SCAC MEETING AGENDA
Friday, May 27th, 2022
In Person at South Texas College of Law

I. WELCOME FROM DEAN MICHAEL BARRY & 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 February 4, 2022 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. 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:
Kennon Wooten
Lisa Hobbs
Hon. Tracy Christopher

A. December 14, 2021 Referral Letter
B. May 23, 2022 Memo re Revised Rule Proposals

V. TEXAS RULES OF EVIDENCE 503(B)(1)(C)

Evidence Sub-Committee Members:
Buddy Low – Chair
Harvey Brown – Vice Chair
Levi Benton
Prof. Elaine Carlson
Marcy Greer
Prof. Lonny Hoffman
Roger Hughes
Hon. Peter Kelly

C. February 17, 2022 Referral Letter
D. May 20th Memo from Evidence Subcommittee
1. November 29, 2021 AREC Memo re TRE 503

VI. TEXAS RULES OF EVIDENCE 803(16)

Evidence Sub-Committee Members:
Buddy Low – Chair
Harvey Brown – Vice Chair
Levi Benton
Prof. Elaine Carlson
Marcy Greer
Prof. Lonny Hoffman
Roger Hughes
Hon. Peter Kelly

E. May 11, 2022 Memo from Evidence Sub-Committee

VII. TEXAS RULE OF APPELLATE PROCEDURE 39.7

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

F. May 6, 2022 Referral Letter
G. May 16, 2022 Memo from Appellate Sub-Committee

VIII. 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

H. May 25, 2022 Memo from Appellate Sub-Committee

Tab A

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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

Fourteenth Court of Appeals
301 Fannin Room 245
Houston, Texas 77002

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

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39.8. Remote Argument

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

39.9 Clerk's Notice

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

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

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

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

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

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

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

Proposed Revisions to Texas Rules of Appellate Procedure 59:

Rule 59. Submission and Argument

59.2. Submission With Argument

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

12.3 Applicability. This rule does not apply to:

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

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

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

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

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

(3) the Code of Judicial Conduct;

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

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

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

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

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

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

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

EXHIBIT B

Texas Rules of Civil Procedure 18c provides:

Recording and Broadcasting of Court Proceedings

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

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

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

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

Texas Rules of Appellate Procedure 14 provides:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

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

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

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

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

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

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

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

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

EXHIBIT C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 92-0068

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

ORDERED:

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

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

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

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

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

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

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

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

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

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

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

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

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

3. Media coverage permitted.

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

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

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

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

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

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

(a) the type of case involved;

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

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

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

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

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

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

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

4. Media coverage prohibited

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

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

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

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

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

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

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

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

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

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

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

September 22, 1992

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

Dear Ms. Mendoza,

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

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

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

Hon. Joseph H. Hart
126th District Court

County Clerk

Mr. Ray Judice
Office of Court Admin

State Law Library

Chmn Supreme Ct Adv Committee

JOSEPH H. HART
DISTRICT JUDGE
126TH JUDICIAL DISTRICT COURT

P. O. BOX 1748
AUSTIN, TEXAS 78767

April 17, 1992

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

Dear Justice Hecht:

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

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

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

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

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

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

Very truly yours,

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

JHH/bjv

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.

[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

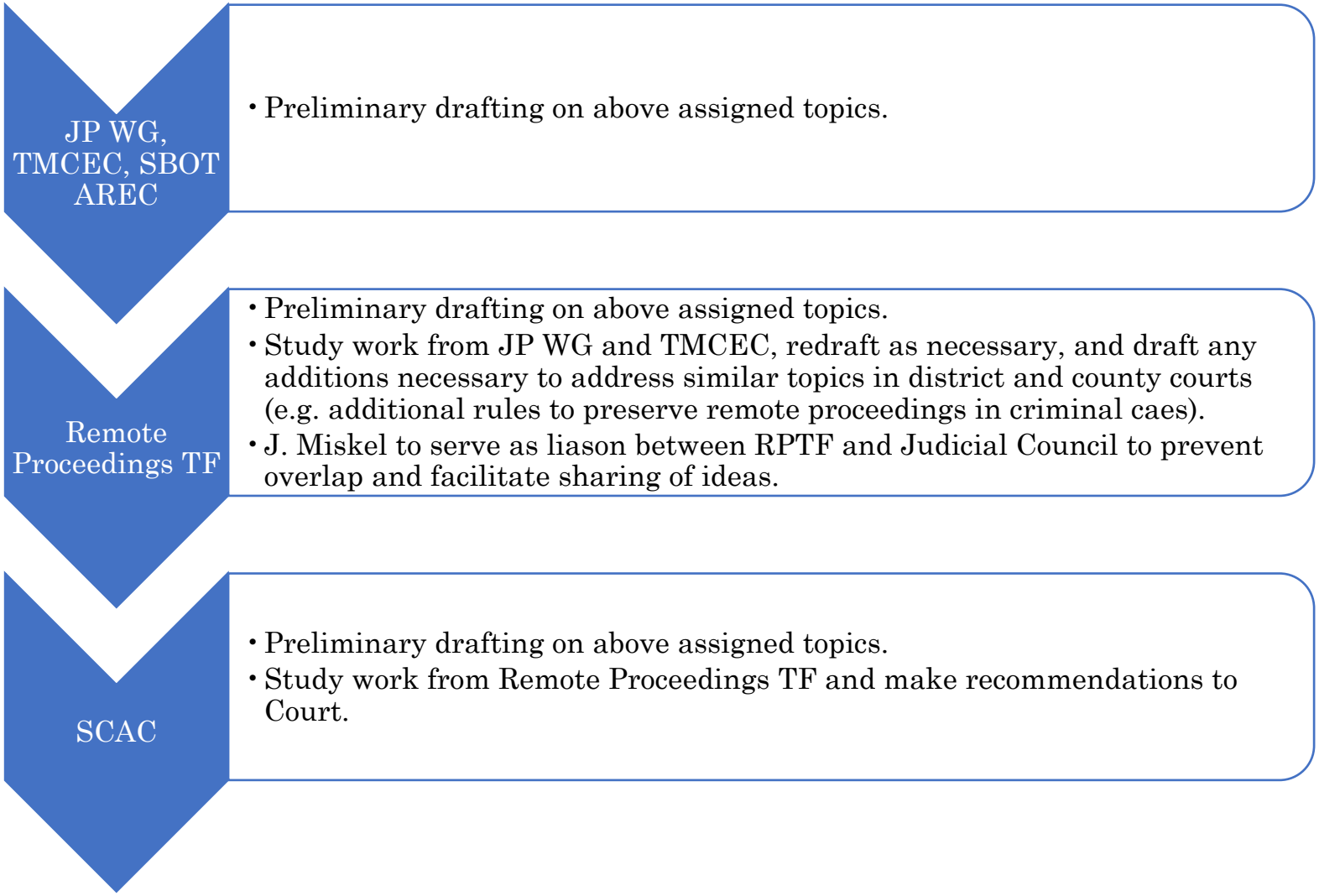
JP WG, TMCEC, SBOT AREC
• Preliminary drafting on above assigned topics.
Remote Proceedings TF
• Preliminary drafting on above assigned topics.
• Study work from JP WG and TMCEC, redraft as necessary, and draft any additions necessary to address similar topics in district and county courts (e.g. additional 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.

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.

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?

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.

Tab B

M E M O R A N D U M

TO: Supreme Court Advisory Committee (SCAC)

FROM: Kennon L. Wooten

IN RE: Remote Proceedings – Revised Rule Proposals

DATE: May 23, 2022

In a letter dated December 14, 2021, Chief Justice Nathan L. Hecht asked the SCAC to study and make recommendations regarding proposed rules set forth in a report from the Remote Proceedings Task Force ("the Task Force"). The Task Force's report, dated November 17, 2021, contains proposals for new Texas Rules of Civil Procedure 21d, 500.2(g), and 500.10; amendments to Texas Rules of Civil Procedure 18c, 21, 176, and 500.8; amendments to Texas Rules of Appellate Procedure 14, 39, and 59; and amendments to Texas Rule of Judicial Administration 12.

During meetings on February 4, 2022 and March 25, 2022, the SCAC addressed the Task Force's proposals relating to Texas Rules of Civil Procedure 21, 21d, 500.2(g), and 500.10.[1] The meeting transcripts reflect a robust discussion about whether and when to allow remote participation in court proceedings.[2] Although the SCAC did not vote on the circumstances under which remote participation in civil jury trials will be allowed, there appeared to be unanimous support to allow such participation only with the consent of all parties involved. Feedback also suggested that many SCAC members felt the initial rule proposals gave trial courts too much discretion in deciding whether to allow or require remote participation in court proceedings. Many members expressed concerns about potential detrimental impacts of remote participation. There was also an acknowledgment that remote participation can be effective in certain circumstances, can reduce costs associated with attending court proceedings, and can increase access to justice.

The March 25 meeting included a vote on whether the SCAC, at its next meeting, should focus on proposed justice-court rules as a preliminary matter, before revisiting proposed rules for district and county courts. Participating SCAC members voted, 21-to-5, to focus on proposed justice-court rules as a preliminary matter. The March 25 meeting also included additional discussion about the perceived unanimity to allow remote jury trials only with all parties' consent. In light of that perceived unanimity, it was decided that there was no need to vote on the matter.

Considering the collective input obtained over the past few months, after the SCAC meeting on March 25, discussion ensued at the Task Force level about whether there may be a better way to balance all of the competing considerations pertaining to remote participation in court proceedings. Based on that discussion, the proposed amendments to Rule of Civil Procedure

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[1] These proposals are appended to the November 8, 2021 memorandum from Subcommittee 2 of the Task Force and members of the Justice Court Working Group ("the Working Group"). That memorandum is a component of the Task Force's report contained in the meeting materials posted at https://www.txcourts.gov/scac/meetings/2021-2030/.

[2] The transcripts of both of these meetings are posted at https://www.txcourts.gov/scac/meetings/2021-2030/.

500.10 (for justice courts) were revised to give a party the right to request participation in a manner other than the manner directed by the court and, generally speaking, for the court to grant that request unless there is good cause not to do so. This approach varies from the initial proposal, which gives a party the right to object to the manner of participation directed by the court and, generally speaking, allows the court to grant the objection if it is supported by good cause. The comments for the revised rule proposal were also modified to reflect the new request mechanism. Also new to the revised rule proposal is a provision about open courts, which is derived from remote-proceedings legislation offered during the last Regular Session of the Texas Legislature.

In light of the new request mechanism in the revised rule proposal for justice courts, additional discussion ensued at the Task Force level about (1) whether the same edits made to the justice-court rules should be made now to the comparable rules for district and county courts, and (2) whether the SCAC will still want to carve out remote jury trials, considering the new request mechanism. With hopes of increasing the efficiency of the SCAC's consideration of remote-proceedings proposals, this memorandum encloses revised rule proposals not only for the justice courts (**Attachment A**), but also for the district and county courts (**Attachment B**). The exception for remote jury trials is bracketed and italicized, so that the SCAC can easily and clearly vote on the rule proposals with and without that exception. Finally, it should be noted that Attachments A and B reflect proposals of a majority of Subcommittee 2 of the Task Force,[3] with input and oversight of the Chair of the Task Force, Chief Justice Tracy Christopher. If the SCAC wants the complete Task Force to weigh in on the revised rule proposals (as it had an opportunity to do with the initial rule proposals), this additional input will be requested and reported back to the SCAC.

[3] Every subcommittee member who voted on revised proposals voted to approve them. Two subcommittee members did not participate in the voting process. In other words, there are no known dissenting opinions on these matters.

ATTACHMENT A
Revised Rule Proposals for Justice Courts
(Draft Date: May 22, 2022)

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) **Manner of Appearance.** 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, *[except that a court may not require lawyers, parties, or jurors to appear remotely for a jury trial absent the consent of all parties involved in the jury trial]*. A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances.

(b) **Request to Appear by Alternate Means.** A party may file a request for a participant to appear at a court proceeding in a manner other than the manner allowed or required by the court. The request must be filed within a reasonable time after a party identifies the need for the request. The court must rule on the request and timely communicate the ruling to the parties, but it is not required to hold a hearing before ruling. The court must grant the request unless it finds there is good cause not to grant. Such good cause must be documented in the ruling denying the request.

(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.

(d) **Open Courts Notice.** If a court proceeding is conducted away from the court 's usual location, the court must provide reasonable notice to the public that the proceeding will be conducted away from the court's usual location and an opportunity for the public to observe the proceeding.

Comment to 2022 Change: New Rule 500.10 clarifies procedures for appearances at court proceedings. Subpart (b) references good cause not to grant a request to appear by alternate means. When evaluating the request, the court should consider factors including, but not limited to, the following: (1) whether a person who is the subject of the request may be unable 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 the proceeding; (2) whether in-person participation could compromise one's health or safety; (3) whether the court can provide language access services for a person with limited English proficiency through the manner of appearance requested; and (4) whether the court can provide a reasonable accommodation for a person with a disability to participate in the proceeding, in the particular manner requested. When a party files a request for

participation in a particular manner, the party should explain the reasons for the request. Subpart (c) requires the court's contact information to be in a notice of a court proceeding. A participant in a court proceeding should be able to use that information to receive a reasonably timely response to any issues concerning participating remotely or by being physically present in the courtroom.

ATTACHMENT B
Revised Rule Proposals for District and County Courts
(Draft Date: May 22, 2022)

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~~Hearing~~.** An application to the court for an order and notice of any court proceeding~~hearing~~ thereon, not presented during a ~~hearing or trial~~proceeding, must be served upon all other parties not less than three days before the time specified for the ~~hearing~~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 2022 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) **Manner of Appearance.** 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*, [except that a court may not require lawyers, parties, or jurors to appear remotely for a jury trial absent the consent of all parties involved in the jury trial]*. A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances.

(b) **Request to Appear by Alternate Means.** A party may file a request for a participant to appear at a court proceeding in a manner other than the manner allowed or required by the court. The request must be filed within a reasonable time after a party identifies the need for the request. The court must rule on the request and timely communicate the ruling to the parties, but it is not required to hold a hearing before ruling. The court must grant the request unless it finds there is good cause not to grant. Such good cause must be documented in the ruling denying the request.

(c) **Open Courts Notice.** If a court proceeding is conducted away from the court 's usual location, the court must provide reasonable notice to the public that the proceeding will be conducted away from the court's usual location and an opportunity for the public to observe the proceeding.

Comment to 2022 Change: Amended Rule 21d clarifies procedures for appearances at court proceedings. Subpart (b) references good cause not to grant a request to appear by alternate means. When evaluating the request, the court should consider factors including, but not limited to, the following: (1) whether a person who is the subject of the request may be unable 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 the proceeding; (2) whether in-person participation could compromise one's health or safety; (3) whether the court can provide language access services for a person with limited English proficiency through the manner of appearance requested; and (4) whether the court can provide a reasonable accommodation for a person with a disability to participate in the proceeding, in the particular manner requested. When a party files a request for participation in a particular manner, the party should explain the reasons for the request.

Tab C

February 17, 2022

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.

Texas Rule of Evidence 503(b)(1)(C). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amending Texas Rule of Evidence 503(b)(1)(C) to allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Part of the proposal was already discussed by the Committee at its December 11, 2015 meeting. The Committee should review and make recommendations, particularly regarding the proposed addition of "related."

Texas Rule of Evidence 803(16). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amending Texas Rule of Evidence 803(16) to limit the hearsay exclusion's ancient documents exception to documents created before electronically stored information was widely used. The Committee should review and make recommendations.

Texas Rule of Appellate Procedure 6.5(d). In the attached memorandum, the State Bar Court Rules Committee proposes exempting non-lead counsel from Texas Rule of Appellate Procedure 6.5's withdrawal requirements if lead counsel continues representation. The Committee should review and make recommendations.

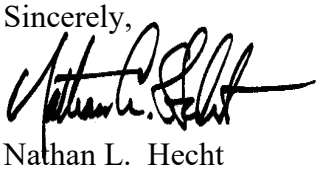
Rules for Identifying Potential Disqualification and Recusal Issues. Texas Rules of Appellate Procedure 38, 52, 53, and 55 are designed to capture the information needed for disqualification and recusal purposes by requiring that petitions and briefs contain the basic information about a case, including the identity of "all" counsel. The Committee should study and

make recommendations on how to strengthen the requirement of disclosure on parties and counsel at the outset so courts will have better information to make informed, reasoned decisions on disqualification and recusal. The Committee should consider whether the Court should:

- amend Rules 38, 52, 53, and 55 to clarify that "all" counsel means both current and former counsel at all levels of a proceeding;
- amend Rules 38, 52, 53, and 55 to clarify that the requirement to list the "names" of all counsel includes all firm names at which they practiced during their representation;
- amend other rules, like those governing the notice of appeal and the docketing statement in the courts of appeals, to require disclosure earlier and more often; and
- impose a duty to amend and supplement.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

MEMORANDUM

From: Administration of Rules of Evidence Committee (AREC)

To: State Bar of Texas (SBOT)
Supreme Court of Texas
The Texas Supreme Court Advisory Committee (SCAC)

Date: November 29, 2021

Re: Recommendation to amend Tex. R. Evid. 503(b)(C) to remove requirement of a "pending action"

RECOMMENDATION

AREC recommends amending Rule 503 to include "anticipated" litigation as follows:

503. Lawyer-Client Privilege

(b) Rules of Privilege.

(1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a related pending or anticipated action or that lawyer's representative, if the communications concern a matter of common interest in the ~~pending~~ action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

This would allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Though the Rule uses the words "common interest," it does not provide a broad common-interest protection (discussed below), as the communication must be made to a lawyer or their representative, and does not reach communications among *parties* who share the common interest.

BACKGROUND

In September 2015, AREC submitted a recommendation to SCAC to expand Rule 503(b)(1)(C) to cover "anticipated" litigation. Prior to that recommendation, interested SBOT Committees were given the opportunity to provide input and all responding Committees expressed support for the change.

On December 11, 2015, SCAC approved of the proposed AREC recommendation by a vote of 25 to 7. However, to date this recommendation has not been adopted and incorporated into the rules of evidence.

In May 2021, AREC voted to submit the above recommended rule change. The SBOT Administrative Committee reviewed the recommendation and had questions about including "related" in the change. AREC again reviewed the recommendation, and in September 2021, again voted to submit this recommended change.

DISCUSSION

Texas' current "allied litigant privilege" is a variation of the "common interest doctrine."[1] *See* Tex. R. Evid. 503(b)(1)(C); *see also In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (discussing Texas' "allied litigant" privilege). It protects communications "to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52. The pending action requirement means that "no commonality of interest exists absent **actual litigation**." *Id*. (emphasis added).

By omitting the pending action requirement, the privilege is extended to communications with another party's attorney even if litigation is not yet filed. This change would aid in more efficient case management and scheduling, and remove any potential procedural tactic of filing suit (or delaying suit) for the sole purpose of shielding (or hindering) common-interest communications. This would also bring Texas law into conformity with Fifth Circuit law.[2] Finally, the anticipated action requirement should, as a practical matter,

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[1] The "common interest doctrine" allows separately represented parties with common legal interests to share information with each other and their respective attorneys without destroying the attorney-client privilege. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Restatement (Third) of the Law Governing Lawyers § 76 (2000) ("(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication. (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.").

[2] The Fifth Circuit recognizes the common interest privilege when there is pending litigation or a palpable threat of litigation at the time of the communication. *In re Santa Fe Int'l Corp.*, 272 F.3d 705,

impose a temporal limitation to tie unfiled related actions to their respective statutes of limitations.

SBOT's Administrative Committee has asked whether "related" should be included in the recommended change, as the term is undefined and could be considered vague. AREC has reviewed this issue and does not believe a definition is required.

"Related" and "unrelated" are used multiple times within the TRE without definition. *See, e.g.,* Tex. R. Evid. 901(6)(B) (example of authenticating telephone conversation includes evidence the call was made a business' number and was related to business reasonably transacted over the phone), 902(9) (commercial paper and related documents are self authenticating), 1004(e) (original writing, recording, or photograph is not required if it is not closely related to a controlling issue"). The word, in various forms, is also used throughout Texas statutes. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 42.001(5) (definition of "litigation costs" by referring to money and obligations "directly related to the action"); Tex. Probate Code § 33.002 (Action Related to Probate Proceeding in Statutory Probate Court).

The Rule's common-interest requirement also acts to bookend, or flank, the Rule 503(b)(C) privilege. This ensures both that the pending or anticipated actions are related, and that the communication concerns a matter of common interest. It would protect, for example:

- Communications among (1) counsel for a physician in an administrative action before the Texas Medical Board involving patient care, and (2) separate counsel for that physician in a suit by a patient against the physician.
- Communications among (1) counsel for a senior government employee in a criminal case involving acts against "whistleblower" employees; and (2) counsel for that same employee in a whistleblower civil suit; and (3) counsel for that employee in unemployment or occupational licensing administrative proceedings. These separate criminal, civil, and administrative actions may involve the same facts and witnesses, but will also involve different parties—and are all clearly related.
- Communications among counsel for insurers in separate actions involving the same agent or insured.

711 (5th Cir. 2001). A "palpable threat of litigation" means an actual, imminent, or directly foreseeable lawsuit. *Id.* at 714 (quoting district court opinion). If communications are made to protect from possible, but not imminent, civil or criminal action, then the common interest doctrine does not apply. *U.S. v. Newell*, 315 F.3d 510, 525-26 (5th Cir. 2002). Additionally, the communication must be made to *further* the common interest. *BCR Safeguard Holding, LLC v. Morgan Stanley Real Estate Advisor, Inc.*, 614 F. App'x 690, 704 (5th Cir. 2015). If a document evinces a conflict of interest between the two parties, then the common interest doctrine will not apply to shield the document from disclosure under the common interest doctrine. *Id.*; *see also U.S. v. Schwimmer*, 892 F.2d 237, 240-44 (2nd Cir. 1989) (discussing common interest privilege and applying common interest rule to information given by defendant to CPA hired by co-defense counsel to serve joint defense interests).

- Communications among counsel for an insurer in a declaratory judgment action involving coverage, and counsel for the same insurer in a suit against it by a policyholder.

The term "related" in AREC's Recommendation clearly includes actions with overlapping facts, claims, witnesses, or parties. Beyond these clear examples, courts are well equipped to analyze the facts at issue in making a determination as to whether separate actions are related.

/s/ *Angie Olalde*
2021-22 Chair, AREC

MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to amend TRE 803(16) on ancient documents to align with amendments to the federal ancient documents hearsay exception

Date: September 10, 2021

Summary

Currently, Texas Rule of Evidence 803(16) excepts from the hearsay rule "A statement in a document **that is at least 20 years old** and whose authenticity is established." Tex. R. Evid. 803(16) (emphasis added).

In 2017,the Federal Rules of Evidence were amended to change the 20-year requirement to a date certain:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (16) Statements in Ancient Documents. A statement in a document **that was prepared prior to January 1, 1998** and whose authenticity is established.

Fed. R. Evid. 803(16) (emphasis added). This was done to address the risk that the hearsay exception for ancient documents could be used as a vehicle for admitting unreliable electronically stored information (ESI). *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803.

AREC recommends amending TRE 803(16) to be consistent with FRE 803(16). This means the exception is no longer tied to a 20-year age limit, but instead focuses on documents created before ESI was widely used.

Background and AREC's Work

ESI has become prevalent since Google first started in 1998. Many fear that the proliferation of unreliable emails, tweets, texts, blogs, web postings and more could be admissible under the ancient documents exception.

AREC and its subcommittee that studied this issue researched and considered several issues, and including the following information:

1. **Is Rule 803(16) used often enough to keep, or should we abrogate it?**

   A quick review of Texas cases shows this rule is still used quite often for trespass to try title cases, wills, products liability, mineral rights cases, and even an occasional criminal case. The case law extends from the time of the common law rule to 2020. Thus, AREC does not recommend removing the rule. The Federal Rule Committee reached the same conclusion after receiving more than 200 comments against abrogation of the rule. In some instances, it is the only way to prove a fact. "As a practical matter, there is usually no other way to prove heirship of a person who died in 1836 than by the recitations in ancient documents." *Zobel v. Slim,* 576 S.W.2d 362, 365 (Tex. 1978).

2. **Should the rule remain unchanged to allow ESI over 20 years old to be exempted as ancient documents?**

   AREC considered whether ESI would actually pose an issue if admitted under a hearsay exception.

   While the condition of traditionally ancient documents such as deeds or wills can be examined to analyze authenticity, that type of review is not available for ESI, which by its nature is electronically stored. Other problems with ESI include the fact that the *content* of a computer-created document can be easily modified, even unintentionally (for example, moving a file from one location to another could alter an electronic document's metadata). Thus, situations could arise where ESI was created more than 20 years ago, but arguments could ensue over whether it has been modified in such a way as to remove it from the ancient documents exception. Additionally, a traditional written document is generally limited to several sheets of paper, while ESI can include a much greater quantity of information, making it more difficult to ascertain whether all parts of proffered ESI may meet the ancient documents exception.

   Finally, it is advisable to have similar application of this rule in federal and Texas state courts. A few states that have adopted the federal version have mentioned the avoidance of forum shopping as a reason for being in harmony with federal courts.

3. **Could we change the language of Rule 803(16) to exempt "hardcopy" documents that are 20 years or older?**

   The Federal Rules Advisory Committee considered this idea and rejected it. The Committee noted that the distinction between ESI and hardcopy would be fraught with questions and difficult to ascertain. Scanned copies of old documents? Digitized versions of an old book? *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803 (explaining "A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.").

4. Will excluding non-ESI documents written after 1998 be a problem?

In many cases, documents produced after January 1, 1998 will be preserved electronically and typically will not face the same issues of admitting a rare hardcopy document. For hardcopy documents created after January 1, 1998, their statements could still be admitted under other exceptions to the hearsay rule, such as for records kept in the course of a regularly conducted business activity under TRE 803(6). As our contemporary medium of communication is largely electronic, as opposed to written letters, AREC recommends this amendment, and that it conform to the federal rule's January 1, 1998 date. *See, e.g., id*. ("The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule.").

AREC'S Recommendation

We recommend Texas Rule of Evidence 803(16), the ancient documents hearsay exception, be amended to match its federal counterpart, as follows:

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

…

(16) Statements in Ancient Documents. A statement in a document that was prepared prior to January 1, 1998 ~~is at least 20 years old~~ and whose authenticity is established.

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 6.5(d)

I. Exact Language of Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For Appellant*. Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.

(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

6.3. To Whom Communications Sent

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

(a) each party’s lead counsel on appeal;

(b) a party’s lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel*. If an attorney substitutes for a withdrawing attorney, the motion to withdraw need not comply with (a) but must state only the

substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

II. Proposed Amendments to Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For Appellant*. Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.

(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

6.3. To Whom Communications Sent

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

(a) each party's lead counsel on appeal;

(b) a party's lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel*. If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

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

Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the

associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel.

The other aspects of Rule 6.5(d) are unchanged. For example, if substitution of counsel is sought, the motion to withdraw must state the substitute attorney's name, contact information, and State Bar number. In addition, Rule 6.5(d) still requires the withdrawing attorney (whether or not seeking substitution) to comply with Rule 6.5(b), requiring delivery of the motion to withdraw to the party either in person or by certified and first-class mail to the party's last known address. The provisions in Rule 6.1(c) for designating new lead counsel also remain unchanged.

Tab D

M E M O R A N D U M

To: SCAC

From: SCAC Evidence Subcommittee

Date: May 20, 2022

Re: TRE 503(b)(1)(1)(C)

Our subcommittee mostly, but not entirely, supports the State Bar's Rules of Evidence Committee (AREC)'s recommendations for amending TRE 503(b)(1)(C). Here is AREC's recommendation:

> AREC recommends amending Rule 503 to include "anticipated" litigation as follows:
>
> 503. Lawyer-Client Privilege
>
> (b) Rules of Privilege.
>
> (1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
>
> (B) between the client's lawyer and the lawyer's representative;
>
> (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a related pending or anticipated action or that lawyer's representative, if the communications concern a matter of common interest in the ~~pending~~ action;
>
> (D) between the client's representatives or between the client and the client's representative; or
>
> (E) among lawyers and their representatives representing the same client.
>
> This would allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Though the Rule uses the words "common interest," it does not provide a broad common-interest protection (discussed below), as the communication must be made to a lawyer or their representative, and does not reach communications among *parties* who share the common interest.

AREC's November 29, 2021 memorandum discussing its recommended changes is attached.

AREC's proposed addition of *anticipated*. Back in 2015 AREC proposed that Rule 503(b)(1)(C) be amended to protect communications in both pending and anticipated actions and the SCAC voted in favor of that change (25-7). Our subcommittee again supports this recommended change. The key points are:

- Adding anticipated actions helps fill a gap in the existing law. Under current TRE 503(b)(1)(C), there is no privilege protecting communications between persons representing prospective parties in an anticipated action; the allied litigant rule of 503(b)(1)(C) only applies when there is pending litigation.

- Our subcommittee agrees with AREC that filling this gap is a good thing. We can think of no good policy reason to not extend a privilege to communications that concern either pending or anticipated legal actions.

- Finally, any concern that adding anticipated actions will expand TRE503(b)(1)(C) to non-litigation matters probably can be quelled by two related points. First, the rule will still be limited to protecting communications that relate to *actions*—which courts have long interpreted as meaning future possible litigation; they have not permitted the rule to protect communications that solely are business-related when there's no reasonable likelihood of litigation. Second, Texas Rule of Civil Procedure 192.5 and the case law that has developed around the work product protection that the rule provides, already sets recognizable guardrails on when litigation is reasonably anticipated. In that regard, we may want to consider adding an advisory note to TRE503 saying we expect existing work product law should guide courts in applying amended TRE503 to anticipated actions. To be discussed.

- Finally, we note that we have spoken to Professor Steven Goode and he supports adding anticipated actions to the rule's scope.

AREC's proposed addition of *related*. Our subcommittee does not support AREC's current proposal to add a related requirement to TRE503(b)(1)(C).

- AREC's 2015 recommendation to amend TRE503(b)(1)(C) did not include a similar recommended change.

- One reason we do not support the addition of a *related* requirement is that the term is undefined. Indeed, a different State Bar committee has also expressed a similar concern.

- Even more centrally, it is not clear to us what work the word *related* is doing that the later phrase, "of common interest in the action" is not already doing. The common interest requirement already ensures there be relatedness between the actions. Our subcommittee believes that a possible, maybe even a likely, outcome of adding *related* to the rule is that the bench and bar will think that the amendment is intended to be a change in the governing standard—and, specifically, that the addition

of the word *related* is intended to make it harder to establish that the protections of Rule 503(b)(1)(C) apply. Under AREC's proposed rule, the communication will now have to "concern a matter of common interest in the action" and will have to be between folks in *related* actions (that are either pending or anticipated). Since adding anticipated actions obviously was meant to broaden the rule, we very much doubt that AREC simultaneously meant for the addition of a related action requirement to make it harder to establish the protections of Rule 503(b)(1)(C). Yet, that seems like a plausible way that the bench and bar may interpret this change.

- Finally, we note that we have spoken to Professor Steven Goode and he agrees that adding a related requirement to the rule is unwise.

Tab D1

MEMORANDUM

From: Administration of Rules of Evidence Committee (AREC)

To: State Bar of Texas (SBOT)
Supreme Court of Texas
The Texas Supreme Court Advisory Committee (SCAC)

Date: November 29, 2021

Re: Recommendation to amend Tex. R. Evid. 503(b)(C) to remove requirement of a "pending action"

RECOMMENDATION

AREC recommends amending Rule 503 to include "anticipated" litigation as follows:

503. Lawyer-Client Privilege

(b) Rules of Privilege.

(1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a related pending or anticipated action or that lawyer's representative, if the communications concern a matter of common interest in the ~~pending~~ action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

This would allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Though the Rule uses the words "common interest," it does not provide a broad common-interest protection (discussed below), as the communication must be made to a lawyer or their representative, and does not reach communications among *parties* who share the common interest.

BACKGROUND

In September 2015, AREC submitted a recommendation to SCAC to expand Rule 503(b)(1)(C) to cover "anticipated" litigation. Prior to that recommendation, interested SBOT Committees were given the opportunity to provide input and all responding Committees expressed support for the change.

On December 11, 2015, SCAC approved of the proposed AREC recommendation by a vote of 25 to 7. However, to date this recommendation has not been adopted and incorporated into the rules of evidence.

In May 2021, AREC voted to submit the above recommended rule change. The SBOT Administrative Committee reviewed the recommendation and had questions about including "related" in the change. AREC again reviewed the recommendation, and in September 2021, again voted to submit this recommended change.

DISCUSSION

Texas' current "allied litigant privilege" is a variation of the "common interest doctrine."[1] *See* Tex. R. Evid. 503(b)(1)(C); *see also In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (discussing Texas' "allied litigant" privilege). It protects communications "to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52. The pending action requirement means that "no commonality of interest exists absent **actual litigation**." *Id.* (emphasis added).

By omitting the pending action requirement, the privilege is extended to communications with another party's attorney even if litigation is not yet filed. This change would aid in more efficient case management and scheduling, and remove any potential procedural tactic of filing suit (or delaying suit) for the sole purpose of shielding (or hindering) common-interest communications. This would also bring Texas law into conformity with Fifth Circuit law.[2] Finally, the anticipated action requirement should, as a practical matter,

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[1] The "common interest doctrine" allows separately represented parties with common legal interests to share information with each other and their respective attorneys without destroying the attorney-client privilege. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Restatement (Third) of the Law Governing Lawyers § 76 (2000) ("(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication. (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.").

[2] The Fifth Circuit recognizes the common interest privilege when there is pending litigation or a palpable threat of litigation at the time of the communication. *In re Santa Fe Int'l Corp.*, 272 F.3d 705,

impose a temporal limitation to tie unfiled related actions to their respective statutes of limitations.

SBOT's Administrative Committee has asked whether "related" should be included in the recommended change, as the term is undefined and could be considered vague. AREC has reviewed this issue and does not believe a definition is required.

"Related" and "unrelated" are used multiple times within the TRE without definition. *See, e.g.,* Tex. R. Evid. 901(6)(B) (example of authenticating telephone conversation includes evidence the call was made a business' number and was related to business reasonably transacted over the phone), 902(9) (commercial paper and related documents are self authenticating), 1004(e) (original writing, recording, or photograph is not required if it is not closely related to a controlling issue"). The word, in various forms, is also used throughout Texas statutes. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 42.001(5) (definition of "litigation costs" by referring to money and obligations "directly related to the action"); Tex. Probate Code § 33.002 (Action Related to Probate Proceeding in Statutory Probate Court).

The Rule's common-interest requirement also acts to bookend, or flank, the Rule 503(b)(C) privilege. This ensures both that the pending or anticipated actions are related, and that the communication concerns a matter of common interest. It would protect, for example:

- Communications among (1) counsel for a physician in an administrative action before the Texas Medical Board involving patient care, and (2) separate counsel for that physician in a suit by a patient against the physician.
- Communications among (1) counsel for a senior government employee in a criminal case involving acts against "whistleblower" employees; and (2) counsel for that same employee in a whistleblower civil suit; and (3) counsel for that employee in unemployment or occupational licensing administrative proceedings. These separate criminal, civil, and administrative actions may involve the same facts and witnesses, but will also involve different parties—and are all clearly related.
- Communications among counsel for insurers in separate actions involving the same agent or insured.

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711 (5th Cir. 2001). A "palpable threat of litigation" means an actual, imminent, or directly foreseeable lawsuit. *Id.* at 714 (quoting district court opinion). If communications are made to protect from possible, but not imminent, civil or criminal action, then the common interest doctrine does not apply. *U.S. v. Newell*, 315 F.3d 510, 525-26 (5th Cir. 2002). Additionally, the communication must be made to *further* the common interest. *BCR Safeguard Holding, LLC v. Morgan Stanley Real Estate Advisor, Inc.*, 614 F. App'x 690, 704 (5th Cir. 2015). If a document evinces a conflict of interest between the two parties, then the common interest doctrine will not apply to shield the document from disclosure under the common interest doctrine. *Id.*; *see also U.S. v. Schwimmer*, 892 F.2d 237, 240-44 (2nd Cir. 1989) (discussing common interest privilege and applying common interest rule to information given by defendant to CPA hired by co-defense counsel to serve joint defense interests).

- Communications among counsel for an insurer in a declaratory judgment action involving coverage, and counsel for the same insurer in a suit against it by a policyholder.

The term "related" in AREC's Recommendation clearly includes actions with overlapping facts, claims, witnesses, or parties. Beyond these clear examples, courts are well equipped to analyze the facts at issue in making a determination as to whether separate actions are related.

/s/ Angie Olalde
2021-22 Chair, AREC

Tab E

MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Evidence Subcommittee

Re: Recommendation to amend TRE 803(16) on ancient documents

Date: May 11, 2022

Summary

Texas Rules of Evidence 803(16) provides an exception to the hearsay rule: "A statement in a document that is "at least 20 years old" and whose authenticity is established." Tex. R. Evid. 803(16).

In 2017 Rule 803(16) of the Federal Rules of Evidence was amended. The prior rule used the same at least 20 years old requirement as the Texas Rule. The 2017 amendment changed this to a date certain:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . .
>
> > (16) Statements in Ancient Documents. A statement in a document **that (a) was prepared prior to January 1, 1998** and whose authenticity is established.

Fed. R. Evid. 803(6) (emphasis added to show new language). The State Bar of Texas Administration of Rules of Evidence Committee (AREC) recommends that the Texas Supreme Court adopt this amended rule.

The Federal Rule of Evidence change was made to address the risk that the hearsay exception for ancient documents could be used as a vehicle for admitting unreliable electronically stored information (ESI). *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803. The impetus for the rule change, and the reason the January 1998 date was selected, is that Google began in 1998 and resulted in a variety of new forms of ESI. Some commentators feared that "ancient" emails, tweets, texts, blogs, web postings, and Facebook posts contain unreliable factual assertions but nevertheless would be admissible under the ancient documents exception. For example, concern was raised that web postings created by someone at their home could be admissible under this rule if they are at least 20 years old.

In view of these concerns, some public comments were received suggesting that the rule should be completely abolished. But others noted that the rule was often utilized in asbestos and insurance cases, and in those cases, it is sometimes a necessity to have the ancient documents exception to prove acts or omissions that occurred decades ago, particularly when witnesses are no longer available. This committee agreed that abolishment went too far.

The comments to the 2017 Amendments state that, despite this rule change, "ancient" hard copy documents–that is a document prepared after January 1, 1998 and more than twenty years ago—can still be admitted, but under two different rules. First, documents created after 1997 may still fall within the business records exception of Rule 803(6).

Second, the comments state that records created after January 1, 1998 may be admissible under the federal residual hearsay exception, Rule 807, "upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807."

Recommendation

The Evidence Subcommittee unanimously recommends accepting AREC's recommendation to amend TRE 803 (16) to conform with FRE 803(16).

The proposed new rule, as suggested by AREC and which follows the revised federal rule (with the changes in bold and underlined), is as follows:

> (16) Statements in Ancient Documents. A statement in a document **that (a) was prepared prior to January 1, 1998** and whose authenticity is established.

The Evidence Subcommittee unanimously recommends that the Court adopt FRE 807. New 803 (16) is based in part on the existence of that rule. AREC under Professor Goode's prior leadership, this subcommittee, and SCAC previously recommended adoption of FRE 807.

If the Court elects to not adopt Rule 807, the Subcommittee also recommends, by a 4 to 2 vote, an additional amendment to Rule 803(16) to create a hearsay exception for ancient documents that are created after January 1, 1998 and satisfy the existing age requirement (i.e. are 20 years or older) and have further indicia of reliability comparable to those in FRE 807 if.

The majority of the committee concluded that an additional exception tracks Rule 807 is necessary because Texas has not adopted FRE 807 and some ancient documents do not have ESI issues. Our additional exception, which follows Rule 807, is in italics below:

> (16) Statements in Ancient Documents. A statement in a document **that (A) was prepared prior to January 1, 1998** and whose authenticity is established; *or (B) is at least 20 years old whose authenticity is established and the offering party demonstrates (i) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (ii) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.*

The committee notes for the federal rules also make it clear that the date is determined when the document was originally written and not when it is electronically scanned. The committee explains:

> Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995, even though the scan was made long after that—that subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is itself altered after the cutoff date, then the hearsay exception will not apply to statements that were added in the alteration.

While AREC did not suggest adding this comment, we do. This comment is worth considering.

Background

The Ancient Documents Exception Rationale

> The primary rationale for Rule 803(16) is need:
>
> Need is the main justification. The lapse of 20 years since the acts, events or conditions described almost guarantees a shortage of evidence. Witnesses will have died or disappeared. Written statements that might fit other exceptions (business records, past recollection) are typically thrown out or lost or destroyed ....
>
> Naturally, statements in ancient documents are affected by risks of misperception, faulty memory, ambiguity, and lack of candor (they are not intrinsically more reliable than oral statements), and a written statement unreliable when made is unreliable forever. Ancient documents do, however, bring fewer risks of misreporting (because the document is in writing), and they bring at least some assurance against negative influences: When authenticated, an ancient document leaves little doubt that the statement was made; there is little risk of errors in transmission; because of its age, the document is not likely to have suffered from the forces generating the suit, so there is less reason to fear distortion or lack of candor.

Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 Yale J.L. & Tech. 1 (2015) (quoting CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:100 (4th ed. 2013). One court focused more on the reliability rationale for the rule:

> The ancient documents exception "is based on a rationale that authenticated ancient documents bear certain indicia of trustworthiness," namely: (1) a lack of motive to fabricate due to the document's age; (2) the writing requirement "minimizes the danger of mistransmission"; and (3) "the document is more likely to be accurate than the oral testimony of the declarant based on his memory of events of twenty or more years ago."

United States v. Stelmokas, 1995 WL 464264, at *5 (E.D. Pa. Aug. 2, 1995) (citing 2 John W.

Strong et al., *McCormick on Evidence* § 322 (4th ed. 1992); Charles E. Wagner, *Federal Rules of Evidence Commentary* 452 (1993); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(16)(1) (1994)); *see also* FED. R. EVID. 803(16) advisory committee's note (arguing that "age affords assurance that the writing antedates the present controversy").

Calls for Reform

In 2015, Professor Daniel Capra published an article asserting that Rule 803(16) needed to be abolished or amended because of the potential for its misuse in the internet age. The article was written in advance of (but published after) a Judicial Conference Advisory Committee on the Federal Rules of Evidence (the Federal Rules Committee) meeting scheduled in April 2014 to consider the rule. The April 2014 meeting considered a memorandum written by Capra that asked whether the committee wanted to consider abolishing the rule.

Capra argued in his published article that the internet contains factual assertions that are easily retrievable and potentially admissible under this rule. *Id*. at 1. Anyone can write on anything, so age alone is no indicator of reliability. He cites as examples retrievable web pages from the National Enquirer surrounding various celebrities, which potentially are admissible under the ancient documents exception. *Id*. at 5. He further observes that "ancient" personal assertions made in Facebook posts "without any verification at all" would satisfy the existing rule, a concern that "is not at all alleviated by the fact that the assertion is old." *Id*. at 24. And the number of potentially unreliable documents posted on the internet is enormous. Indeed,

> ten million static web pages are added to the Internet every day. In 2006 alone, the world produced electronic information that was equal to three million times the amount of information stored in every book ever written. . . . As electronic communications continue to age, all of the factual assertions in terabytes of easily retrievable data will be potentially admissible for their truth simply because they are old.

Id. at 1. Capra explains:

> Up until now, the ancient documents rule has been a sleepy little exception applied to hardcopy information. . . . But that can change now that much ESI has reached, if not surpassed, the twenty-year mark. It has been said that ESI "surrounds us like an ever-deepening fog or an overwhelming flood." The question is whether anything should be done about the ancient documents exception before that exception—and its applicability to ESI—are discovered by lawyers and judges. The potential problem is that ESI might be stored without much trouble for twenty years, and the sheer volume of it could end up flooding the courts with unreliable hearsay, through an exception that would be applied much more broadly than the drafters (or the common law) saw coming in the days of paper. Examples include self-serving emails from a business, tweets and texts about events from people who were not at the event, web postings accusing individuals of misconduct, and anonymous blog posts. . . . But now that terabytes and zettabytes of information are reaching or have already reached a twentieth birthday, the committee should rethink the ancient documents exception. In other words, data overload is already, or soon will be, a real problem worth fixing.

Id. at 3-4, 12 (footnotes omitted). Capara also argued that the necessity rationale for Rule 803(16) is diminished in the internet age: "Because ESI is prevalent and easily preserved, whatever

reliable evidence existed at the time of a twenty-year old event *probably* still exists. Indeed, the probability that most or all ESI records (emails, text messages, receipts, scanned documents, etc.) will be available is certainly higher than the probability that hardcopy documents or eyewitnesses will still be available and useful several decades after a contested event." *Id*. at 15 (footnotes omitted).

Capra conceded that there are no cases reflecting that ESI is currently causing a problem under Rule 803(16) and therefore an argument exists that amending the rule "due to a projected but not-yet-existing onslaught of old ESI is inappropriate." *Id*. at 30. He responds:

> The counterargument is that technology and the use of technology at trials develop very quickly. Trying to keep up with these changes is very difficult in the context of the deliberate nature of the rulemaking process. Enacting an amendment to the national rules of procedure takes a minimum of three years. Given all the ESI that will become potentially admissible without regard to reliability under Rule 803(16) in the next three or four years, it behooves the rulemakers to get out ahead of the curve. It would of course not be completely unreasonable to wait for the problem to rear its head in the courts. The consequence of waiting is not that the rule would lag behind emerging technology, but simply that unreliable hearsay may well be admitted en masse for a few years.

Id. at 30-31 (footnote omitted).

In August 2015, the Judicial Conference Advisory Committee on the Federal Rules of Evidence (the Federal Rules Committee) recommended the abolishment of Rule 803(16). *See* PRELIMINARY DRAFT OF Proposed Amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Evidence at *25. It rejected the rationale for the then-existing rule:

> The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception—such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

On October 9, 2015, the Symposium on Hearsay Reform was held in Chicago. A number of speakers advocated the complete elimination of the hearsay rules and adoption of a rule granting judges "greater discretion" on deciding whether to admit such evidence. *See* January 2016 report of the Judicial Conference Advisory Committee on the Federal Rules of Evidence (the Federal Rules Committee). *See also* October 2015 report of the Federal Rules Committee at *5. Participants debated the advantages and disadvantages of various potential amendments to the rule. *Id*.

That afternoon, the Federal Rules Committee met and agreed that the rule should be eliminated and released to the public that proposal for comment. "[P]laintiffs' lawyers in environmental, insurance and asbestos cases" objected to the proposal. *See* October 2015 report of the Federal Rules Committee at *6. The committee reported that it believed the objections were misplaced.

In 2015, Professor Peter Nicolas wrote a critique of the proposal to abolish the rule. First, he argued that Professor Capra had overstated the problems with the rule and identified other evidence rules that could be utilized to exclude unreliable ancient documents. *Id*. at 178-179. But he agreed that Professor Capra and the committee had raised a number of valid concerns, concerns he argued could be addressed by an amendment to the rule rather than abrogation. *Id*. at 180-81

In January 2016, the federal rules committee promulgated a suggested amendment to the federal rules that would have eliminated the hearsay rule for ancient documents and issued it for public comment. The committee observed that since its November 2015 meeting it had "received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old."

The 2017 Amendment Rejects Abolishment But Adopts Other Revisions

By its April 2016 meeting, the committee had received over 200 public comments on the proposal to eliminate Rule 803(16), almost all negative. Advisory Committing on Evidence Rules, Minutes of April 29, 2016, at *2. The committee agreed

> it was not appropriate to continue with the proposal to eliminate Rule 803(16)—the public comments did raise concerns about the effect of the amendments and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comments also showed that looking at the reported cases does not give a sense of how often the ancient documents exception is actually used—in part because with ancient documents, there is nothing to report, because there is currently no basis for any objection to the admission of such documents.) The DOJ representative added that there are a number of types of actions in which the government routinely uses ancient documents—such as CERCLA cases and cases involving title dispute in "rails to tails" litigation—and that elimination of the ancient documents excerption would impose substantial burdens in these cases, because the documents would be difficult to qualify under the residual exception, given the particularized notice requirements of Rule 807. The Committee was sympathetic to the concerns about the costs that would be imposed in particular kinds of existing cases if the ancient documents exception were eliminated.

Id. at *3. The committee then unanimously recommended that the ancient documents exception be amended because of concerns about ESI. *Id*. at *5. Its recommended rule was subsequently adopted.

AREC's Memo and Our Comments

AREC and its subcommittee researched four issues. We quote its answers with our additions in italics.

1. **Is Rule 803(16) used often enough to keep, or should we abrogate it?**

   A quick review of Texas cases shows this rule is still used quite often for trespass to try title cases, wills, products liability, mineral rights cases, and even an occasional criminal case. The case law extends from the time of the common law rule to 2020. Thus, AREC does not recommend removing the rule. The Federal Rule Committee reached the same conclusion after receiving more than 200 comments against abrogation of the rule. In some instances, it is the only way to prove a fact. "As a practical matter, there is usually no other way to prove heirship of a person who died in 1836 than by the recitations in ancient documents." *Zobel v. Slim*, 576 S.W.2d 362, 365 (Tex. 1978).

   A majority of our committee have concerns that there are other specific examples of "ancient" documents that are not ESI and have indicia of reliability. Thus, we believe the date of January 1998 may be reasonable for ESI but the 20 year criteria should be used for other documents that satisfy FRE 807.

2. **Should the rule remain unchanged to allow ESI over 20 years old to be exempted as ancient documents?**

   AREC considered whether ESI would actually pose an issue if admitted under a hearsay exception.

   While the condition of traditionally ancient documents such as deeds or wills can be examined to analyze authenticity, that type of review is not available for ESI, which by its nature is electronically stored. Other problems with ESI include the fact that the *content* of a computer-created document can be easily modified, even unintentionally (for example, moving a file from one location to another could alter an electronic document's metadata). Thus, situations could arise where ESI was created more than 20 years ago, but arguments could ensue over whether it has been modified in such a way as to remove it from the ancient documents exception. Additionally, a traditional written document is generally limited to several sheets of paper, while ESI can include a much greater quantity of information, making it more difficult to ascertain whether all parts of proffered ESI may meet the ancient documents exception.

   Finally, it is advisable to have similar application of this rule in federal and Texas state courts. A few states that have adopted the federal version have mentioned the avoidance of forum shopping as a reason for being in harmony with federal courts.

   The Capra article focuses on a different concern with ESI: factual assertions that are prevalent on the internet and are made by persons without any personal knowledge and are often the result of rampant hearsay, ill-will, or financial gain. We agree with Capra's concerns as well as AREC's comments and therefore agree with the amendment as it pertains to ESI.

3. **Could we change the language of Rule 803(16) to exempt "hardcopy" documents that are 20 years or older?**

The Federal Rules Advisory Committee considered this idea and rejected it. The Committee noted that the distinction between ESI and hardcopy would be fraught with questions and difficult to ascertain. Scanned copies of old documents? Digitized versions of an old book? *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803 (explaining "A party will often offer hardcopy that is derived from ESL Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.").[1]

Professor Capra noted that this was a potential problem and even proposed a rule for addressing this problem. 17 Yale. J.L. & Tech. at 36. He argued that it should not be adopted, however, because FRE 101(b)(6) "equates electronic evidence with hardcopy." Id.[2] *He stated that if a carve-out for handwritten documents is created, the following comment, or a similar comment, should be added:*

> *The amendment provides an exception to the general definition in Rule 101(b)(6), under which a reference to any kind of writing includes electronically stored information. Nothing in the amendment is intended to undermine any other use of electronically stored information under these Rules.*

Id. at 38. The SCAC Evidence Subcommittee did not believe a special rule for handwritten notes is necessary because of its recommendation to include a provision modeled on FRE 807. However, it is worth noting that the impetus to the FRE 803(16) revision is concerns about ESI, and that concern is inapplicable to handwritten documents.

Assuming FRE 807 is not adopted, our proposal would treat an ancient handwritten document as an exception to the hearsay rule and admissible if it satisfied the same criteria as set forth in Rule 807. In other words, if Rule 807 is not adopted—and we believe it should be—we recommend adopting a version of it into Rule 803(16) for documents at least 20 years old. As a practical matter, that would create a vehicle to admit, at this time, some 20 year-old documents written after January 1, 1998 and before today's date if they satisfy FRE 807's requirements.

Of course, revising the Texas rule from the FRE undermines the value of harmonization and presents the opportunity for forum shopping. And having a Texas-unique rule also creates other burdens, burdens described well by Professor Capra:

[1] The federal rules committee stated:

> *The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.*

[2] FRE 101(b)(6) provides: "a reference to any kind of written material or any other medium includes electronically stored information."

> *The Advisory Committee on Evidence Rules has always taken a conservative approach to proposing amendments to the Evidence Rules. Amendments are costly because experienced litigators and judges need to know the rules that exist, often without having the luxury of referring to a book. Any change to those rules imposes dislocation costs on litigators, judges, and the legal system as a whole--so the change had better be worth it.*

17 Yale J.L. & Tech. at 12. *Nevertheless, we believe ancient handwritten documents have sufficient indicia of reliability to remain admissible.*

4. Will excluding non-ESI documents written after 1998 be a problem?

In many cases, documents produced after January 1, 1998 will be preserved electronically and typically will not face the same issues of admitting a rare hardcopy document. For hardcopy documents created after January 1, 1998, their statements could still be admitted under other exceptions to the hearsay rule, such as for records kept in the course of a regularly conducted business activity under TRE 803(6). As our contemporary medium of communication is largely electronic, as opposed to written letters, AREC recommends this amendment, and that it conform to the federal rule's January 1, 1998 date. *See, e.g., id.* ("The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESL. And the date is no more arbitrary than the 20-year cutoff date in the original rule.").

The SCAC Evidence Subcommittee, by a 4 to 2 vote, disagreed because unlike the federal rules, Texas does not have a residual hearsay rule comparable to FRE 807 for the admittance of handwritten documents, which the Federal Rules committee specifically relied on in its recommendation.

Thus, a majority of the Subcommittee believes that Texas at a minimum should adopt the federal residual hearsay rule if it adopts FRE 803(16). There are many strong policy arguments for Rule 807. The Fifth Circuit explained the rationale for the residual exception:

> *This provision was added because Congress recognized that the specifically defined exceptions would not encompass every situation wherein a particular piece of hearsay demonstrated such reliability and appropriateness that it should be considered by the finder of fact. Congress believed that the residual exception was necessary to avoid the distortion of the specific exceptions beyond the reasonable circumstances they were intended to include. This exception was designed to protect the integrity of the specifically enumerated exceptions by providing the courts with the flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies.*

Dartez v. Fibreboard Corp., 765 F.2d 456, 462 (5th Cir. 1985). AREC, our committee, and SCAC have previously suggested that the Texas Supreme Court adopt FRE 807. It has not done so. We still believe it would be helpful. Professor Goode informs us that he knows of no efforts to repeal or amend FRE 807 since its 2019 amendment. It provides a

narrow, but sometimes needed, additional exception to the hearsay rules.

Our Recommendations

First. We unanimously recommend Texas Rule of Evidence 803(16), the ancient documents hearsay exception, be amended in conformity with the Federal Rules.

Second. We also unanimously recommend the adoption of the federal residual hearsay rule, Rule 807.[3]

Third. If FRE 807 is not adopted, we recommend, by a 4-2 vote, that Texas Rule of Evidence 803(16), be amended to include as subpart B language from FRE 807 because part of the rationale for the amendment to FRE 803(16) is the availability of that Rule as a method for introducing documents that are older than 20 years old but are more recent than January 1, 1998. The proposed amendment is as follows with the additions in italics:

Rule 803. Exceptions to the Rule Against Hearsay-Regardless of Whether the Declarant Is Available as a Witness The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

> (16) Statements in Ancient Documents. A statement in a document that **(A)** ~~is at least 20 years old~~ **was prepared prior to January 1, 1998** and whose authenticity is established; *or* (B) *is at least 20 years old and whose authenticity is established and the offering party demonstrates that (i) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (ii) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.*

Commented [HB1]: This language comes directly from the existing TRE 803(16)

Commented [HB2]: This language comes directly from FRE 807.

Fourth. The author of this report recommends that a comment be adopted that quotes from the federal comments to the new rule and explains when a document is created. That comment states:

> Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. If a hardcopy document is prepared in 1995 and a party seeks

[3] FRE 807(a) provides:

> a) **In General**. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> > (1) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
> >
> > (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Subpart b requires notice to be "provided in writing before the trial or hearing"

to admit a scanned copy of that document, the date of preparation is 1995, even if the scan was made long after that. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is itself altered after the cutoff date, then the hearsay exception will not apply to statements that were added in the alteration.

The committee ran out of time and never discussed this comment.

Tab F

May 6, 2022

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.

Texas Rule of Appellate Procedure 39.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Appellate Procedure 39.7 to clarify that all parties may participate in oral argument when it is granted, even if a party did not request oral argument on the cover of the party's brief. The Committee should review and make recommendations.

Texas Rule of Civil Procedure 193.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Civil Procedure 193.7 to clarify that a party must specifically state that a particular document will be used against the producing party to trigger the 10-day period for the producing party to object to the document's authenticity. The Committee should review and make recommendations.

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 39.7

I. Exact Language of Existing Rule

Rule 39. Oral Argument; Decision Without Argument

39.1. Right to Oral Argument

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

39.2. Purpose of Oral Argument

Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from prepared text. Counsel should assume that all members of the court have read the briefs before oral argument and counsel should be prepared to respond to questions. A party should not refer to or comment on matters not involved in or pertaining to what is in the record.

39.3. Time Allowed

The court will set the time that will be allowed for argument. Counsel must complete argument in the time allotted and may continue after the expiration of the allotted time only with permission of the court. Counsel is not required to use all the allotted time. The appellant must be allowed to conclude the argument.

39.4. Number of Counsel

Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.

39.5. Argument by Amicus

With leave of court obtained before the argument and with a party's consent, an amicus curiae may share the allotted time with that party. Otherwise, counsel for amicus may not argue.

39.6. When Only One Party Files a Brief

If counsel for only one party has filed a brief, the court may allow that party to argue.

39.7 Request and Waiver

A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument waives the party's right to argue. But even if a party has waived oral argument, the court may direct the party to appear and argue.

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

Notes and Comments

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

II. Proposed Amendments to Existing Rule 39.7

Rule 39. Oral Argument; Decision Without Argument

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(b) the dispositive issue or issues have been authoritatively decided;

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(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court. A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Notes and Comments

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Comment to Proposed 2022 change: Subdivision 39.7 is amended to provide that if a court of appeals sets a case for oral argument, then all parties to the case that filed a brief shall be entitled to participate in the oral argument, even if one or more parties did not request oral argument on the cover of its brief.

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

The 1997 revisions to the rules of appellate procedure "[were] meant to take the traps out of TRAP." See Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither*, in MATTHEW BENDER C.L.E., PRACTICING UNDER THE NEW RULES OF TRIAL AND APPELLATE PROCEDURE 1-12 (Nov. 1997). Texas Rule of Appellate Procedure 39.7 is part of former Rule 75 and became effective on September 1, 1997. Unfortunately, Rule 39.7 is a vestige of the procedural traps that were sought to be eliminated.

Rule 39.7 describes the process for requesting (and currently waiving) oral argument in a court of appeals. Rule 39.7 provides that a party's ability to participate in oral argument is waived if the party did not request oral argument on the cover of its brief. When a court of appeals sets a case for oral argument, each party has a reasonable expectation that it will be allowed to participate at oral argument—even if that party did not request oral argument the cover of its brief. This expectation is reinforced by a majority of the courts of appeals that have addressed the issue in their Internal Operating Procedures (IOPs) (discussed below).

Elsewhere, this common situation under Rule 39.7 leads to an unexpected and harsh reality. For example, in the Dallas Court of Appeals, a party that does not request oral argument on the cover of its brief will receive a notice from the court setting the case for oral argument. After complying with the instruction in the notice to notify the court of the name of the attorney who will be presenting argument for that party ("no later than the Thursday prior to the date the case is scheduled for argument"), counsel will be contacted by the clerk's office and informed that it is not entitled to participate at oral argument *unless* an appropriate motion to argue is filed and granted before oral argument. The motion is often granted—sometimes just a day before oral argument.[1] Other times the motion is denied or the party may learn at oral argument that it cannot

[1] *See, e.g.*, 05-21-00267-CV (motion to argue granted 13 days before oral argument); 05-21-00367-CV (motion to argue granted 29 days before oral argument); 05-21-00469-CV (motion to argue granted 30 days before oral argument); 05-20-00546-CV (motion to argue granted 19 days before oral argument); 05-19-00224-CV (motion to argue granted 4 days before oral argument); 05-19-00432-CV (motion to argue granted 5 days before oral argument); 05-19-00921-CV (motion to argue granted 1 day before oral argument); 05-18-00052-CV (motion to argue granted 14 days before oral argument; 05-18-00487-CV (motion to argue granted 1 day before oral argument); 05-18-00844-CV (motion to argue granted 30 days before oral argument); 05-18-00876-CV (motion to argue granted 3 days before oral argument); 05-18-01041-CV (motion to argue granted 2 days before oral argument);); 05-18-01371-CV (motion to argue granted 10 days before oral argument); 05-17-00773-CV (motion to argue granted 5 days before oral argument); 05-17-00329-CV (motion to argue granted 30 days before oral argument); 05-17-00849-CV (motion to argue granted 19 days before oral argument); 05-17-01104-CR (motion to argue granted 34 days before oral argument); 05-16-00246-CV (motion to argue granted 6 days before oral argument); 05-16-00784-CV (motion to argue granted 4 days before oral argument); 05-16-01096-CV (motion to argue granted 1 day before oral argument); 05-15-01104-CV (motion to argue granted 30 days before oral argument); 05-14-01424-CV (motion to argue granted 14 days before oral argument).

participate.[2]

There is no uniformity for handling this recurring circumstance among the courts of appeals. They generally fall into three categories:

> First, the 4th (San Antonio), 5th (Dallas), and 7th (Amarillo) Courts of Appeals each provide in their IOPs that when a party does not request oral argument on the cover its brief, that party must file a motion with the court to participate in an oral argument set for the case.
>
> Next, the 1st (Houston), 6th (Tyler), 8th (El Paso), and 14th (Houston) Courts of Appeals each provide in their IOPs that if the court grants oral argument, any party that filed a brief will be given an opportunity to argue, even if that party did not request oral argument on the cover of its brief. The 2nd (Fort Worth) Court of Appeals likewise rejects the notion of a party not being able to participate at oral argument.
>
> Lastly, the IOPs for the 3rd (Austin), 9th (Beaumont), 10th (Waco), 11th (Eastland), 12th (Tyler), and 13th (Corpus Christi-Edinburg) Courts of Appeals provide no specific guidance for this situation leaving counsel to guess what to do.

To remove this unfair and unanticipated trap for the unwary practitioner, the proposed change to Rule 39.7 would eliminate the current situation where a party that has not requested oral argument on the cover of its brief is not entitled to participate in oral argument that is set by the court. In at least three courts of appeals, that party must file a motion to participate close to the eve of oral argument. The proposed change to Rule 39.7 would eliminate uncertainty and disparate treatment and make it clear that if a court of appeals grants oral argument, any party that filed a brief will be given an opportunity to argue even if that party did not request oral argument on the cover of its brief. Stated differently in the proposed language: "A party's failure to request oral argument does not waive that party's right to argue, if the court of appeals sets the case for oral argument."

The other aspects of Rules 39 and 39.7 are unchanged.

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[2] *See Newsome v. State*, 1991 WL 214461 at *1 (Tex. App.—Dallas 1991, no pet.) ("Appellant's counsel failed to file a timely request for oral argument; appellant has waived oral argument. As oral argument was waived, the Court declines to assign counsel for the purpose of oral argument. Appellant's pro se motion to assign counsel for oral argument is denied.").

Tab G

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: May 16, 2022

Re: May 6, 2022 Referral Letter relating to TRAP 39.7 participation in oral argument

I. Matter referred to subcommittee

> **Texas Rule of Appellate Procedure 39.7.** In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Appellate Procedure 39.7 to clarify that all parties may participate in oral argument when it is granted, even if a party did not request oral argument on the cover of the party's brief. The Committee should review and make recommendations.

The State Bar Court Rules Committee memo is attached as Appendix A.

II. Proposed rule change

The Court Rules Committee of the State Bar has proposed that TRAP 39.7 be revised to make clear that any party filing a brief may participate in oral argument. That Committee proposed the following change to the rule and a new comment:

> **39.7 Request ~~and Waiver~~**
>
> A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument **does not** waive~~s~~ the party's right to argue **if the appellate court sets the case for oral argument.** ~~**But even if a party has waived oral argument, the court may direct the party to appear and argue.**~~
>
> **Comment to Proposed 2022 change: Subdivision 39.7 is amended to provide that if a court of appeals sets a case for oral argument, then all parties to the case that filed a brief shall be entitled to participate in the oral argument, even if one or more parties did not request oral argument on the cover of its brief.**

III. Subcommittee recommendation

The Appellate Rules Subcommittee unanimously recommends adoption of the proposal.

IV. Discussion

The Court Rules Committee memo provides a thorough discussion and a well-reasoned basis for the change. As stated in the attached memo:

> . . . Rule 39.7 provides that a party's ability to participate in oral argument is waived if the party did not request oral argument on the cover of its brief. When a court of appeals sets a case for oral argument, each party has a reasonable expectation that it will be allowed to participate at oral argument—even if that party did not request oral argument the cover of its brief. This expectation is reinforced by a majority of the courts of appeals that have addressed the issue in their Internal Operating Procedures (IOPs) (discussed below).
>
> Elsewhere, this common situation under Rule 39.7 leads to an unexpected and harsh reality. For example, in the Dallas Court of Appeals, a party that does not request oral argument on the cover of its brief will receive a notice from the court setting the case for oral argument. After complying with the instruction in the notice to notify the court of the name of the attorney who will be presenting argument for that party ("no later than the Thursday prior to the date the case is scheduled for argument"), counsel will be contacted by the clerk's office and informed that it is not entitled to participate at oral argument *unless* an appropriate motion to argue is filed and granted before oral argument. The motion is often granted—sometimes just a day before oral argument. Other times the motion is denied or the party may learn at oral argument that it cannot participate.
>
> There is no uniformity for handling this recurring circumstance among the courts of appeals. They generally fall into three categories:
>
> > First, the 4th (San Antonio), 5th (Dallas), and 7th (Amarillo) Courts of Appeals each provide in their IOPs that when a party does not request oral argument on the cover its brief, that party must file a motion with the court to participate in an oral argument set for the case.
> >
> > Next, the 1st (Houston), 6th (Tyler), 8th (El Paso), and 14th (Houston) Courts of Appeals each provide in their IOPs that if the court grants oral argument, any party that filed a brief will be given an opportunity to argue, even if that party did not request oral argument on the cover of its brief. The 2nd (Fort Worth) Court of Appeals likewise rejects the notion of a party not being able to participate at oral argument.
> >
> > Lastly, the IOPs for the 3rd (Austin), 9th (Beaumont), 10th (Waco), 11th (Eastland), 12th (Tyler), and 13th (Corpus Christi-Edinburg) Courts of

> Appeals provide no specific guidance for this situation leaving counsel to guess what to do.
>
> To remove this unfair and unanticipated trap for the unwary practitioner, the proposed change to Rule 39.7 would eliminate the current situation where a party that has not requested oral argument on the cover of its brief is not entitled to participate in oral argument that is set by the court. In at least three courts of appeals, that party must file a motion to participate close to the eve of oral argument. The proposed change to Rule 39.7 would eliminate uncertainty and disparate treatment and make it clear that if a court of appeals grants oral argument, any party that filed a brief will be given an opportunity to argue even if that party did not request oral argument on the cover of its brief. Stated differently in the proposed language: "A party's failure to request oral argument does not waive that party's right to argue, if the court of appeals sets the case for oral argument."

Appendix A at 5-6 (footnotes omitted).

Appendix A

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 39.7

I. Exact Language of Existing Rule

Rule 39. Oral Argument; Decision Without Argument

39.1. Right to Oral Argument

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

39.2. Purpose of Oral Argument

Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from prepared text. Counsel should assume that all members of the court have read the briefs before oral argument and counsel should be prepared to respond to questions. A party should not refer to or comment on matters not involved in or pertaining to what is in the record.

39.3. Time Allowed

The court will set the time that will be allowed for argument. Counsel must complete argument in the time allotted and may continue after the expiration of the allotted time only with permission of the court. Counsel is not required to use all the allotted time. The appellant must be allowed to conclude the argument.

39.4. Number of Counsel

Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.

39.5. Argument by Amicus

With leave of court obtained before the argument and with a party's consent, an amicus curiae may share the allotted time with that party. Otherwise, counsel for amicus may not argue.

39.6. When Only One Party Files a Brief

If counsel for only one party has filed a brief, the court may allow that party to argue.

39.7 Request and Waiver

A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument waives the party's right to argue. But even if a party has waived oral argument, the court may direct the party to appear and argue.

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

Notes and Comments

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

II. Proposed Amendments to Existing Rule 39.7

Rule 39. Oral Argument; Decision Without Argument

39.1. Right to Oral Argument

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

39.2. Purpose of Oral Argument

Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from prepared text. Counsel should assume that all members of the court have read the briefs before oral argument and counsel should be prepared to respond to questions. A party should not refer to or comment on matters not involved in or pertaining to what is in the record.

39.3. Time Allowed

The court will set the time that will be allowed for argument. Counsel must complete argument in the time allotted and may continue after the expiration of the allotted time only with permission of the court. Counsel is not required to use all the allotted time. The appellant must be allowed to conclude the argument.

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Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.

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With leave of court obtained before the argument and with a party's consent, an amicus curiae may share the allotted time with that party. Otherwise, counsel for amicus may not argue.

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A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument **does not** waive~~s~~ the party's right to argue **if the appellate court sets the case for oral argument.** ~~**But even if a party has waived oral argument, the court may direct the party to appear and argue.**~~

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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:

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Notes and Comments

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Comment to Proposed 2022 change: Subdivision 39.7 is amended to provide that if a court of appeals sets a case for oral argument, then all parties to the case that filed a brief shall be entitled to participate in the oral argument, even if one or more parties did not request oral argument on the cover of its brief.

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

The 1997 revisions to the rules of appellate procedure "[were] meant to take the traps out of TRAP." See Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither*, in MATTHEW BENDER C.L.E., PRACTICING UNDER THE NEW RULES OF TRIAL AND APPELLATE PROCEDURE 1-12 (Nov. 1997). Texas Rule of Appellate Procedure 39.7 is part of former Rule 75 and became effective on September 1, 1997. Unfortunately, Rule 39.7 is a vestige of the procedural traps that were sought to be eliminated.

Rule 39.7 describes the process for requesting (and currently waiving) oral argument in a court of appeals. Rule 39.7 provides that a party's ability to participate in oral argument is waived if the party did not request oral argument on the cover of its brief. When a court of appeals sets a case for oral argument, each party has a reasonable expectation that it will be allowed to participate at oral argument—even if that party did not request oral argument the cover of its brief. This expectation is reinforced by a majority of the courts of appeals that have addressed the issue in their Internal Operating Procedures (IOPs) (discussed below).

Elsewhere, this common situation under Rule 39.7 leads to an unexpected and harsh reality. For example, in the Dallas Court of Appeals, a party that does not request oral argument on the cover of its brief will receive a notice from the court setting the case for oral argument. After complying with the instruction in the notice to notify the court of the name of the attorney who will be presenting argument for that party ("no later than the Thursday prior to the date the case is scheduled for argument"), counsel will be contacted by the clerk's office and informed that it is not entitled to participate at oral argument *unless* an appropriate motion to argue is filed and granted before oral argument. The motion is often granted—sometimes just a day before oral argument.[1] Other times the motion is denied or the party may learn at oral argument that it cannot

[1] *See, e.g.*, 05-21-00267-CV (motion to argue granted 13 days before oral argument); 05-21-00367-CV (motion to argue granted 29 days before oral argument); 05-21-00469-CV (motion to argue granted 30 days before oral argument); 05-20-00546-CV (motion to argue granted 19 days before oral argument); 05-19-00224-CV (motion to argue granted 4 days before oral argument); 05-19-00432-CV (motion to argue granted 5 days before oral argument); 05-19-00921-CV (motion to argue granted 1 day before oral argument); 05-18-00052-CV (motion to argue granted 14 days before oral argument; 05-18-00487-CV (motion to argue granted 1 day before oral argument); 05-18-00844-CV (motion to argue granted 30 days before oral argument); 05-18-00876-CV (motion to argue granted 3 days before oral argument); 05-18-01041-CV (motion to argue granted 2 days before oral argument);); 05-18-01371-CV (motion to argue granted 10 days before oral argument); 05-17-00773-CV (motion to argue granted 5 days before oral argument); 05-17-00329-CV (motion to argue granted 30 days before oral argument); 05-17-00849-CV (motion to argue granted 19 days before oral argument); 05-17-01104-CR (motion to argue granted 34 days before oral argument); 05-16-00246-CV (motion to argue granted 6 days before oral argument); 05-16-00784-CV (motion to argue granted 4 days before oral argument); 05-16-01096-CV (motion to argue granted 1 day before oral argument); 05-15-01104-CV (motion to argue granted 30 days before oral argument); 05-14-01424-CV (motion to argue granted 14 days before oral argument).

participate.[2]

There is no uniformity for handling this recurring circumstance among the courts of appeals. They generally fall into three categories:

> First, the 4th (San Antonio), 5th (Dallas), and 7th (Amarillo) Courts of Appeals each provide in their IOPs that when a party does not request oral argument on the cover its brief, that party must file a motion with the court to participate in an oral argument set for the case.
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> Next, the 1st (Houston), 6th (Tyler), 8th (El Paso), and 14th (Houston) Courts of Appeals each provide in their IOPs that if the court grants oral argument, any party that filed a brief will be given an opportunity to argue, even if that party did not request oral argument on the cover of its brief. The 2nd (Fort Worth) Court of Appeals likewise rejects the notion of a party not being able to participate at oral argument.
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> Lastly, the IOPs for the 3rd (Austin), 9th (Beaumont), 10th (Waco), 11th (Eastland), 12th (Tyler), and 13th (Corpus Christi-Edinburg) Courts of Appeals provide no specific guidance for this situation leaving counsel to guess what to do.

To remove this unfair and unanticipated trap for the unwary practitioner, the proposed change to Rule 39.7 would eliminate the current situation where a party that has not requested oral argument on the cover of its brief is not entitled to participate in oral argument that is set by the court. In at least three courts of appeals, that party must file a motion to participate close to the eve of oral argument. The proposed change to Rule 39.7 would eliminate uncertainty and disparate treatment and make it clear that if a court of appeals grants oral argument, any party that filed a brief will be given an opportunity to argue even if that party did not request oral argument on the cover of its brief. Stated differently in the proposed language: "A party's failure to request oral argument does not waive that party's right to argue, if the court of appeals sets the case for oral argument."

The other aspects of Rules 39 and 39.7 are unchanged.

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[2] *See Newsome v. State*, 1991 WL 214461 at *1 (Tex. App.—Dallas 1991, no pet.) ("Appellant's counsel failed to file a timely request for oral argument; appellant has waived oral argument. As oral argument was waived, the Court declines to assign counsel for the purpose of oral argument. Appellant's pro se motion to assign counsel for oral argument is denied.").

Tab H

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **May 25, 2022**

I. Background

In response to HB 7, passed by the 85th Legislature, the Texas Supreme 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 HB 7 Phase II Report recommends a rule standardizing the use of *Anders* briefs[1] in this context and opinion templates for use in parental termination cases. The Court's referral letter asks the Committee to review these HB 7 Task Force recommendations.

II. *Anders* Procedures, Brief Checklist, and Opinion Templates

A. Rule Additions and Brief Checklist

The HB 7 Task Force recognized that there is significant momentum behind the *Anders* practice in the appellate courts. *See, e.g., In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) (per curiam). The Supreme Court gave no indication that it was seeking to eliminate the practice. The Supreme Court's charge directed the Task Force to draft *Anders* brief procedures in appeals of parental termination and child protection cases for inclusion in the Rules of Appellate Procedure. The Task Force was also asked to propose a rule addressing the inconsistency presented by the *In re P.M.* decision relating to the right to counsel through Supreme Court review in parental termination appeals in contrast to analogous procedures in the criminal-law context, in which there is no statutory right to continued representation through the petition stage at the Court of Criminal Appeals. Additional proposed amendments to Rules 28.4 and 53.2 provide a suggested procedure for attorney handling and appellate disposition of frivolous parental termination and child protection appeals.

[1] *Anders v. California*, 386 U.S. 738 (1967).

The HB 7 Task Force proposed the addition of new subparts to Rule 28.4 and 53.2. *See* **Appendix 1**. The Appellate Rules Subcommittee's comments and revisions to the proposed rule additions are shown in track change format.

28.4. ACCELERATED APPEALS IN PARENTAL TERMINATION AND CHILD PROTECTION CASES

(__) *Frivolous Parental Termination and Child Protection*[2] *Appeals.* An ~~appointed~~[3] attorney representing a party appealing from a final order in a parental termination case or child protection case[4] should not move to withdraw based upon a determination that the appeal is frivolous.[5] Instead, the attorney must:

(1) certify that the attorney has determined the appeal to be frivolous ~~because there are no appellate issues arguable on their merits~~;[6]

(2) contemporaneously file a brief that:

(A) demonstrates the attorney has mastered the record and researched the case adequately; and

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[2] In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of a conservator for the child is requested, an indigent parent is entitled by statute to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code §§ 107.013(a), 107.016(3). In termination cases, this right extends to the filing of a petition for review in the Texas Supreme Court. *In the interest of P.M.*, 520 S.W.3d 24 (Tex. 2016) (per curiam). The Appellate Rules Subcommittee expressed concern that the phrase ***"child protection"*** may be overly broad or imprecise, and invites the full Committee's discussion as to the proper terminology for the classes of cases for which an *Anders* briefing procedure should be authorized. Should the procedure be limited to parental termination cases in a suit filed by a governmental entity; or, should it also include appointment of a conservator?

[3] Parents in state-initiated parental-rights termination cases may assert ineffective assistance of counsel claims regardless of whether counsel is court-appointed or privately retained. *See In re D.T.*, 625 S.W.3d 62, 69-73 (Tex. 2021). Therefore, the subcommittee recommends that the reference to an "appointed" attorney be deleted.

[4] *See* note 2 *infra.*

[5] *In re P.M.*, 520 S.W.3d at 26; *In re A.M.,* 495 S.W.3d 573, 582-83 & n.2 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

[6] The Appellate Rules Subcommittee recommends avoiding the addition of further language describing or defining what "frivolous" means in this rule and instead drawing from existing definitions of "frivolous" in rules, statutes, and case law; doing so avoids the potential for disagreement in case law about whether a different definition of "frivolous" applies in this specific context.

(B) explains the basis for the attorney's determination that the appeal is frivolous~~there are no nonfrivolous grounds for appeal~~; and

(C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and

(D) in a parental termination case, addresses all issues included in the Parental Termination Appeal Checklist approved by the Supreme Court;

(3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and

(4) contemporaneously file a copy of the written notice provided to the client~~ in satisfaction of Rule 28.4(d)(3)~~.

(__) *Pro Se Response to Certification of Frivolous Appeal*. A party appealing from a final order in a parental termination case or child protection[7] case whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b). An appellate court may abate the appeal[8] for appointment of a new lawyer to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

(__) *Court of Appeals Disposition of Frivolous Parental Termination and Child Protection*[9] *Appeals*. In addition to the requirements of Rule 47, upon determination that an appeal in a parental termination case or child protection case is frivolous~~ because there are no appellate issues arguable on their merits~~, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:

(1) within five days after the opinion is ~~handed down~~ issued, send the client a copy of the opinion and judgment and a notification that:~~;~~

(A~~2~~) ~~inform the client that~~ the attorney and the court of appeals both determined the appeal is frivolous~~ because there are no appellate issues arguable on their merits~~;

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[7] *See* note 2 *infra*.

[8] The Appellate Rules Subcommittee invites the full Committee's discussion about whether the 180-day timelines for deciding a parental termination appeal under Texas Rule of Judicial Administration 6.2 should be abated under this provision.

[9] *See* note 2 *infra*.

(B~~3~~) ~~advise the client that~~ the attorney cannot recommend that further review of a frivolous appeal;

(C4) the client has ~~notify the client of~~ the right to file a petition for review under Rule 53; and

(~~2~~5) if requested by the client, file a petition for review following the notifications required under subsection (1)~~file a petition for review if actually requested by the client~~.[10]

The HB 7 Task Force proposed the addition of Rule 53.2(__). *See* **Appendix 1**.

53.2. CONTENTS OF PETITION

(__) *Review of Appeal Determined to be Frivolous by the Court of Appeals in Parental Termination Cases and Child Protection*[11] *Cases*. If ~~To the extent appointed~~ counsel filed the certification under Rule 28.4(__)(1), ~~informed the court of appeals that, after thoroughly reviewing the record, counsel concluded that there are no non-frivolous grounds for appeal,~~ and the court of appeals ~~likewise~~ determined the appeal was~~to be~~ frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.

The HB 7 Task Force concluded that amendments to these rules will resolve the *In re P.M.* dilemma by specifying that an appointed appellate lawyer invoking the frivolous-appeal procedure should not actually move to withdraw for that reason, nor should the court of appeals allow the attorney to withdraw solely for that reason. The proposed rule amendments otherwise invoke the traditional *Anders* standard for explaining the basis for the attorney's conclusion that the appeal is frivolous, as well as the procedure for the appellant to file a *pro se* response. Proposed Rule 53.2(__) would allow counsel, after the court of appeals has determined the appeal to be frivolous, to adopt the brief filed in the court of appeals by reference in a petition for review with the Texas Supreme Court in lieu of the contents required by subparts (f)-(j) above.

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[10] *Cf.* Tex. R. App. P. 48.4 ("In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a pro se petition for discretionary review under Rule 68. This notification shall be sent certified mail, return receipt requested, to the defendant at his last known address. The attorney shall also send the court of appeals a letter certifying his compliance with this rule and attaching a copy of the return receipt within the time for filing a motion for rehearing. The court of appeals shall file this letter in its record of the appeal.").

[11] *See* note 2 *infra.* Any limits that are placed on the *Anders* procedure in this context should be reflected in the rule's subheading to avoid confusion about whether the procedures apply to all frivolous appeals or only those pertaining to parental termination.

The Task Force proposed a "Parental Termination Brief Checklist" suitable for publication on appellate court websites to guide the evaluation of parental-termination appeals and, if warranted, *Anders* briefs. *See* **Appendix 2.**

Recommendation: The Appellate Rules Subcommittee recommends approval of the rule additions shown above, as modified and following discussion of the following points. (1) Is the phrase "child protection" too broad or imprecise to describe the types of cases to which an Anders briefing procedure will apply? (2) Should the rule be limited only to appointed counsel? (3) Should the term "frivolous" be further defined? (4) Should the 180-day timeline for deciding parental termination appeals be abated pending appointment of a new attorney to evaluate whether the appeal is frivolous?

The Appellate Rules Subcommittee invites the full Committee's discussion of whether an Anders checklist for parental termination appeals is advisable. The subcommittee notes that at least three of the intermediate Texas appellate courts provide Anders guidelines for criminal cases on their websites.

B. Opinion Templates

At the Supreme Court's direction as the HB 7 Task Force entered into Phase II of its work, the Task Force considered whether the Supreme Court should promote or adopt a template designed to produce shorter Court of Appeals opinions. To that end, a HB 7 subcommittee drafted several templates designed to streamline COA review of appeals. *See* **Appendix 3**.

- Template A is used when the issue on appeal is limited to statutory grounds only.
- Template B is used when the issue on appeal is limited to the best interest of the child.
- Template C is used when the issues on appeal involve both statutory grounds and best interest.

The templates are appropriate only when the complaints on appeal are the legal and/or factual sufficiency of the evidence to support a ground for termination and/or the best interest finding.

Recommendation: The Appellate Rules Subcommittee invites the full Committee's discussion of whether template opinions for legal/factual sufficiency of the evidence are advisable.

Appendix 1

HB 7 Task
Force Phase II
Report

Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

28.4. Accelerated Appeals in Parental Termination and Child Protection Cases

(a) *Application and Definitions.*

(1) Appeals in parental termination and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.

(2) In Rule 28.4:

(A) a "parental termination case" means a suit in which termination of the parent-child relationship is at issue.

(B) a "child protection case" means a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

(b) *Appellate Record.*

(1) Responsibility for Preparation of Reporter's Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c), when the reporter's responsibility to prepare, certify and timely file the reporter's record arises under Rule 35.3(b), the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter's record. The trial court must arrange for a substitute reporter, if necessary.

(2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.

(3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from a parental termination or child protection case.

(c) *Certification by Appointed Counsel and Motion to Show Authority.* A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court's ruling. The court must rule on the motion

to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.

(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 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.

(e) *Remand for New Trial.* If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.

(f) *Frivolous Parental Termination and Child Protection Appeals.* An appointed attorney representing a party appealing from a final order in a parental termination case or child protection case should not move to withdraw based upon a determination that the appeal is frivolous.[11] Instead, the attorney must:

(1) certify that the attorney has determined the appeal to be frivolous because there are no appellate issues arguable on their merits;[12]

(2) contemporaneously file a brief that:

(A) demonstrates the attorney has mastered the record and researched the case adequately;

(B) explains the attorney's determination that there are no nonfrivolous grounds for appeal; and

(C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and

(D) in a parental termination case, addresses all issues included in the Parental Termination Appeal Checklist approved by the Supreme Court;

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[11] *In re P.M.*, 520 S.W.3d 24, 26 (Tex. 2016); *In re A.M.*, 495 S.W.3d 573, 582-83 & n.2 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

[12] *In re D.A.S.*, 973 S.W.2d 296, 297 (Tex. 1998) (citing *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396 (1967)).

(3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and

(4) contemporaneously file a copy of the written notice provided to the client in satisfaction of Rule 28.4(d)(3).

(g) *Pro Se Response to Certification of Frivolous Appeal.* A party appealing from a final order in a parental termination case or child protection case whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b). An appellate court may abate the appeal for appointment of a new lawyer to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

(h) *Court of Appeals Disposition of Frivolous Parental Termination and Child Protection Appeals.* In addition to the requirements of Rule 47, upon determination that an appeal in a parental termination case or child protection case is frivolous because there are no appellate issues arguable on their merits, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:

(1) within five days after the opinion is handed down, send the client a copy of the opinion and judgment;

(2) inform the client that the attorney and the court of appeals both determined the appeal is frivolous because there are no appellate issues arguable on their merits;

(3) advise the client that the attorney cannot recommend that further review of a frivolous appeal;

(4) notify the client of the right to file a petition for review under Rule 53; and

(5) file a petition for review if actually requested by the client. [13]

[13] *Cf.* TEX. R. APP. P. 48.4 ("In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a pro se petition for discretionary review under Rule 68. This notification shall be sent certified mail, return receipt requested, to the defendant at his last known address. The attorney shall also send the court of appeals a letter certifying his compliance with this rule and attaching a copy of the return receipt within the time for filing a motion for rehearing. The court of appeals shall file this letter in its record of the appeal.").

Rule 53. Petition for Review

53.2. Contents of Petition

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

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

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

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

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

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);

(2) the name of the judge who signed the order or judgment appealed from;

(3) the designation of the trial court and the county in which it is located;

(4) the disposition of the case by the trial court;

(5) the parties in the court of appeals;

(6) the district of the court of appeals;

(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;

(8) the citation for the court of appeals' opinion; and

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

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

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

should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

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

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

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

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

(k) *Appendix*.

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

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;

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

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

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

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit

was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.

(l) *Certification by Appointed Counsel.* In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

(m) *Review of Appeal Determined to be Frivolous by the Court of Appeals.* To the extent appointed counsel informed the court of appeals that, after thoroughly reviewing the record, counsel concluded that there are no non-frivolous grounds for appeal, and the court of appeals likewise determined the appeal to be frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.

Appendix 2

HB7 Task Force Phase II Report

PARENTAL TERMINATION BRIEF CHECKLIST

You are strongly encouraged to consult your client, consult trial counsel, and complete and append this checklist to your *Anders* brief to ensure compliance with the appellate rules and to assist the court in conducting its examination of the record. Provide citations to the record and to relevant authority, where appropriate, in the right-hand column to demonstrate compliance by the trial court or parties.

Pretrial	
Service of process	
Any adverse pretrial rulings	
Pretrial effectiveness of counsel	
Did counsel's representation reflect satisfaction of basic obligations to the client, as described in the American Bar Association's *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*?[14]	
Did counsel's representation reflect an appropriate attorney-client relationship?[15]	
Did counsel's representation reflect an appropriate pretrial investigation?[16]	
Did counsel's representation reflect appropriate utilization of informal and formal discovery procedures?[17]	
Did counsel's pretrial representation reflect appropriate preparation?[18]	
Trial	
Timeliness of proceeding under Family Code § 263.401	
Jury selection, if applicable	
Any adverse rulings during trial on objections or motions	
Sufficiency of the evidence, including a recitation of applicable legal elements and evaluation of evidence adduced at trial, including any evidence suggesting that termination would not be in the best interest of the child	
Jury instructions, if applicable	
Effectiveness of counsel at trial	
Did counsel's representation at trial reflect appropriate preparation, including the identification, location, and preparation of all witnesses, as well as adequate cross-examination of adverse witnesses?[19]	
Did counsel object to inadmissible evidence and otherwise take appropriate steps to preserve error?	

[14] AM. BAR ASS'N, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, at 8-11, https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf (basic obligations of parent's attorney) [hereinafter, *ABA Standards*]; *see also* TEX. FAM. CODE § 107.0131(a)(1)(I).

[15] *ABA Standards*, at 11-19 (relationship with the client).

[16] *ABA Standards*, at 19-20 (investigation).

[17] *ABA Standards*, at 20-21 (informal and formal discovery).

[18] *ABA Standards*, at 21-29 (court preparation, hearings).

[19] *ABA Standards*, at 21-29 (court preparation, hearings).

Post-trial	
Any adverse rulings on post-trial motions	
Post-trial effectiveness of counsel	
Was the client actually represented by counsel during the period when a motion for new trial could be filed?	
Did counsel utilize appropriate post-trial procedures, including the utilization of a motion for new trial as necessary to supplement the record and preserve error?[20]	
In the Supreme Court of Texas: Any issues identified by appellant in pro se filings responding to a previous certification that the appeal is frivolous	

[20] *ABA Standards*, at 29-32 (post hearings/appeals).

Appendix 3

HB7 Task
Force Phase II
Report

INSTRUCTIONS FOR USE OF TEMPLATES

The sample opinions are designed to provide guidance and are by no means comprehensive for use in all parental termination appeals.

These sample opinions are for use only when the complaints on appeal are the legal and/or factual sufficiency of the evidence to support a ground(s) for termination and/or the best interest finding.

Use only the footnotes applicable to the issues in the appeal.

Phase II Report, Template A

Fourth Court of Appeals
San Antonio, Texas
MEMORANDUM OPINION

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

Opinion by: _____, Justice

Sitting: _____, Justice
_____, Justice
_____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.[1] Father/Mother does not challenge the sufficiency of the evidence supporting the trial court's/jury's statutory predicate finding(s). Instead, Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that terminating his/her parental rights is in his/her child's/children's best interests. We affirm the trial court's order.

BACKGROUND[2]

[Recitation of basic facts: Department received report, filed petition, child/children removed, statutory ground(s) pleaded by Department . . . .] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENCE REQUIRED, STANDARDS OF REVIEW

The evidentiary standards[3] the Department must meet and the statutory grounds[4] the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal[5] and factual[6] sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. Father's/Mother's Course of Parental Conduct

The trial court/jury found by clear and convincing evidence that [statutory ground(s)]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1) ([list grounds paragraphs *e.g.*, (N), (O)]). On appeal, Father/Mother does not challenge this/these predicate statutory ground/s finding/s.

B. Best Interests of the Child/Children

Instead, Father/Mother challenges the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child/children's best interests. *See id.* § 161.001(b)(2). The non-exclusive *Holley* factors[7] for assessing best interests of children are well known. Applying each standard of review and the applicable factors, we examine the evidence pertaining to the best interests of the child/children.

C. Evidence of Best Interests of the Child/Children

A bench/jury trial was held on [date/s]. The trial court/jury heard testimony from [list of witnesses], and it received recommendations from the children's attorney ad litem. The trial court/jury heard testimony pertaining to the child's/children's best interests, and the trial court/jury

was the "sole judge[] of the credibility of the witnesses and the weight to give their testimony." *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Father/Mother argues that the evidence that parental termination was in the child's/children's best interest is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard testimony that [key evidence of *Holley* factors, (and statutory factors, if appropriate) with cites after each key fact or facts; e.g., desires of the child, present and future emotional and physical needs of the child, present or future emotional and physical danger to the child, child's age and physical and mental vulnerabilities, etc.] *Holley*, 544 S.W.2d at 372 (factors (_), (_), (_)); *see also* TEX. FAM. CODE ANN. § 263.307(b)(_), (_), (_).

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the evidence is legally and factually sufficient to demonstrate that terminating Father's/Mother's parental rights to his/her child/children was in the child/children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley*, 544 S.W.2d at 372.

CONCLUSION

Because (1) Father/Mother does not challenge the trial court's/jury's finding, by clear and convincing evidence, of a predicate ground for termination and (2) the evidence is legally and factually sufficient to support the trial court's/jury's finding that termination of Father's/Mother's parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

[1] To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

[2] Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

[3] Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

[4] Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;
(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
(J) been the major cause of:
  (i) the failure of the child to be enrolled in school as required by the Education Code; or
  (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:

(i) Section 19.02 (murder);
(ii) Section 19.03 (capital murder);
(iii) Section 19.04 (manslaughter);
(iv) Section 21.11 (indecency with a child);
(v) Section 22.01 (assault);
(vi) Section 22.011 (sexual assault);
(vii) Section 22.02 (aggravated assault);
(viii) Section 22.021 (aggravated sexual assault);
(ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
(x) Section 22.041 (abandoning or endangering child);
(xi) Section 25.02 (prohibited sexual conduct);
(xii) Section 43.25 (sexual performance by a child);
(xiii) Section 43.26 (possession or promotion of child pornography);
(xiv) Section 21.02 (continuous sexual abuse of young child or children);
(xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
(xvi) Section 43.05(a)(2) (compelling prostitution);

(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;

(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
(i) the department has made reasonable efforts to return the child to the parent;
(ii) the parent has not regularly visited or maintained significant contact with the child; and
(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
(i) failed to complete a court-ordered substance abuse treatment program; or
(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:
(i) conviction of an offense; and
(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;

(R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;

(T) been convicted of:
(i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
(ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
(iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that

contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or

(iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code.

Id. § 161.001(b)(1).

[5] Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). "[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* If the court "determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true," the evidence is legally sufficient. *Id.*

[6] Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

[7] *Holley* Factors. The Supreme Court of Texas identified the following as factors to consider in determining the best interest of a child in its landmark case *Holley v. Adams*:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the best interest of the child;
(F) the plans for the child by these individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors); *see also* TEX. FAM. CODE ANN. § 263.307 (West 2014) (articulating best-interest factors to "be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment").

Fourth Court of Appeals
San Antonio, Texas

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

BEFORE JUSTICE _____, JUSTICE _____, AND JUSTICE _____

In accordance with this Court's opinion of this date, the trial court's order terminating ___'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____
_____, Justice

created on: October 7, 2018

Phase II Report, Template B

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

Opinion by: _____, Justice

Sitting: _____, Justice
_____, Justice
_____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.[1] Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that his/her course of conduct met a statutory ground for termination. Because (1) the evidence was sufficient to support the trial court's/jury's finding of a predicate ground/predicate grounds for terminating Father's/Mother's parental rights, and (2) Father/Mother does not challenge the finding that terminating his/her parental rights was in the child's/children's best interest, we affirm the trial court's order.

BACKGROUND[2]

[Recitation of basic facts: Department received report, filed petition, child/children removed. Father/Mother reoffended, did not complete service plan, or other ground.] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENTIARY STANDARDS, STATUTORY GROUNDS, STANDARDS OF REVIEW

The evidentiary standards[3] the Department must meet and the statutory grounds[4] the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal[5] and factual[6] sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. First Statutory Ground Finding

The trial court/jury found by clear and convincing evidence that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_).

Father/Mother argues that the evidence to support this finding is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard evidence that . . . .[brief recitation of facts pertaining to and supporting the first statutory ground]

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the trial court/jury could have formed a firm belief or conviction that [first statutory ground] . *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_); [Texas Supreme Court case cite].

B. Second Statutory Ground Finding

[Repeat the same format from first ground, or, state that one ground is sufficient. [cite]]

C. Best Interests of the Child/Children

Father/Mother does not challenge the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child's/children's best interests. *See id.* § 161.001(b)(2).

CONCLUSION

Because (1) the evidence was legally and factually sufficient to support the trial court's/jury's finding by clear and convincing evidence of a predicate ground/predicate grounds for termination and (2) Father/Mother does not challenge the finding that termination of his/her parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

[1] To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

[2] Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

[3] Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

[4] Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;
(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
(J) been the major cause of:
  (i) the failure of the child to be enrolled in school as required by the Education Code; or
  (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
  (i) Section 19.02 (murder);
  (ii) Section 19.03 (capital murder);
  (iii) Section 19.04 (manslaughter);
  (iv) Section 21.11 (indecency with a child);
  (v) Section 22.01 (assault);
  (vi) Section 22.011 (sexual assault);
  (vii) Section 22.02 (aggravated assault);
  (viii) Section 22.021 (aggravated sexual assault);
  (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
  (x) Section 22.041 (abandoning or endangering child);
  (xi) Section 25.02 (prohibited sexual conduct);
  (xii) Section 43.25 (sexual performance by a child);
  (xiii) Section 43.26 (possession or promotion of child pornography);
  (xiv) Section 21.02 (continuous sexual abuse of young child or children);
  (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
  (xvi) Section 43.05(a)(2) (compelling prostitution);
(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
  (i) the department has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the child; and
(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
(i) failed to complete a court-ordered substance abuse treatment program; or
(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:
(i) conviction of an offense; and
(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;

(R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;

(T) been convicted of:
(i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
(ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
(iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
(iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code;

Id. § 161.001(b)(1).

[5] Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). "[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* If the court "'determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,'" the evidence is legally sufficient. *Id.*

[6] Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. and [D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

BEFORE JUSTICE _____, JUSTICE _____, AND JUSTICE _____

In accordance with this Court's opinion of this date, the trial court's order terminating ___'s parental rights to A.B.C. [and D.E.F]. is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____
_____, Justice

Phase II Report, Template C

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

Opinion by: _____, Justice

Sitting: _____, Justice
_____, Justice
_____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.[1] Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that his/her course of conduct met a statutory ground for termination or that terminating his/her parental rights is in his/her child/children's best interests. Because the evidence was legally and factually sufficient to support the trial court's/jury's statutory ground(s) and best interest findings, we affirm the trial court's order.

BACKGROUND[2]

[Recitation of basic facts: Department received report, filed petition, child/children removed. Father/Mother reoffended, did not complete service plan, or other ground.] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENTIARY STANDARDS, STATUTORY GROUNDS, STANDARDS OF REVIEW

The evidentiary standards[3] the Department must meet and the statutory grounds[4] the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal[5] and factual[6] sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. First Statutory Ground Finding

The trial court/jury found by clear and convincing evidence that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_).

Father/Mother argues that the evidence to support this finding is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard evidence that _____ [brief recitation of facts pertaining to and supporting first statutory ground]

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the trial court/jury could have formed a firm belief or conviction that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_); [Texas Supreme Court case cite].

B. Second Statutory Ground Finding

[Repeat the same format from first ground, or, state that one ground is sufficient. [cite]]

C. Best Interests of the Child/Children

Father/Mother also challenges the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child's/children's best interests. *See id.* § 161.001(b)(2). The non-exclusive *Holley* factors[7] for assessing best interests of children are well known. Applying each standard of review and the applicable factors, we examine the evidence pertaining to the best interests of the child/children.

D. Evidence of Best Interests of the Child/Children

A bench/jury trial was held on [date/s]. The trial court/jury heard testimony from [list of witnesses], and it received recommendations from the children's attorney ad litem. The trial court/jury heard testimony pertaining to the child's/children's best interests, and the trial court/jury was the "sole judge[] of the credibility of the witnesses and the weight to give their testimony." *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); In re *H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Father/Mother argues that the evidence that parental termination was in the child's/children's best interest is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard testimony that _____.

[key evidence that implicates *Holley*, (and statutory factors, if appropriate) with cites after each key fact or facts; e.g., desires of the child, present and future emotional and physical needs of the child, present or future emotional and physical danger to the child, child's age and physical and mental vulnerabilities, etc.] *Holley*, 544 S.W.2d at 372 (factors (_), (_), (_)); *see also* TEX. FAM. CODE ANN. § 263.307(b)(_), (_), (_).

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the evidence is legally and factually sufficient to demonstrate that terminating

Father's/Mother's parental rights to his/her child/children was in the child/children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley*, 544 S.W.2d at 372.

CONCLUSION

Because the evidence was legally and factually sufficient to support the trial court's/jury's finding, by clear and convincing evidence, (1) of a predicate ground/predicate grounds for termination and (2) that termination of Father's/Mother's parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

[1] To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

[2] Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

[3] Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

[4] Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
(J) been the major cause of:
  (i) the failure of the child to be enrolled in school as required by the Education Code; or
  (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
  (i) Section 19.02 (murder);
  (ii) Section 19.03 (capital murder);
  (iii) Section 19.04 (manslaughter);
  (iv) Section 21.11 (indecency with a child);
  (v) Section 22.01 (assault);
  (vi) Section 22.011 (sexual assault);
  (vii) Section 22.02 (aggravated assault);
  (viii) Section 22.021 (aggravated sexual assault);
  (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
  (x) Section 22.041 (abandoning or endangering child);
  (xi) Section 25.02 (prohibited sexual conduct);
  (xii) Section 43.25 (sexual performance by a child);
  (xiii) Section 43.26 (possession or promotion of child pornography);
  (xiv) Section 21.02 (continuous sexual abuse of young child or children);
  (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
  (xvi) Section 43.05(a)(2) (compelling prostitution);
(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
  (i) the department has made reasonable efforts to return the child to the parent;
  (ii) the parent has not regularly visited or maintained significant contact with the child; and
  (iii) the parent has demonstrated an inability to provide the child with a safe environment;
(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for

not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
  (i) failed to complete a court-ordered substance abuse treatment program; or
  (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:
  (i) conviction of an offense; and

(R) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition; been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;

(T) been convicted of:
  (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
  (ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
  (iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
  (iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code;

Id. § 161.001(b)(1).

[5] Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). "[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* If the court "'determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,'" the evidence is legally sufficient. *Id.*

[6] Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. "If, in light of the entire record, the disputed evidence that a reasonable

factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

[7] *Holley* Factors. The Supreme Court of Texas identified the following as factors to consider in determining the best interest of a child in its landmark case *Holley v. Adams*:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the best interest of the child;
(F) the plans for the child by these individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors) ; *see also* TEX. FAM. CODE ANN. § 263.307 (West 2014) (articulating best-interest factors to "be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment").

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

BEFORE JUSTICE _____, JUSTICE _____, AND JUSTICE _____

In accordance with this Court's opinion of this date, the trial court's order terminating ___'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____
_____, Justice