicits the views of the Supreme Court Advisory Committee as a whole about the following potential approaches that can serve as the basis of specific rule amendments for further subcommittee development.

- **Approach No. 1 (Approval by the Supreme Court or its "appointed entity" required for certain local rules).** Prior subcommittee deliberations resulted in 2018 proposed amendments to TRCP 3a and TRJA 10. *See id*. The 2018 proposed amendments remain under consideration by the Supreme Court.

    - The 2018 proposed amendment to TRCP 3a removed language requiring Supreme Court approval of local rules.

    - The Supreme Court approval requirement was incorporated in the 2018 proposed amendment to TRJA 10. Under that 2018 proposal, approval "by the Supreme Court of Texas or its appointed entity" still would be required unless the rule addresses only standards of decorum; procedures for handling uncontested matters in civil cases; or "content required by Section 74.093(b) of the Government Code" pertaining to matters such as docketing, designation of court divisions, and case load distribution.

- **Approach No. 2 (Supreme Court approval not required).** In fall 2021, the Supreme Court asked the subcommittee to consider additional versions of proposed revisions to TRCP 3a.

    - **2021 Version 1** of TRCP 3a contains no Supreme Court review or approval process. This version provides broadly that local rules and standing orders must not conflict with other laws and rules; and cannot be enforced unless published on the Office of Court Administration's website. ***See* Ex. 2.**

    - **2021 Version 2** of TRCP 3a provides for a limited form of Supreme Court review, but does not require approval. Instead, the Supreme Court would have the opportunity to prevent local rules from going into effect.

        - Under this version, submission to the Supreme Court is required for certain local rules that address topics other than topics required under Section 74.093(b) of the Texas Government Code. ***See* Ex. 3.**

        - The non-mandatory topics for which rule approval would be required potentially include court schedules; management of specific classes of cases; transfer of cases; DWOPs; conference requirements and procedures; obtaining and removing settings; hearings by submission; and remote hearings and other proceedings.

        - When submission to the Supreme Court is required, approval would be obtained first from the regional presiding judge; once obtained, the proposed local rules as approved by the regional presiding judge then would be submitted electronically to the Supreme Court.

        - Local rules would become effective 45 days after submission to the Supreme Court unless otherwise directed by the Supreme Court.

- **Approach No. 3. (Review and approval by an authority other than the Supreme Court).** In fall 2021, the subcommittee considered whether an entity other than the Supreme Court can be enlisted to review local rules or certain types of local rules—either before or after implementation. The Supreme Court has expressed potential interest in a post-implementation mechanism by which interested parties could submit a challenge to the regional presiding judge for a determination as to whether a particular local rule conflicts with other laws and rules, or otherwise is problematic. Criteria or a standard would need to be developed for identifying the type of rule or challenge that would be considered for this procedure, and how the ultimate determination would be made by the regional presiding judge.

MEMORANDUM

TO: Texas Supreme Court Advisory Committee (SCAC)
FROM: Judicial Administration Subcommittee
RE: Local Rules Agenda Item—for the SCAC Meeting on September 28-29, 2018
DATE: September 24, 2018

In a referral letter dated July 5, 2017, Chief Justice Hecht asked the SCAC to consider issues relating to local rules. Specifically, he noted that Rule of Civil Procedure 3a and Rule of Judicial Administration 10 require the Supreme Court of Texas to approve any new or amended local rule of a trial court and asked the SCAC to propose a new process and corresponding rule amendments that remove the primary responsibility for approving the local rules of trial courts from the Supreme Court of Texas. He encouraged consideration of the following things:

- whether statewide rules should define what must be in a local rule, rather than a standing order;
- whether the regional presiding judge, the regional court of appeals, or both should be required to approve local rules of trial courts and whether the process should be different for rules that only apply to criminal cases;
- whether trial courts should be able to adopt certain kinds of rules without prior approval of a supervising court; and
- a process for Supreme Court review of a proposed or enacted local rule at the request of any person.

The local-rules project was assigned to the Judicial Administration Subcommittee, and the Court's former Rules Attorney Martha Newton prepared a memorandum to facilitate the subcommittee's work. The subcommittee met telephonically twice and discussed, among other things, Martha's memorandum, the considerations set forth above, the standards governing local rules, and potential rule amendments to address issues with current procedures and practices. The Court of Criminal Appeals' Rules Attorney, Holly Taylor, participated in the second call. The subcommittee then prepared a memorandum for the SCAC's consideration on July 13, 2018.

The SCAC discussed issues pertaining to local rules during its meeting on July 13, 2018. No votes occurred in regard to local rules during that meeting, but several ideas were discussed, including the following: (1) whether an entity should be formed to assist the Supreme Court with reviewing proposed local rules and, if so, whether that entity should be appointed by the Supreme Court or the State Bar of Texas; (2) whether, when, and how local rules and standing orders should be reviewed; (3) whether local-rules templates should be prepared and, if so, what they should address; (4) whether and how to address formally the Court of Criminal Appeals' role in relation to local rules; and (5) how to publicize local rules and standing orders.

The proposed rule amendments below are a product of the SCAC's discussion and of the subcommittee's further consideration of issues and options during telephonic meetings on September 6, 2018 and September 20, 2018. Of note, there are some areas of disagreement among members of the subcommittee. The subcommittee members will address those areas of

disagreement during the upcoming SCAC meeting. To facilitate the SCAC's discussion of the proposals below, the following documents are attached to this memorandum: (1) Martha Newton's memorandum (Exhibit A); (2) Tex. R. Civ. P. 3a (Exhibit B); (3) Tex. R. Jud. Admin. 10 (Exhibit C); (4) Tex. Gov't Code § 74.093 (Exhibit D); (4) Tex. R. App. P. 1.2 (Exhibit E); and (5) 28 U.S.C. §§ 2071–72 (Exhibit F).

PROPOSED RULE AMENDMENTS

Texas Rule of Civil Procedure 3a

Rule 3a. Local Rules and Standing Orders

Each administrative judicial region, district court, county court, county court at law, and probate court may ~~make~~adopt and amend local rules and standing orders governing practice before such courts, provided that the local rules and standing orders comply fully with the requirements of Rule 10 of the Texas Rules of Judicial Administration.~~:~~

~~(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;~~

~~(2) no time period provided by these rules may be altered by local rules;~~

~~(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;~~

~~(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;~~

~~(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;~~

~~(6) n~~No local rule or~~,~~ standing order~~, or practice~~ of any court~~, —~~other than those ~~local rules and amendments~~local rules and standing orders that ~~which~~ fully comply with all requirements of ~~this Rule 3a,~~ Rule of Judicial Administration 10—shall ever be applied to determine the merits of any matter.

Texas Rule of Judicial Administration 10

Rule 10. Local Rules and Standing Orders

(a) *Relationship with Other Authorities*. The local rules and standing orders adopted or amended by the administrative judicial regions and the courts of each county in this state must not duplicate or be inconsistent with ~~shall conform to all~~any provisions of the federal or Texas constitution, Texas statutes, ~~,~~ or statewide ~~and administrative region~~ rules in Texas. This

requirement extends to, but is not limited to, any time periods provided by a constitutional provision, statute, or statewide rule.

~~If approved by the Supreme Court pursuant to Rule 3a, T.R.C.P., the local rules shall be published and available to the Bar and public, and shall include the following:~~

(b) *Multi-Court Counties*. ~~a.~~ In multi-court counties having two or more court divisions, each division must adopt a single set of local rules which shall govern all courts in the division.

(c) *Local Rule Content.* Each set of local rules in this state must:

(1) be consistent with any applicable template issued by the Supreme Court of Texas;

(2) for each rule, identify any provision in the Texas Rules of Civil Procedure or Code of Criminal Procedure that addresses the same subject matter as the rule, either through a numbering system that corresponds with the numbering system in the Texas Rules of Civil Procedure or Code of Criminal Procedure or through another, equally apparent method;

(3) include the following:

(i) ~~b.~~ provisions for the fair and equitable distribution of the caseload among the judges in the county;

(ii) ~~c. P~~provisions to ensure uniformity of forms to be used by the courts under Rules 165a and 166, T.R.C.P.;

(iii) ~~d. d~~Designation of the responsibility for emergency and special matters;

(iv) ~~e. P~~plans for judicial vacation, sick leave, attendance at educational programs, and similar matters; and

(v) any other content required by Section 74.093 of the Government Code.[1]

(d) *Local Rule Approval Process.* No local rule will become effective until it is submitted to and approved by the Supreme Court of Texas or its appointed entity, unless the rule addresses only:

(1) standards of decorum;

(2) procedures for handling uncontested matters in civil cases; or

(3) content required by Section 74.093(b) of the Government Code.

The Supreme Court of Texas may request the advice of the Texas Court of Criminal Appeals before approving local rules affecting the administration of criminal justice consistent with Section 74.024 of the Government Code.

[1] Discussion Point: Should there be a provision requiring proposed amendments to identify any new content that is being proposed in a format that will make the proposed content readily distinguishable from existing rule content, or is it preferable to let the appointed committee decide the format in which proposed amendments must be submitted?

(e) *Publication Requirement.* A proposed local rule shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys and other individuals practicing before the court or courts for which it is made. All local rules must be submitted to the Administrative Director of the Texas Office of Court Administration within ten days of their effective date and made available online and upon request to the members of the bar and public.[2]

(f) *Standing Orders.* A standing order must not contain any content that is mandated under (c)(3) to be included in a local rule, and cannot be enforced in any case unless it has been filed in that case and provided to each party in that case. Before enforcing a standing order in any case, a court or judge may submit that standing order to the Supreme Court of Texas for approval.

(g) *Review Process.* Any person may submit a written request to the Supreme Court of Texas for review of any local rule or standing order [that has not been approved by the Supreme Court of Texas].[3] If such local rule or standing order is in effect when the request for review is submitted, it will remain in effect unless and until it is modified or abrogated by the Supreme Court of Texas. Any request for review submitted under this rule must specify the local rule or standing order at issue and detail each concern relating to each specified rule or order. A request for review may be submitted through a State Bar of Texas representative.

[2] Discussion Point: Should the Office of Court Administration (OCA) be the receiving entity, or does it make more sense for the Supreme Court of Texas to receive local rules and then deliver them to OCA for publication online?

[3] Discussion Point: Should the review process be available for all local rules and standing orders, or only those local rules and standing orders that have not been approved previously by the Supreme Court of Texas?

EXHIBIT A

To: The Judicial Administration Subcommittee of SCAC Oct. 23, 2017
From: Martha Newton
Re: Problems With the Existing Local Rules Approval Process

Here are my observations on the local rules approval process. Of course, they do not necessarily reflect the views of the Supreme Court or any of its Members.

Introduction

Professor Charles Alan Wright in his first treatises on federal practice and procedure recognized that the proliferation of local rules and practices threatened the integrity of the federal rules—and that was in 1965! But his warnings, though not unheeded, could not stop the process then and cannot roll it back now because two fundamental principles of rulemaking are in tension. On the one hand, uniformity is always and everywhere to be prized—up and down the halls of the federal courthouse, and from district to district. Knowing that the rules will be the same in the District of New Mexico and the Southern District of New York assures efficiency, builds trust and confidence, and, well, promotes justice. On the other hand, the evolution of society and of its expectations of the justice system demands innovation. E-filing and other technologies don't just assist the system; they change it fundamentally. Innovation often comes through individual experimentation, but to prevent this from disadvantaging those who do not usually practice in a particular court, new or different practices or procedures can't be the secret trove of the local bar. They should be available to all—in local rules. In time, Professor Wright was correct: uniformity must not stifle innovation, but it must assimilate it. The two competitors must work together.

The Texas Rules of Civil Procedure, first adopted in 1941, have always authorized trial courts to make local rules of practice. Since 1983, when former TRCP 817 became TRCP 3a, the rules have required that any proposed rule or amendment be submitted to SCOTX for approval before it becomes effective. *See* TEX. R. CIV. P. 3a(3) (current version); *id.* R. 3a (version adopted by order dated Dec. 5, 1983). The Rules of Judicial Administration, adopted in 1987, have required that local rules for district and statutory county courts address administrative issues such as the amount of vacation time and sick leave a judge is entitled to, and that

these provisions also be submitted to SCOTX under TRCP 3a. *See* TEX. R. JUD. ADMIN. 10(c).[1] The requirements in TRCP 3a and RJA 10 that every new or amended local rule of practice and administration be submitted to SCOTX for approval have resulted in a system that is unworkable.

Reasons Why the Current System is Unworkable

1. Too Many Trial Courts; Not Enough Manpower

Hundreds of Texas trial courts or groupings of trial courts (*e.g.*, the district courts of X County) have or want local rules. SCOTX has one staff member, the Rules Attorney, to review and present all submissions to the Court, in addition to the many other responsibilities of the position.

The Court must necessarily prioritize its statewide rulemaking projects. Since 2006, the highest number of sets of local rules approved by the Court in a single year was 17 sets in 2012. Most years, 10 or fewer sets are approved. There are typically about 25 sets of local rules pending before the Court at any given time.

The Court cannot approve submitted local rules at a fast-enough pace. This, I emphasize, is not for want of interest or because local rules are not important. The Court simply does not have the resources to move more swiftly. Most local rules are pending in the Court at least a year before they are approved. Some remain pending for several years. The Court will sometimes take up the rules of a larger county out of order because larger counties serve more Texans, so the delay tends to affect smaller, rural counties the most.

2. Delay Begets Delay

Once a set of local rules finally makes it to the top of the pile, the approval process is rarely smooth and efficient. The Court wants the Rules Attorney to

[1] Chapter 74 of the Government Code also requires that each county adopt local rules of administration that address matters enumerated in the statute, but the statute does not expressly require that the rules be approved by SCOTX. *See* TEX. GOV'T CODE § 74.093.

contact the sponsoring judge(s) to resolve any concerns before presenting the rules to the Court. Often, a sponsoring judge is no longer on the bench, amendments to the TRCP made in the interim render a proposed local rule or amendment outdated or invalid, or the submitting court wants to make changes to what was previously submitted. In addition, trial court judges can be hard to reach. For good reasons, direct contact information for a trial court judge is often hard to find, and of course, many are on the bench all day. Some courts never respond to our questions at all.

3. No Guidance on the Content of Local Rules

Trial court judges routinely issue "standing orders" that are never submitted to SCOTX for approval. There is no guidance in TRCP 3a or elsewhere on what kind of court-issued directive must be approved by SCOTX and what kind of directive a court can make on its own in a standing order. As a result, we often open local rules that have been pending in the Court for a long time only to find that the proposed changes relate to minor issues of courtroom or courthouse management—for example, they move the uncontested docket from Monday at 9 a.m. to Tuesday at 9 a.m. or add some basic, noncontroversial rules of courtroom decorum.

On the other end of the spectrum, some trial courts have attempted to impose rules through standing orders that are directly contrary to a rule in the TRCP. For example, we recently received local rules issued years ago as administrative orders, one exempting certain civil cases from the e-filing mandate in TRCP 21(f)(1), and another automatically sealing all documents filed in guardianship cases, despite the requirements of TRCP 76a.

Sometimes we have the opposite problem—a lower court has incorporated provisions of the TRCP or other statewide rules into its local rules. But when the TRCP or statewide rules change, the local rules become outdated.

4. No Recourse When Trial Courts Enforce Local Rules Without SCOTX Approval

We are frequently informed that other courts are enforcing local rules and procedures without SCOTX approval. Another Texas county has displayed on the district clerk's website: (1) local rules for the district courts of the county that were

submitted to the Court but have not been approved because the local administrative judge has not responded to our questions about a specific rule; and (2) local rules for a particular district court in the county, never submitted to the Court, that require counsel to provide the judge with courtesy paper copies of pleadings and other documents.[2]

When a lower court enforces a local rule without SCOTX approval, court patrons do not have much recourse. The Court occasionally asks the Rules Attorney to call the lower court to express the Court's disapproval, but there is no mechanism in the TRCP for the Court to abrogate a local rule. When the Court declines to approve a local rule, it does not issue an order; we just communicate the Court's disapproval by phone or in writing.

5. Lack of Expertise on Criminal Rules

Proposed local rules often contain rules specific to criminal cases. The Court of Criminal Appeals does not have statutory authority to approve local rules, so SCOTX is often in the position of having to approve local rules on which the Court has no expertise. The Court has taken varied approaches to dealing with criminal rules over the years.

At some time in the past, the Court refused to approve any local rules for criminal cases at all. The Court's policy later shifted to approving criminal rules that were "procedural only," but that approach proved unworkable—procedural rules can have profound due process implications in criminal cases. More recently, I have begun conferring with the CCA's rules attorney, Holly Taylor, on proposed local rules for criminal cases. This approach is better than any existing alternative, but it is inefficient for SCOTX to serve as an intermediary between a lower court and the

[2] TRCP 21(f)(9) states: "Unless required by local rule, a party need not file a paper copy of an electronically filed document." When Rule 21 was amended to mandate e-filing in 2014, the Court was undecided whether to authorize lower courts to require the filing of courtesy paper copies. Paragraph (f)(9) enabled the Court to defer making a decision because any local rule requiring paper copies would have to be approved by the Court under Rule 3a. Since then, the Court has firmly settled on the side of no paper and rejected every local rule requiring paper that has been submitted for Court approval.

CCA. Additionally, the CCA has the busiest docket of any court in the country, and thus probably has even less time to devote to policing local rules than SCOTX has.

Some Ideas for an Improved System

The Court desires SCAC's independent advice on how to improve local rules. But here are some possible features of a new system:

- authorizing trial courts to adopt certain kinds of rules (whether called rules or standing orders) without getting approval from any higher court;

- requiring trial courts to choose from different versions of particular rules (this is sometimes done in the federal circuits)

- requiring that other proposed rules be approved by the court of appeals;

- prohibiting a local rule's either duplicating or making an exception to a rule in the TRCP;

- assuring that local rules for criminal cases will be approved by a judge or court with sufficient expertise;

- providing recourse for a court patron who believes that a local rule is being enforced without the requisite approval or that a local rule is improper under a rule or policy of statewide applicability; and

- requiring uniform publication and availability of all local rules in a central database on the Texas Judiciary's website.

EXHIBIT B

Texas Rule of Civil Procedure 3a

Rule 3a. Local Rules

Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(2) no time period provided by these rules may be altered by local rules;

(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;

(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;

(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;

(6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

EXHIBIT C

Texas Rule of Judicial Administration 10

Rule 10. Local Rules

The local rules adopted by the courts of each county shall conform to all provisions of state and administrative region rules. If approved by the Supreme Court pursuant to Rule 3a, T.R.C.P., the local rules shall be published and available to the Bar and public, and shall include the following:

a. In multi-court counties having two or more court divisions, each division must adopt a single set of local rules which shall govern all courts in the division.

b. Provisions for fair distribution of the caseload among the judges in the county.

c. Provisions to ensure uniformity of forms to be used by the courts under Rules 165a and 166, T.R.C.P.

d. Designation of the responsibility for emergency and special matters.

e. Plans for judicial vacation, sick leave, attendance at educational programs, and similar matters.

EXHIBIT D

Texas Government Code § 74.093

§ 74.093. Rules of Administration

(a) The district and statutory county court judges in each county shall, by majority vote, adopt local rules of administration.

(b) The rules must provide for:

(1) assignment, docketing, transfer, and hearing of all cases, subject to jurisdictional limitations of the district courts and statutory county courts;

(2) designation of court divisions or branches responsible for certain matters;

(3) holding court at least once a week in the county unless in the opinion of the local administrative judge sessions at other intervals will result in more efficient court administration;

(4) fair and equitable division of caseloads; and

(5) plans for judicial vacation, sick leave, attendance at educational programs, and similar matters.

(c) The rules may provide for:

(1) the selection and authority of a presiding judge of the courts giving preference to a specified class of cases, such as civil, criminal, juvenile, or family law cases;

(2) other strategies for managing cases that require special judicial attention;

(3) a coordinated response for the transaction of essential judicial functions in the event of a disaster; and

(4) any other matter necessary to carry out this chapter or to improve the administration and management of the court system and its auxiliary services.

(c-1) The rules may provide for the establishment and maintenance of the lists required by Section 37.003, including the establishment and maintenance of more than one of a list required by that section that is categorized by the type of case, such as family law or probate law, and the person's qualifications.

(d) Rules relating to the transfer of cases or proceedings shall not allow the transfer of cases from one court to another unless the cases are within the jurisdiction of the court to which it is transferred. When a case is transferred from one court to another as provided under this section, all processes, writs, bonds, recognizances, or other obligations issued from the transferring court are returnable to the court to which the case is transferred as if originally issued by that court.

EXHIBIT E

Texas Rule of Appellate Procedure 1.2

Rule 1.2. Local Rules

(a) *Promulgation.* A court of appeals may promulgate rules governing its practice that are not inconsistent with these rules. Local rules governing civil cases must first be approved by the Supreme Court. Local rules governing criminal cases must first be approved by the Court of Criminal Appeals.

(b) *Copies.* The clerk must provide a copy of the court's local rules to anyone who requests it.

(c) *Party's Noncompliance.* A court must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and a reasonable opportunity to cure the noncompliance.

EXHIBIT F

28 U.S.C. §§ 2071–72

§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.
(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

RULE 3a. LOCAL RULES AND STANDING ORDERS

(a) *General Rule.* Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules and standing orders governing practice before such courts~~, provided~~:.

(b) *Relationship with Other Authorities*. Local rules and standing orders

~~(1) that any proposed rule or amendment shall~~must not be inconsistent with ~~these~~any provisions of the federal of Texas constitution, Texas statutes, statewide rules in Texas, or ~~with~~ any rule of the administrative judicial region in which the court is located~~;~~. This requirement extends to any

~~(2) no~~ time period provided by ~~these rules may be altered by local rules;~~a constitutional provision, statute, statewide rule, or rule of the administrative judicial region.

~~(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;~~

~~(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;~~

~~(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to members of the bar;~~

~~(6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.~~

(c) *Publication Requirement.* Local rules and standing orders must be published on the Office of Court Administration's website. Local rules and standing orders cannot be enforced unless they are published on the website.

Notes and Comments

Comment to 1990 change: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders to local practices to determine issues of substantive merit.

Comment to 2022 change: Rule 3a is amended to remove the requirement that the Supreme Court approve local rules and to address standing orders. Amended Rule 3a provides that local rules and standing orders must not conflict with other laws and rules and cannot be enforced unless published on the Office of Court Administration's website. Section 74.093(b) of the Texas Government Code imposes additional requirements for local rules.

RULE 3a. LOCAL RULES AND STANDING ORDERS

(a) *General Rule*. Each administrative judicial region, district court, county court, county court at law, and probate court may adopt and amend local rules and standing orders governing practice before such courts in civil cases.

(b) *Relationship with Other Authorities*. Local rules and standing orders must not duplicate or be inconsistent with any provisions of the federal or Texas constitution, Texas statutes, or statewide rules in Texas. This requirement extends to any time period provided by a constitutional provision, statute, or statewide rule.

(c) *Local Rules*.

(1) Multi-Court Counties. In multi-court counties having two or more court divisions, each division must adopt a single set of local rules that governs all courts in the division.

(2) Required and Permitted Topics; Requesting Approval of Additional Topics.

(A) Each set of local rules must address the topics required by section 74.093(b) of the Texas Government Code.

(B) Each set of local rules may address the topics listed in the list of approved local rules topics adopted by the Supreme Court of Texas.[1]

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[1] Potential topics for consideration include:

- court schedule;
- prioritization of and other strategies for managing specified classes of cases;
- transfer of cases;
- dismissal for want of prosecution;
- conference requirements and procedures;
- obtaining and removing settings;
- conflicting settings;
- attorney vacations;
- announcements;
- hearings by submission;
- remote hearings and other proceedings;
- required forms or documents;
- procedure for making a record of court proceedings by electronic recording;

(C) Each set of local rules must not address any additional topics without Supreme Court of Texas approval. To obtain approval, the region, court, or courts adopting or amending local rules must submit a written request to the Supreme Court of Texas. The written request must state:

(i) the name of the region, court, or courts;

(ii) the specific topic the region, court, or courts wishes to address in the local rules; and

(iii) the specific reasons for the request.

(3) Submission Process. The region, court, or courts adopting or amending local rules must electronically submit:

(A) the local rules to the presiding judge of the administrative judicial region in which the region, court, or courts adopting or amending the local rules is located ("regional presiding judge") for approval; and

(B) the local rules and proof of the regional presiding judge's approval to the Supreme Court of Texas.

(4) Format. The region, court, or courts adopting or amending local rules must submit a complete set of local rules. Each set of local rules must:

(A) be consistent with any applicable template or other format requirements issued by the Supreme Court of Texas; and

(B) identify, for each rule, any provision in the Texas Rules of Civil Procedure that addresses the same subject matter as the rule.

- attorney conduct and decorum;
- attorney withdrawal;
- establishment and maintenance of lists of attorneys ad litem, guardians ad litem, and guardians; and
- disaster procedures.

(5) Effective Date. Local rules are effective 45 days after proper submission to the Supreme Court of Texas, unless otherwise directed by the Supreme Court of Texas.

(6) Publication Requirement. Promptly after the effective date, the Texas Office of Court Administration must publish the local rules on a website specified by the Supreme Court of Texas. Local rules cannot be enforced unless they are published on the website.

(7) Review Process. Any person—individually or through a State Bar of Texas representative—may submit a written request to the Supreme Court of Texas for review of a local rule. The request must specify the local rule at issue and detail each concern relating to the local rule. If the local rule is in effect when the request is submitted, it remains effective unless it is modified or abrogated by the Supreme Court of Texas.

(d) *Standing Orders*. Standing orders must not address any topic that is mandated or permitted under subparagraph (c)(2). Standing orders must be submitted electronically to the Texas Office of Court Administration. Standing orders cannot be enforced unless they are published on a website specified by the Supreme Court of Texas.

(e) *Failure to Comply.* Local rules and standing orders that do not fully comply with this rule must not be applied to determine the merits of any matter.

Notes and Comments

Comment to 1990 change: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders to local practices to determine issues of substantive merit.

Comment to 2022 change: Rule 3a is amended to revise the local-rules process and to address standing orders. Rule 3a incorporates provisions of former Rule of Judicial Administration 10. In accordance with the Supreme Court's order, Misc. Docket No. 21-XXXX, all local rules currently in effect may remain in effect until [August 1, 2022], at which point they are abrogated and unenforceable.