SCAC MEETING AGENDA
Friday, June 16th & Saturday, June 17th, 2023
In Person at SBOT – Austin, TX

FRIDAY, June 16th and SATURDAY, June 17th, 2023:

I. WELCOME FROM K. WOOTEN

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 17, 2023 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. DISCOVERY IN FAMILY LAW CASES

167 – 206 Sub-Committee Members:
Robert Meadows – Chair
Hon. Tracy Christopher – Vice Chair
Prof. Alexandra Albright
Manuel Barrelez
Hon. Harvey Brown
Alistair Dawson
Hon. Ana Estevez

A. HB 2850
B. June 14, 2023 Memo from the Discovery Sub-Committee
C. HB 2850 Bill Analysis
D. TRCP 190 – 195A

V. SUSPENSION OF MONEY JUDGMENT PENDING APPEAL

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

E. HB 4381
F. June 14, 2023 Memo from Appellate Rules Sub-Committee

VI. PERMISSIVE APPEALS

Appellate Rules Sub-Committee:
Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Rich Phillips

Scott Stolley
Charles Watson

G. SB 1603
H. June 14, 2023 Memo from Appellate Rules Sub-Committee
I. September 15, 2022 Memo from Appellate Rules Sub-Committee

VII. CONDUCT OF JUDICIAL CANDIDATES

Judicial Administration Sub-Committee Members:
Hon. Bill Boyce– Chair
Kennon Wooten– Vice Chair
Nina Cortell
Hon. Tom Gray
Michael Hatchell
Prof. Lonny Hoffman
Hon. David Peeples
Hon. Maria Salas Mendoza

J. HB 367
K. June 14, 2023 Memo from Judicial Administration Sub-Committee
L. Code of Judicial Conduct
M. Procedural Rules

VIII. JUDICIAL DISCLOSURE AND EDUCATION

Judicial Administration Sub-Committee Members:
Hon. Bill Boyce– Chair
Kennon Wooten– Vice Chair
Nina Cortell
Hon. Tom Gray
Michael Hatchell
Prof. Lonny Hoffman
Hon. David Peeples
Hon. Maria Salas Mendoza

N. June 14, 2023 Memo from Judicial Administration Sub-Committee
    1. HB 2384
    2. Code of Judicial Conduct
    3. Procedural Rules

IX. COURT CONFIDENTIALITY

Legislative Mandate Sub-Committee Members:
Jim Perdue– Chair
Pete Schenkkan – Vice Chair
Prof. Elaine Carlson
Hon. David Evans
Robert Levy

Richard Orsinger

O. SB 372
P. June 14, 2023 Memo from Legislative Mandates Sub-Committee

X. SVP MAGISTRATE REFFERALS

500 - 510 Sub-Committee Members:
Hon. Levi Benton– Chair
Hon. Ana Estevez – Vice Chair
Prof. Elaine Carlson
Hon. Stephen Yelenosky

Q. SB 1179
R. SB 1180
S. June 13, 2023 Memo from Rules 500-510 Sub-Committtte
T. 96-9273 Order of the Supreme Court of Texas
U. Rule for Magistrates in Civil Commitment Litigation

XI. BUSINESS COURT

Business Court Sub-Committee:
Marcy Greer – Chair
Hon. R.H. Wallace – Vice Chair
Rusty Hardin
Hon. Peter Kelly
Hon. Emily Miskel
Chris Porter
Hon. Maria Salas Mendoza
Hon. Cathy Stryker
Hon. John Warren

V. HB 19
W. Formatted version of HB 19

XII. FIFTEENTH COURT OF APPEALS

Business Court Sub-Committee:
Marcy Greer – Chair
Hon. R.H. Wallace – Vice Chair
Rusty Hardin
Hon. Peter Kelly
Hon. Emily Miskel
Chris Porter
Hon. Maria Salas Mendoza
Hon. Cathy Stryker
Hon. John Warren

X. SB 1045

XIII. TEXAS RULE OF EVIDENCE 509

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

Y. May 22, 2023 Report of TRE Sub-Committee
1. Exhibit A
2. Exhibit B
3. Exhibit C

XIV. TEXAS RULE OF EVIDENCE 510

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

Z. June 5, 2023 Report from TRE Sub-Committee
1. Exhibit A
2. Exhibit B

Tab A

1 AN ACT
2 relating to discovery procedures for civil actions brought under
3 the Family Code.
4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
5 SECTION 1. The Family Code is amended by adding Title 6 to
6 read as follows:
7 TITLE 6. CIVIL PROCEDURE
8 CHAPTER 301. DISCOVERY PROCEDURES FOR CIVIL ACTIONS
9 SUBCHAPTER A. GENERAL PROVISIONS
10 Sec. 301.001. APPLICABILITY OF CHAPTER. This chapter
11 applies only to a civil action brought under this code.
12 Sec. 301.002. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE.
13 Notwithstanding Section 22.004, Government Code, this chapter may
14 not be modified or repealed by a rule adopted by the supreme court.
15 Sec. 301.003. DRAFT EXPERT REPORTS AND DISCLOSURES
16 PROTECTED. A draft expert report or draft disclosure required
17 under this chapter is protected from discovery, regardless of the
18 form in which the draft is recorded.
19 SUBCHAPTER B. REQUEST FOR DISCLOSURE
20 Sec. 301.051. REQUEST. Not later than the 30th day before
21 the last day of any applicable discovery period, a party may obtain
22 disclosure from another party of the information or material
23 described by Section 301.052 by serving the other party the
24 following request:

1 "Under Subchapter B, Chapter 301, Family Code, you are
2 requested to disclose, not later than the 30th day after the date of
3 service of this request, the information or material described by
4 Section (state applicable provision of Section 301.052)."
5 Sec. 301.052. CONTENT. (a) A party may request disclosure
6 under Section 301.051 of any or all of the following:
7 (1) the correct names of the parties to the action;
8 (2) the name, address, and telephone number of any
9 potential parties;
10 (3) the legal theories and, in general, the factual
11 bases of the responding party's claims or defenses;
12 (4) the amount and any method of calculating economic
13 damages;
14 (5) the name, address, and telephone number of any
15 person having knowledge of relevant facts and a brief statement of
16 each identified person's connection with the action;
17 (6) for any testifying expert:
18 (A) the expert's name, address, and telephone
19 number;
20 (B) the subject matter on which the expert will
21 testify;
22 (C) the general substance of the expert's mental
23 impressions and opinions and a brief summary of the basis for those
24 impressions and opinions, or if the expert is not retained by,
25 employed by, or otherwise subject to the control of the responding
26 party, documents reflecting that information; and
27 (D) if the expert is retained by, employed by, or

1 otherwise subject to the control of the responding party:
2 (i) all documents, tangible things,
3 reports, models, or data compilations that have been provided to,
4 reviewed by, or prepared by or for the expert in anticipation of the
5 expert's testimony; and
6 (ii) the expert's current resume and
7 biography;
8 (7) any discoverable settlement agreement described
9 by Rule 192.3(g), Texas Rules of Civil Procedure;
10 (8) any discoverable witness settlement described by
11 Rule 192.3(h), Texas Rules of Civil Procedure;
12 (9) in an action alleging physical or mental injury
13 and damages from the occurrence that is the subject of the action:
14 (A) all medical records and bills that are
15 reasonably related to the injuries or damages asserted; or
16 (B) an authorization permitting the disclosure
17 of the information described by Paragraph (A);
18 (10) in an action alleging physical or mental injury
19 and damages from the occurrence that is the subject of the action,
20 all medical records and bills obtained by the responding party
21 through an authorization provided by the requesting party; and
22 (11) the name, address, and telephone number of any
23 person who may be designated as a responsible third party.
24 (b) For purposes of Subsection (a)(3), the responding party
25 is not required to compile all evidence that may be offered at
26 trial.
27 Sec. 301.053. RESPONSE. The responding party must serve a

1 written response on the requesting party not later than the 30th day
2 after the date the requesting party serves a request under Section
3 301.051, except that:
4 (1) a defendant served with a request before the
5 defendant's answer is due is not required to respond until the 50th
6 day after the date the request is served; and
7 (2) a response to a request under Section
8 301.052(a)(6) is governed by Subchapter C.
9 Sec. 301.054. PRODUCTION OF DOCUMENTS AND TANGIBLE ITEMS.
10 The responding party shall provide copies of documents and other
11 tangible items with the response to a request served under Section
12 301.051 unless:
13 (1) the responsive documents are voluminous;
14 (2) the responding party states a reasonable time and
15 place for the production of the documents;
16 (3) the responding party produces the documents at the
17 time and place stated under Subdivision (2) unless otherwise agreed
18 by the parties or ordered by the court; and
19 (4) the responding party provides the requesting party
20 a reasonable opportunity to inspect the documents.
21 Sec. 301.055. WORK PRODUCT OBJECTION PROHIBITED. A party
22 may not assert a work product privilege for or object on the basis
23 of a work product privilege to a request served under Section
24 301.051.
25 Sec. 301.056. CERTAIN RESPONSES NOT ADMISSIBLE. A response
26 to a request under Section 301.052(a)(3) or (4) that has been
27 changed by an amended or supplemental response is not admissible

1 and may not be used for impeachment.

2 SUBCHAPTER C. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES

3 Sec. 301.101. PERMISSIBLE DISCOVERY METHODS. A party may
4 request another party to designate and disclose information
5 concerning testifying expert witnesses only through:

6 (1) a disclosure request served under Section 301.051;
7 or

8 (2) a deposition or report permitted by this
9 subchapter.

10 Sec. 301.102. DEADLINE FOR RESPONSE. Unless otherwise
11 ordered by the court, a responding party shall provide the
12 information requested under Section 301.052(a)(6) not later than
13 the later of:

14 (1) the 30th day after the date the request is served;
15 or

16 (2) either, as applicable:

17 (A) with respect to an expert testifying for a
18 party seeking affirmative relief, the 90th day before the end of the
19 discovery period; or

20 (B) with respect to an expert not described by
21 Paragraph (A), the 60th day before the end of the discovery period.

22 Sec. 301.103. DEPOSITION AVAILABILITY. (a) A party
23 seeking affirmative relief shall make an expert retained by,
24 employed by, or otherwise under the control of the party available
25 for a deposition in accordance with this section.

26 (b) If a party seeking affirmative relief does not provide a
27 report of the party's expert's factual observations, tests,

1 supporting data, calculations, photographs, and opinions when the
2 party designates the expert, the party shall make the expert
3 available for a deposition reasonably promptly after the
4 designation. If the deposition cannot be reasonably concluded more
5 than 15 days before the deadline for designating other experts due
6 to the actions of the party who designated the expert, the court
7 shall extend the deadline for other experts testifying on the same
8 subject.

9 (c) If a party seeking affirmative relief provides a report
10 of the party's expert's factual observations, tests, supporting
11 data, calculations, photographs, and opinions when the party
12 designates the expert, the party is not required to make the expert
13 available for a deposition until reasonably promptly after all
14 other experts have been designated.

15 (d) A party not seeking affirmative relief shall make an
16 expert retained by, employed by, or otherwise under the control of
17 the party available for a deposition reasonably promptly after the
18 party designates the expert and the experts testifying on the same
19 subject for the party seeking affirmative relief have been deposed.

20 Sec. 301.104. CONTENT OF ORAL DEPOSITIONS AND COURT-ORDERED
21 REPORTS. In addition to a disclosure request served under Section
22 301.051, a party may obtain discovery by oral deposition and a
23 report prepared in accordance with Section 301.105 of:

24 (1) the subject matter on which a testifying expert is
25 expected to testify;

26 (2) the expert's mental impressions and opinions;

27 (3) the facts known to the expert, regardless of when

1 the factual information is acquired, that relate to or form the
2 basis of the expert's mental impressions and opinions; and
3 (4) other discoverable items, including documents not
4 produced in response to a disclosure request.
5 Sec. 301.105. COURT-ORDERED REPORTS. If the discoverable
6 factual observations, tests, supporting data, calculations,
7 photographs, or opinions of an expert are not recorded and reduced
8 to tangible form, the court may order that information be reduced to
9 tangible form and produced in addition to the deposition.
10 Sec. 301.106. AMENDMENT AND SUPPLEMENTATION OF DISCOVERY.
11 A party's duty to amend and supplement written discovery regarding
12 a testifying expert is governed by Rule 193.5, Texas Rules of Civil
13 Procedure. If a party retains, employs, or otherwise controls an
14 expert witness, the party must amend or supplement the expert's
15 deposition testimony or written report only with regard to the
16 expert's mental impressions or opinions and the basis for those
17 impressions or opinions.
18 Sec. 301.107. COST OF EXPERT WITNESSES. When a party takes
19 the oral deposition of an expert witness retained by an opposing
20 party, the party retaining the expert shall pay all reasonable fees
21 charged by the expert for time spent in preparing for, giving,
22 reviewing, and correcting the deposition.
23 Sec. 301.108. EXPERT COMMUNICATIONS PROTECTED.
24 Communications between a party's attorney and a testifying expert
25 witness in an action subject to this chapter are protected from
26 discovery regardless of the form of the communications, except to
27 the extent that the communications:

1 (1) relate to compensation for the expert's study or
2 testimony;
3 (2) identify facts or data that the party's attorney
4 provided and that the expert considered in forming the opinions the
5 expert will express; or
6 (3) identify assumptions that the party's attorney
7 provided and that the expert relied on in forming the opinions the
8 expert will express.
9 SECTION 2. Chapter 301, Family Code, as added by this Act,
10 applies only to an action filed on or after the effective date of
11 this Act.
12 SECTION 3. This Act takes effect September 1, 2023.

______________________________ ______________________________

President of the Senate Speaker of the House

I certify that H.B. No. 2850 was passed by the House on May 4, 2023, by the following vote: Yeas 142, Nays 2, 1 present, not voting.

____

Chief Clerk of the House

I certify that H.B. No. 2850 was passed by the Senate on May 24, 2023, by the following vote: Yeas 30, Nays 1.

____

Secretary of the Senate

APPROVED: _____________________

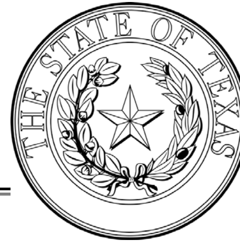
Date

____

Governor

Tab B

Memorandum



To: SCAC

From: Discovery Subcommittee

Date: June 14, 2023

Re: H.B. 2850 referral

Our subcommittee was asked to see what changes needed to be made to the discovery rules in light of H.B. 2850. We asked Richard Orsinger to join us on the committee.

This memo discusses the import of each section of the bill that impacts the rules. The impact of this bill is far from clear. Does it replace only certain sections of the Rules of Civil Procedure or only a select few? The bill analysis indicates it was only to effect Rules 194 and 195 but the language of the bill is not clear.

Section 301.002 Conflicts with the Rules of Procedure

Recommendation: Further study and discussion. This provision provides that "this chapter may not be modified or repealed by the supreme court." Many sections of the discovery rules provide that the trial court or the parties by agreement can modify the rules. Can we keep these potential "modifications" in the rules for cases brought under the Family Code?

Section 301.003 Draft Expert Reports and Disclosures Protected

Recommendation: no changes needed. We have reviewed the rules and believe these provisions are current law.

Section 301.051—301.056 Requests For Disclosures

Recommendation: Although not explicit, it appears that this section is meant to eliminate "required disclosures" under the rule. The Supreme Court has two choices: either comment

under current rules (192.1, 192.2, and 194 and maybe others) that these rules do not apply in proceedings brought under the Family Code or import these rules into the Texas Rules of Civil Procedures. Our committee recommends putting the new provisions in the rules. We have made changes and created a new rule 194A.

Section 301.101-301.108 Discovery Regarding Testifying Expert Witnesses

Recommendation: this section appears to explicitly allow discovery of testifying experts **only** through this section. Therefore, it replaces TRCP 195 and perhaps other sections might be impacted such as 194.3. Again, there are two choices: a comment to the rules referring to the Family Code provisions or the incorporation of the new section into the rules. Our committee recommends putting the new provisions in our rules. We have made changes and created a new rule 195A.

Other General Problems

1.We will need to redefine the discovery period since there are no initial disclosures. We recommend returning to the prior definition of the discovery period for Family cases.

2. The new statute only refers to testifying witnesses and does not cover discovery regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. It is unclear as to the effect of this issue. We recommend further study and discussion.

Tab C

BILL ANALYSIS

C.S.H.B. 2850
By: Smith
Juvenile Justice & Family Issues
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In 2020, the Texas Supreme Court made changes to both Rule 194 and Rule 195 of the Texas Rules of Civil Procedure. These changes relating to requests for disclosures and discoveries regarding testifying expert witnesses have placed an unneeded burden on pro se litigants and attorneys, especially in rural areas. C.S.H.B. 2850 seeks to address these issues by reversing the policy changes made by the supreme court relating to disclosure requirements and discovery regarding testifying expert witnesses.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2850 amends the Family Code to set out discovery procedures that apply to suits under the Family Code.

C.S.H.B. 2850 authorizes a party to request not later than the 30th day before the last day of any applicable discovery period to obtain disclosure from another party of any or all of the following information and material:

- the correct names of the parties to the action;
- the name, address, and telephone number of any potential parties;
- the legal theories and, in general, the factual bases of the responding party's claims or defenses;
- the amount and any method of calculating economic damages;
- the name, address, and telephone number of any person having knowledge of relevant facts and a brief statement of each identified person's connection with the action;
- for any testifying expert:
    - the expert's name, address, and telephone number;
    - the subject matter on which the expert will testify;
    - the general substance of the expert's mental impressions and opinions and a brief summary of the basis for those impressions and opinions, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting that information; and
    - certain other materials if the expert is retained by, employed by, or otherwise subject to the control of the responding party;
- any discoverable settlement agreement;

- any discoverable witness settlement;
- in an action alleging physical or mental injury and damages from the occurrence that is the subject of the action, all medical records and bills that are reasonably related to the injuries or damages asserted or an authorization permitting the disclosure of such information;
- in an action alleging physical or mental injury and damages from the occurrence that is the subject of the action, all medical records and bills obtained by the responding party through an authorization provided by the requesting party; and
- the name, address, and telephone number of any person who may be designated as a responsible third party.

The bill establishes that that the responding party is not required to compile all evidence that may be offered at trial as a part of a such a request for the legal theories and, in general, the factual bases of the responding party's claims or defenses. The bill establishes that a response to a request for legal theories or a request for the amount and any method of calculating economic damages is not admissible if it has been changed by an amended or supplemental response and prohibits its use for impeachment.

C.S.H.B. 2850 requires the responding party to serve a written response on the requesting party for applicable information regarding expert testimony not later than the 30th day after the date the requesting party serves a request, except that a defendant served with a request before the defendant's answer is due is not required to respond until the 50th day after the date the request is served.

C.S.H.B. 2850 requires a responding party, unless otherwise ordered by the court, to provide the requested information regarding any testifying expert not later than the 30th day after the date the request is served or the following date, as applicable:

- with respect to an expert testifying for a party seeking affirmative relief, the 90th day before the end of the discovery period; or
- with respect to any other expert, the 60th day before the end of the discovery period.

C.S.H.B. 2850 requires the responding party to provide a copy of the documents and other tangible things with their response to the request unless all of the following conditions apply:

- the responsive documents are voluminous;
- the response states a reasonable time and place for the production of the documents;
- the responding party produces the documents at the time and place stated in the response unless otherwise agreed by the parties or ordered by the court; and
- the responding party provides the requesting party a reasonable opportunity to inspect the documents.

C.S.H.B. 2850 authorizes a party, in addition to a disclosure request, to obtain discovery by oral deposition and a report containing the following information:

- the subject matter on which a testifying expert is expected to testify;
- the expert's mental impressions and opinions;
- the facts known to the expert, regardless of when the factual information is acquired, that relate to or form the basis of the expert's mental impressions and opinions; and
- other discoverable items, including documents not produced in response to a disclosure request.

C.S.H.B. 2850 requires a party to an applicable suit who is seeking affirmative relief to make an expert retained by, employed by, or otherwise under the control of the party available for a deposition in accordance with the following provisions:

- if the party does not provide a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions when the party designates the expert:
    - the party must make the expert available for a deposition reasonably promptly after the designation; and

- if the deposition cannot be reasonably concluded more than 15 days before the deadline for designating other experts due to the actions of the party who designated the expert, the court must extend the deadline for other experts testifying on the same subject; and
- if the party does provide that required report when the party designates the expert, the party is not required to make the expert available for a deposition until reasonably promptly after all other experts have been designated.

C.S.H.B. 2850 requires a party to an applicable suit who is not seeking affirmative relief to make an expert retained by, employed by, or otherwise under the control of the party available for a deposition reasonably promptly after the party designates the expert and the experts testifying on the same subject for the party seeking affirmative relief have been deposed. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert are not recorded and reduced to tangible form, the court may order that information be reduced to tangible form and produced into a report, in addition to the deposition.

C.S.H.B. 2850 prohibits a party in an applicable suit from asserting a work product privilege or objecting on the basis of a work product privilege to a disclosure request provided under the bill's provisions.

C.S.H.B. 2850 expressly limits the methods a party may use to request that another party designate and disclose information concerning testifying expert witnesses in an applicable suit to a disclosure request or a deposition or report in accordance with the procedures provided by the bill. The bill establishes that a party's duty to amend and supplement written discovery regarding a testifying expert is governed by the applicable provision of the Texas Rules of Civil Procedure establishing that duty for responses to written discovery in general. The bill requires a party who retains, employs, or otherwise controls an expert witness to supplement the expert's deposition testimony or written report only with regard to the expert's mental impressions or opinions and the basis for those impressions or opinions. When a party takes the oral deposition of an expert witness retained by an opposing party, the party retaining the expert is required to pay all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition.

C.S.H.B. 2850 prohibits the modification or repeal of its provisions by a rule adopted by the Texas Supreme Court. The bill applies only to a civil action brought under the Family Code filed on or after the bill's effective date.

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 2850 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute omits a provision from the introduced that prohibited a court from exempting a party to one of the following civil actions from the requirements for initial disclosure under the Texas Rules of Civil Procedure:

- an action brought by or against the Office of the Attorney General in a Title IV-D case;
- an action for a family violence protective order; or
- a child protection suit.

The substitute omits a provision found in the introduced that sets out certain information and statements that a court is prohibited from requiring a party to provide in a suit for dissolution of

a marriage or a suit under the Family Code for spousal or child support. The substitute also omits a provision included in the introduced that prohibits a court from exempting a party to an applicable action from an initial disclosure requirement. Instead, the substitute provides for the content for which a party is authorized to request disclosure.

The substitute includes a provision not in the introduced establishing that certain requests that have been changed by an amended or supplemental response are inadmissible and prohibits their use for impeachment.

Both the introduced and the substitute prohibit a party in an applicable suit from asserting work product privilege, however the substitute additionally prohibits a party from objecting on the basis of a work product privilege.

The provisions in the introduced regarding information provided before a discovery request applied to a civil action under the Family Code for divorce, annulment, to declare a marriage void, or for child or spousal support, whereas all of the substitute's provisions apply to a civil action brought under the Family Code.

Whereas the introduced set deadlines for a responding party to provide certain information relating to testifying and nontestifying experts, the substitute makes these deadlines applicable to a request for information regarding any testifying expert.

The substitute sets a deadline that was not in the introduced for a responding party to respond to the requesting party for a general request for disclosure not later than the 30th day after the date the requesting party serves the request. The substitute includes an exception from the deadline requirement absent from the introduced that a defendant served with a request before the defendant's answer is due is not required to respond until the 50th day after the date the request is served. The substitute requires that the responding party's response be served as a written response, whereas the introduced did not make such a specification.

Tab D

RULE 190. DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required.

Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $250,000 or Less (Level 1)

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

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

(2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $250,000.

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

Commented [TC1]: Should we mention the family code here? Or in a comment

(1) *Discovery period.* For all cases except not governed by the Family Code, aAll discovery must be conducted during the discovery period, which begins when the first initial disclosures are due and continues for 180 days.

For those cases governed by the Family Code, all discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party.

. . .

190.3 Discovery Control Plan - By Rule (Level 2)

(a) Application. Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

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

Commented [TC2]: Same comment

(1) Discovery period. For all cases not governed by the Family Code aAll discovery must be conducted during the discovery period, which begins when the first initial disclosures are due and continues until:

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

~~(B) in other cases,~~ the earlier of

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

(ii) nine months after the first initial disclosures are due.

For those cases governed by the Family Code, all discovery must be conducted during the discovery period, which begins when the suit is filed and continues until thirty days before the date set for trial.

. . .

190.4 Discovery Control Plan - By Order (Level 3)

*(a) Application***.** The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit. The parties may submit an agreed order to the court for its consideration. The court should act on a party's motion or agreed order under this subdivision as promptly as reasonably possible.

(b) Limitations. The discovery control plan ordered by the court may address any issue concerning discovery or the matters listed in Rule 166, and may change any limitation on the time for or amount of discovery set forth in these rules. The discovery limitations of Rule 190.2, if applicable, or otherwise of Rule 190.3 apply unless specifically changed in the discovery control plan ordered by the court. The plan must include:

Commented [TC3]: Does the new statute preclude trial court changes?

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

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

(3) appropriate limits on the amount of discovery; and

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

190.5 Modification of Discovery Control Plan

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

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

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

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

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

. . .

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

191.1 Modification of Procedures

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

Commented [TC4]: Does the new statute change this?

. . .

192.1 Forms of Discovery.

Permissible forms of discovery are:

(a) required disclosures, except in cases governed by the Family Code;

(b)Requests for Disclosures in cases governed by the Family Code

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

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

(ed) interrogatories to a party;

(fe) requests for admission;

(g~~f~~) oral or written depositions; and

(h~~g~~) motions for mental or physical examinations.

192.2 Timing and Sequence of Discovery.

(a) Timing. Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery on another party until after the other party's initial disclosures are due, in cases not governed by the Family Code.

In cases governed by the Family Code, Requests for Disclosure can be served with the Original Petition.

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

192.3 Scope of Discovery.

(a) Generally. In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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

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

(d) Trial witnesses. A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This

paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

(e) Testifying and consulting experts in cases not governed by the Family Code. The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

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

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

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

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

(7) the expert's current resume and bibliography.

(f) for cases governed by the Family Code the scope of discovery for testifying experts is as follows:

~~1)~~ A party may discover the following information regarding a testifying expert:

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

(B)the subject matter on which the expert will testify;

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

Commented [TC5]: Not mentioned in the new statute. Do we keep this part for Family Law cases?

Commented [TC6]: Although not specifically discussed in the statue under "scope of discovery," the statute clearly limits expert discovery in 301.052

(D)if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(1) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert 's testimony; and
(2)the expert 's current resume and biography.

Commented [TC7]: Statute uses biography instead of bibliography

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

(hg) Settlement agreements. A party may obtain discovery of the existence and contents of

any relevant portions of a settlement agreement. Information concerning a settlement

agreement is not by reason of disclosure admissible in evidence at trial.

(ih) Statements of persons with knowledge of relevant facts.

. . .

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

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

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

Commented [TC8]: Can this be done

. . .

RULE 194. REQUIRED DISCLOSURES IN CASES THAT ARE NOT GOVERNED BY THE FAMILY CODE.

194.1 Duty to Disclose; Production.

(a) Duty to Disclose. Except as exempted by Rule 194.2(d) or as otherwise agreed by the parties or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4.

(b) Production. If a party does not produce copies of all responsive documents, electronicallystored information, and tangible things with the response, the response must state a reasonable time and method for the production of these items. The responding party must produce the items at the time and in the method stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

194.2 Initial Disclosures.

(a) Time for Initial Disclosures. A party must make the initial disclosures within 30 days after the filing of the first answer or general appearance unless a different time is set by the parties' agreement or court order. A party that is first served or otherwise joined after the filing of the first answer or general appearance must make the initial disclosures within 30 days after being served or joined, unless a different time is set by the parties' agreement or court order.

(b) Content. Without awaiting a discovery request, a party must provide to the other parties:

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

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

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

(4) the amount and any method of calculating economic damages;

(5) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

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

(7) any indemnity and insuring agreements described in Rule 192.3(f);

(8) any settlement agreements described in Rule 192.3(g);

(9) any witness statements described in Rule 192.3(h);

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

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

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

~~(c) Content in Certain Suits Under the Family Code.~~

~~(1) In a suit for divorce, annulment, or to declare a marriage void, a party must, without awaiting a discovery request, provide to the other party the following, for the past two years or since the date of marriage, whichever is less:~~

~~(A) all deed and lien information on any real property owned and all lease information on any real property leased;~~

~~(B) all statements for any pension plan, retirement plan, profit-sharing plan, employee benefit plan, and individual retirement plan;~~

~~(C) all statements or policies for each current life, casualty, liability, and health insurance policy; and~~

~~(D) all statements pertaining to any account at a financial institution, including banks, savings and loans institutions, credit unions, and brokerage firm~~s.

~~(2) In a suit in which child or spousal support is at issue, a party must, without awaiting a discovery request, provide to the other party:~~

~~(A) information regarding all policies, statements, and the summary description of benefits for any medical and health insurance coverage that is or would be available for the child or the spouse;~~

~~(B) the party's income tax returns for the previous two years or, if no return has been filed, the party's Form W-2, Form 1099, and Schedule K-1 for such years; and~~

~~(C) the party's two most recent payroll check stubs~~.

(d) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure, but a court may order the parties to make particular disclosures and set the time for disclosure:

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

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

(3) a petition for habeas corpus;

~~(4) an action under the Family Code filed by or against the Title IV-D agency in a Title IV-D case;~~

~~(5) a child protection action under Subtitle E, Title 5 of the Family Code;~~

~~(6) a protective order action under Title 4 of the Texas Family Code;~~

(7) other actions involving domestic violence; and

(8) an action on appeal from a justice court.

194.3 Testifying Expert Disclosures.

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

194.4 Pretrial Disclosures.

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

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

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

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

~~(c) Proceedings Exempt from Pretrial Disclosure. An action arising under the Family Code filed by or against the Title IV-D agency in a Title IV-D case is exempt from pretrial disclosure, but a court may order the parties to make particular disclosures and set the time for disclosure.~~

194.5 No Objection or Assertion of Work Product.

No objection or assertion of work product is permitted to a disclosure under this rule.

194.6 Certain Responses Not Admissible.

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

RULE 194A. REQUESTS FOR DISCOSURE IN CASES GOVERNED BY THE FAMILY CODE [did not reformat due to time constraints]

Commented [TC9]: The statue is imported verbatim.

Sec. 301.051. REQUEST. Not later than the 30th day before the last day of any applicable discovery period, a party may obtain disclosure from another party of the information or material described by Section 301.052 by serving the other party the following request:

"Under Subchapter B, Chapter 301, Family Code, you are requested to disclose, not later than the 30th day after the date of service of this request, the information or material described by Section (state applicable provision of Section 301.052)."

Sec. 301.052. CONTENT. (a) A party may request disclosure under Section 301.051 of any or all of the following:

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

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

(3) the legal theories and, in general, the factual bases of the responding party's claims or defenses;

(4) the amount and any method of calculating economic damages;

(5) the name, address, and telephone number of any person having knowledge of relevant facts and a brief statement of each identified person's connection with the action;

(6) for any testifying expert:

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

(B) the subject matter on which the expert will testify;

(C) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for those impressions and opinions, or if

the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting that information; and

(D) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

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

(ii) the expert's current resume and biography;

(7) any discoverable settlement agreement described by Rule 192.3(g), Texas Rules of Civil Procedure;

(8) any discoverable witness settlement described by Rule 192.3(h), Texas Rules of Civil Procedure;

(9) in an action alleging physical or mental injury and damages from the occurrence that is the subject of the action:

(A) all medical records and bills that are reasonably related to the injuries or damages asserted; or

(B) an authorization permitting the disclosure of the information described by Paragraph (A);

(10) in an action alleging physical or mental injury and damages from the occurrence that is the subject of the action, all medical records and bills obtained by the responding party through an authorization provided by the requesting party; and

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

(b) For purposes of Subsection (a)(3), the responding party is not required to compile all evidence that may be offered at trial.

Sec. 301.053. RESPONSE. The responding party must serve a written response on the requesting party not later than the 30th day after the date the requesting party serves a request under Section 301.051, except that:

(1) a defendant served with a request before the defendant's answer is due is not required to respond until the 50th day after the date the request is served; and

(2) a response to a request under Section 301.052(a)(6) is governed by Subchapter C.

Sec. 301.054. PRODUCTION OF DOCUMENTS AND TANGIBLE ITEMS. The responding party shall provide copies of documents and other tangible items with the response to a request served under Section 301.051 unless:

(1) the responsive documents are voluminous;

(2) the responding party states a reasonable time and place for the production of the documents;

(3) the responding party produces the documents at the time and place stated under Subdivision (2) unless otherwise agreed by the parties or ordered by the court; and

(4) the responding party provides the requesting party a reasonable opportunity to inspect the documents.

Sec. 301.055. WORK PRODUCT OBJECTION PROHIBITED. A party may not assert a work product privilege for or object on the basis of a work product privilege to a request served under Section 301.051.

Sec. 301.056. CERTAIN RESPONSES NOT ADMISSIBLE. A response to a request under Section 301.052(a)(3) or (4) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES IN CASES THAT ARE NOT GOVERNED BY THE FAMILY CODE

. . .

RULE 195A DISCOVERY REGARDING TESTIFYING EXPERTS FOR CASES GOVERNED BY THE FAMILY CODE [did not reformat due to time constraints]

Commented [TC10]: The statute is imported verbatim.

Sec. 301.101. PERMISSIBLE DISCOVERY METHODS. A party may request another party to designate and disclose information concerning testifying expert witnesses only through:

(1) a disclosure request served under Section 301.051; or

(2) a deposition or report permitted by this subchapter.

Sec. 301.102. DEADLINE FOR RESPONSE. Unless otherwise ordered by the court, a responding party shall provide the information requested under Section 301.052(a)(6) not later than the later of:

(1) the 30th day after the date the request is served; or

(2) either, as applicable:

(A) with respect to an expert testifying for a party seeking affirmative relief, the 90th day before the end of the discovery period; or

(B) with respect to an expert not described by Paragraph (A), the 60th day before the end of the discovery period.

Sec. 301.103. DEPOSITION AVAILABILITY. (a) A party seeking affirmative relief shall make an expert retained by, employed by, or otherwise under the control of the party available for a deposition in accordance with this section.

(b) If a party seeking affirmative relief does not provide a report of the party's expert's factual observations, tests, supporting data, calculations, photographs, and opinions when the party designates the expert, the party shall make the expert available for a deposition reasonably promptly after the designation. If the deposition cannot be reasonably concluded more than 15 days before the deadline for designating other experts due to the actions of the party who designated the expert, the court shall extend the deadline for other experts testifying on the same subject.

(c) If a party seeking affirmative relief provides a report of the party's expert's factual observations, tests, supporting data, calculations, photographs, and opinions when the party designates the expert, the party is not required to make the expert available for a deposition until reasonably promptly after all other experts have been designated.

(d) A party not seeking affirmative relief shall make an expert retained by, employed by, or otherwise under the control of the party available for a deposition reasonably promptly after the party designates the expert and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

Sec. 301.104. CONTENT OF ORAL DEPOSITIONS AND COURT-ORDERED REPORTS. In addition to a disclosure request served under Section 301.051, a party may obtain discovery by oral deposition and a report prepared in accordance with Section 301.105 of:

(1) the subject matter on which a testifying expert is expected to testify;

(2) the expert's mental impressions and opinions;

(3) the facts known to the expert, regardless of when the factual information is acquired, that relate to or form the basis of the expert's mental impressions and opinions; and

(4) other discoverable items, including documents not produced in response to a disclosure request.

Sec. 301.105. COURT-ORDERED REPORTS. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert are not recorded and reduced to tangible form, the court may order that information be reduced to tangible form and produced in addition to the deposition.

Sec. 301.106. AMENDMENT AND SUPPLEMENTATION OF DISCOVERY. A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5, Texas Rules of Civil Procedure. If a party retains, employs, or otherwise controls an expert witness, the party must amend or supplement the expert's deposition testimony or written report only with regard to the expert's mental impressions or opinions and the basis for those impressions or opinions.

Sec. 301.107. COST OF EXPERT WITNESSES. When a party takes the oral deposition of an expert witness retained by an opposing party, the party retaining the expert shall pay all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition.

Sec. 301.108. EXPERT COMMUNICATIONS PROTECTED. Communications between a party's attorney and a testifying expert witness in an action subject to this chapter are protected from discovery regardless of the form of the communications, except to the extent that the communications:

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

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

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

Tab E

1 AN ACT

2 relating to the suspension of a money judgment pending appeal in a
3 civil action.

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

5 SECTION 1. Chapter 52, Civil Practice and Remedies Code, is
6 amended by adding Section 52.007 to read as follows:

7 Sec. 52.007. ALTERNATIVE SECURITY IN CERTAIN CASES. (a)
8 This section applies only to a judgment debtor with a net worth of
9 less than $10 million.

10 (b) On a showing by the judgment debtor that posting
11 security in the amount required under Section 52.006(a) or (b)
12 would require the judgment debtor to substantially liquidate the
13 judgment debtor's interests in real or personal property necessary
14 to the normal course of the judgment debtor's business, the trial
15 court shall allow the judgment debtor to post alternative security
16 with a value sufficient to secure the judgment.

17 (c) During an appeal, the judgment debtor shall continue to
18 manage, use, and receive earnings from interests in real or
19 personal property in the normal course of business.

20 (d) If an appellate court reduces the amount of the judgment
21 that the trial court used to set security, the judgment debtor is
22 entitled, pending appeal of the judgment to a court of last resort,
23 to a redetermination of the amount of security required to suspend
24 enforcement of a judgment under Section 52.006 or under Rule 24,

1 Texas Rules of Appellate Procedure.

2 SECTION 2. The change in law made by this Act applies only
3 to a civil action commenced on or after the effective date of this
4 Act. A civil action commenced before the effective date of this Act
5 is governed by the law in effect immediately before the effective
6 date of this Act, and that law is continued in effect for that
7 purpose.

8 SECTION 3. This Act takes effect September 1, 2023.

H.B. No. 4381

______________________________ ______________________________

President of the Senate Speaker of the House

I certify that H.B. No. 4381 was passed by the House on May 2, 2023, by the following vote: Yeas 130, Nays 15, 1 present, not voting.

____

Chief Clerk of the House

I certify that H.B. No. 4381 was passed by the Senate on May 17, 2023, by the following vote: Yeas 31, Nays 0.

____

Secretary of the Senate

APPROVED: _____________________

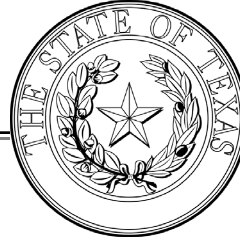
Date

____

Governor

Tab F

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: June 14, 2023

Re: June 3, 2023 Referral Letter relating to HB 4381 and TRAP 24.2 alternate security

I. Matter referred to subcommittee

Suspension of Money Judgment Pending Appeal. Civil Practice and Remedies Code § 52.006 and Texas Rule of Appellate Procedure 24.2(a)(1) govern the amount of a supersedeas bond when the judgment is for money. HB 4381, by adding Civil Procedure and Remedy Code § 52.007, requires a court to allow a judgment debtor worth less than $10 million to post "alternative security with value sufficient to secure the judgment" if the judgment debtor shows that the amount required by CPRC § 52.006 and TRAP 24.2(a)(1) would "require the judgment debtor to substantially liquidate the judgment debtor's interests in real or personal property necessary to normal course of the judgement debtor's business." The Committee should consider whether Texas Rule of Appellate Procedure 24.2 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

II. Relevant materials

Attached is a copy of HB 4381.

III. Subcommittee recommendation

The Subcommittee recommends

- adding a new subsection (e) to TRAP 24.2 reflecting this new alternative security procedure, and
- modifying TRAP 24.1(a)(4) and 24.2(c)(1) to reflect this addition.

IV. Discussion

This statutory alternative security provision is not a modification of a prior mechanism; instead, it is a new mechanism for a particular circumstance. After the statutory 50% net worth/$25 million supersedeas cap was enacted in 2003 and became section 52.006 of the Civil Practice & Remedies Code, the statutory cap language was incorporated in TRAP 24.2. For consistency and ease of reference for attorneys, the subcommittee recommends inclusion of this new statutory mechanism in TRAP 24.2 as new subsection (e):

(e) Alternative Security in Certain Cases.

(1) This subsection (e) applies only to a judgment debtor with a net worth of less than $10 million.
(2) On a showing by the judgment debtor that posting security in the amount required under 24.2(a)(1) would require the judgment debtor to substantially liquidate the judgment debtor's interests in real or personal property necessary to the normal course of the judgment debtor's business, the trial court shall allow the judgment debtor to post alternative security with a value sufficient to secure the judgment.
(3) During an appeal, the judgment debtor shall continue to manage, use, and receive earnings from interests in real or personal property in the normal course of business.
(4) If an appellate court reduces the amount of the judgment that the trial court used to set security, the judgment debtor is entitled, pending appeal of the judgment to a court of last resort, to a redetermination of the amount of security required to suspend enforcement of a judgment under Rule 24.

The subcommittee recommends this modification to TRAP 24.1(a) (4):

(4) providing alternate security under (e) or as ordered by the court.

The subcommittee recommends this modification to the first sentence of TRAP 24.2(c)(1):

(c) Determination of Net Worth.

1 Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit or security under (a)(1)(A) or (e) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained.

The subcommittee invites further discussion and requests input on a related question. There are a number of potential areas for uncertainty and litigation based on potentially unclear wording used in HB 4381. Among those areas identified by the subcommittee are the following: (1) are financial instruments or investments "personal property"; (2) what constitutes a "debtor's business"; (3) the word "shall" can be ambiguous depending on the context because it sometimes means "must" and other times means "may"; (4) what is the meaning of "a value sufficient to secure the judgment"; (5) who makes the "redetermination"; and (6) does the "court shall allow" language require a court order?

For related inquiries, such as TRAP 24.2(c)'s procedure to determine "net worth," the rule does not attempt to set out a comprehensive definition of "net worth" and related concepts such as "liabilities." The more precise meaning of "net worth," which has nuances depending on accounting principles and the circumstances involved in any given case, has been refined in case law applying TRAP 24.2(c). A question for discussion by the SCAC is whether the preferred approach is to incorporate HB 4381's language verbatim and leave potential uncertainties to be resolved through the litigation process; or, instead, to supplement the statutory language in the rule in an effort to provide greater clarity for courts and litigants.

Tab G

S.B. No. 1603

1 AN ACT

2 relating to the decision of a court of appeals not to accept certain
3 interlocutory appeals.

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

5 SECTION 1. Section 51.014, Civil Practice and Remedies
6 Code, is amended by adding Subsections (g) and (h) to read as
7 follows:

8 (g) If a court of appeals does not accept an appeal under
9 Subsection (f), the court shall state in its decision the specific
10 reason for finding that the appeal is not warranted under
11 Subsection (d).

12 (h) The supreme court may review a decision by a court of
13 appeals not to accept an appeal under Subsection (f) de novo. If
14 the supreme court concludes that the requirements to permit an
15 appeal under Subsection (d) are satisfied, the court may direct the
16 court of appeals to accept the appeal.

17 SECTION 2. The change in law made by this Act applies only
18 to an application for interlocutory appeal filed on or after the
19 effective date of this Act.

20 SECTION 3. This Act takes effect September 1, 2023.

________________________________ ________________________________

President of the Senate Speaker of the House

I hereby certify that S.B. No. 1603 passed the Senate on April 12, 2023, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendment on May 11, 2023, by the following vote: Yeas 30, Nays 0.

____

Secretary of the Senate

I hereby certify that S.B. No. 1603 passed the House, with amendment, on May 4, 2023, by the following vote: Yeas 143, Nays 1, one present not voting.

____

Chief Clerk of the House

Approved:

____

Date

____

Governor

Tab H

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: June 14, 2023

Re: June 3, 2023 Referral Letter relating to SB 1603 and TRAP 28.3 permissive appeals

I. Matter referred to subcommittee

Permissive Appeals. On September 15, 2022, the Court asked the Committee to study permissive appeals, and the Committee discussed the issue at its February 17, 2023 meeting. The Court now asks that the Committee supplement its study and propose any recommended amendments in light of SB 1603. SB 1603 adds Civil Practice and Remedies Code § 51.014(g) and (h) to require a court of appeals that does not accept a permissive appeal to "state in its decision the specific reason for finding that the appeal is not warranted" and to expressly allow the Court to review de novo the decision not to accept a permissive appeal and direct the court of appeals to accept the appeal. The Committee should consider whether Texas Rule of Appellate Procedure 28.3 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

II. Relevant materials

Attached are copies of (1) SB 1603 and (2) Appellate Rules Subcommittee memo dated February 14, 2023.

III. Subcommittee recommendation

First, the Subcommittee recommends that the Court adopt the following revised version of proposed TRAP 28.3(*l*), which reflects the statutory language (including de novo review by the Supreme Court):

> (*l*) ***When Petition Denied.*** If the court denies the petition, the court must state in its decision the specific reasons for its finding that an appeal is not warranted. On petition for review, the Supreme Court may review the denial of permission to appeal de novo, and, if the Supreme Court finds that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

Second, based on feedback received after the February 17, 2023 meeting, the Subcommittee also revises its recommendation regarding TRAP 28.2. Apparently, even though the prior version of section 51.014(d) was repealed effective September 1, 2011, there are a few cases that were filed before that date and remain pending. Thus, repeal appears to be premature. But to minimize the confusion caused by the continued presence of TRAP 28.2, the Subcommittee recommends adding an express reference to "cases filed before September 1, 2011" to the heading of TRAP 28.2.

IV. Discussion

A. Prior action for the Subcommittee and the Advisory Committee

At the Court's request, the Subcommittee studied issues related to denial of permission to appeal and recommended adoption of TRAP 28.3(*l*). A copy of the Subcommittee's February 15, 2023, memo is attached. At the February 2023 meeting of the Advisory Committee, the Committee voted 14-12 to recommend adoption of the following proposed TRAP 28.3(*l*):

> ***(l)*** ***When Petition Denied.*** If the petition is denied, the court must specifically identify in its order the reasons, if any, the petition does not satisfy the statutory or procedural requirements for a permissive appeal.

The Committee also voted unanimously to recommend repeal of TRAP 28.2.

B. Revised proposed TRAP 28.3(*l*)

After the February meeting, the Legislature passed SB 1603 and the Governor has signed it. A copy of the enrolled version of SB 1603 is attached.

SB 1603 adds sections 51.014(g) and (h) to the Civil Practice and Remedies Code. New (g) provides that:

> (g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).

New (h) provides that:

> (h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) de novo. If the supreme court concludes that the requirements to permit an appeal under Subsection (d) are satisfied, the court may direct the court of appeals to accept the appeal.

These new subsections apply only to cases filed after September 1, 2023.

Based on the enacted statutory language, the Subcommittee recommends that the Court adopt the revised TRAP 28.3(*l*) above. This version of the proposed rule tracks the language of CPRC 51.014(g). This language is arguably not as specific as the language approved by the Committee in February, but the Subcommittee concluded that it is best for the rule to track the statutory language.

The revised version of the proposed rule also covers the Supreme Court review contemplated by CPRC 51.014(h). Because the Court has already held that it has jurisdiction to grant a petition for review from a denial of permission to appeal, the proposed rule makes clear that review in the Supreme Court would be by petition for review. *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 736 (Tex. 2019).

There are two options in terms of when the change should be effective. Because 51.014(g) and (h) are similar (although not identical) to proposed TRAP 28.3(*l*) previously voted on by the full Committee, the new subsection could take effect on the rule's effective date and apply to all pending cases. Alternatively, the new subsection could track the statute and apply only to cases filed after September 1, 2023, with the addition of the following comment to TRAP 28:

> **Comment to 2023 change:** Rule 28.3(*l*) applies only to cases filed after September 1, 2023.

C. Revised recommendation regarding TRAP 28.2

In the February 14, 2023, memo, the Subcommittee recommended repealing TRAP 28.2 because it applies only to cases filed before September 1, 2011. The Committee voted to recommend repeal to the Court. After that February meeting, a member of the Subcommittee received feedback from a Texas lawyer indicated that there are still cases pending that were filed before September 1, 2011 and to which Rule 28.2 could apply. In light of that feedback, the Subcommittee now recommends that the Court wait to repeal TRAP 28.2.

It does appear, however, that the continued existence of TRAP 28.2 is causing confusion about the proper procedure for permissive interlocutory appeals. There are a number of recent appellate decisions on petitions for permission to appeal that note that the parties failed to obtain the trial court's permission to appeal and apparently tried to appeal based solely on the parties' agreement.

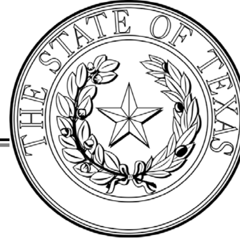
To alleviate this confusion, the Subcommittee recommends that the Court revise the heading of TRAP 28.2 to make clear that it applies ***only*** to cases filed before September 1, 2011:

> **28.2. Agreed Interlocutory Appeals in Civil Cases (applicable only to cases filed before September 1, 2011)**

While the current comments to TRAP 28 state that TRAP 28.2 applies only to cases filed before September 1, 2011, it appears the comment is not providing the intended guidance. The Subcommittee further recommends that the Court revisit possible repeal of TRAP 28.2 in the future.

Tab I

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: February 14, 2023

Re: September 15, 2022 Referral Letter relating to TRAP 28.3

I. Matter referred to subcommittee

Permissive Appeals. The Court requests the Committee to consider whether Rule 28.3 or Rule 47 of the Texas Rules of Appellate Procedure should be amended to require a court of appeals to provide more than the "basic" reasons for its decision to reject a permissive appeal and to draft any recommended amendments. *Industrial Specialists, LLC v. Blanchard Refining Company LLC*, 2022 WL 2082236 (Tex. 2022) may inform the Committee's work.

II. Subcommittee recommendations

The Subcommittee recommends that Rule 28.3 be amended by adding Rule 28.3(*l*):

(l) ***When Petition Denied.*** If the petition is denied, the court must specifically identify [explain] in its order the reasons, if any, the petition does not satisfy the statutory or procedural requirements for a permissive appeal.

The Subcommittee also recommends that the Court consider repealing Rule 28.2, because, as discussed below, it is unlikely that there are going to be any more appeals to which Rule 28.2 would apply.

III. Discussion

A. Statutory history

CPRC 51.014(d) was intended to provide an additional avenue for immediate appeals of certain interlocutory orders where immediate appeal would advance termination of the litigation. In its first iteration (adopted in 2001), section 51.014(d) required that the parties agree to an interlocutory appeal. *See* Acts 2001, 77th Leg., R.S., Ch. 1389, § 1. The Court adopted TRAP 28.2 to provide procedures for agreed interlocutory appeals.

In 2011, section 51.014(d) was amended to remove the requirement that the parties agree to the appeal. *See* Acts 2011, 82nd Leg., ch. 203, § 3.01. At the same time, the Legislature enacted section 51.014(f), which gives the court of appeals discretion to accept an appeal under section 51.014(d). *Id.* The amended statute applies only to cases filed after September 1, 2011. *Id.* To effectuate the amendments, the Court adopted TRAP 28.3 and TRCP 168 to set out the procedures for parties to seek

the trial court's permission to appeal and for parties to ask the court of appeals to accept the appeal. At the time, the Court retained Rule 28.2 for any case filed before September 1, 2011, which would be governed by the former version of section 51.014(d).

Under the current version of section 51.014(d), a trial court may grant permission to appeal an otherwise unappealable interlocutory order if: "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *see also* TEX. R. CIV. P. 168. If the trial court grants permission, then the party seeking to appeal must file a petition for permission to appeal in the court of appeals. TEX. R. APP. P. 28.3.

Additional background about the procedural and statutory requirements for permissive interlocutory appeals can be found in "*Permissive Appeals in the Wake of* Sabre Travel," which is attached to this memo.

B. *Sabre Travel* and *Industrial Specialists*

In *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, the Supreme Court considered intermediate appellate courts' discretion regarding appeals under section 51.014(d). 567 S.W.3d 725, 729 (Tex. 2019). The Court unanimously held that section 51.014(f) gives appellate courts discretion to deny permission to appeal even if the statutory and procedural requirements for appeal are met. *Id.* at 732. But the Court also strongly encouraged appellate courts to accept these appeals when the requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33.

The Supreme Court was again asked to address intermediate appellate courts' discretion in *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, 652 S.W.3d 11 (Tex. 2022). A copy of the opinion is attached to this memo.

The court of appeals had issued a 3-sentence opinion denying the petition for permission to appeal. *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, 634 S.W.3d 760 (Tex. App.—Houston [14th Dist.] 2019) (mem. op.). In the first sentence the court identified the parties. *Id.* In the second, the court set out the statutory requirements for a permissive appeal. *Id.* And in the third, the court stated: "Because we conclude that the petition fails to establish each requirement of Rule 28.3(3)(e)(4), we deny the petition for permissive appeal." *Id.* Both parties petitioned for review in the Supreme Court, arguing that the court of appeals abused its discretion by (1) denying the petition for permission to appeal and (2) failing to adequately explain its reasoning.

There was no majority opinion, but the judgment of the Court was that the court of appeals did not abuse its discretion. Justice Boyd authored a plurality opinion, joined by Justice Devine and Justice Huddle. *Id.* at 13. Justice Blackrock wrote a concurring opinion, joined by Justice Bland. *Id.* at 21. And Justice Busby dissented, joined by Chief Justice Hecht and Justice Young. *Id.* at 23. (Justice Lehrmann did not participate in the decision. *Id.* at 21.)

The Court's holding (in Justice Boyd's plurality and joined by the concurring justices) is:

> We hold that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.

Id. at 21 & n.16.

The parties in *Industrial Specialists* argued that after *Sabre Travel*, the courts of appeals had not followed the Court's encouragement to grant permission to appeal when the statutory requirements are met. They also pointed out that courts of appeals routinely deny permission to appeal in short opinions similar to the one the court of appeals had issued. And some courts issue opinions that simply note that the court has reviewed the petition and denied it.

A statistical analysis in "*Permissive Appeals in the Wake of* Sabre Travel" found that from February 1, 2019 through June 2022, approximately 129 petitions for permission to appeal were filed in courts of appeals. Of those, only about 35 (or about 27%) were granted. Interestingly, the grant rate appears to have declined after *Sabre Travel*. A prior version of the article found that the grant rate on petitions for permission to appeal filed between 2011 and 2016 was about 40%. Courts of appeals appear to have focused more on the comments about discretion in *Sabre Travel* than on the encouragement to grant permission to appeal.

The table below summarizes some of the key positions of and disagreements among the three opinions in *Industrial Specialists*.

Plurality	Concurrence	Dissent
"If the two [statutory] requirements are satisfied, the statute then grants vast--indeed unfettered--discretion to accept or permit the appeal." The court of appeals' opinion was sufficient because it stated that the court considered whether the statutory requirements were met and found that they were not. "We could perhaps impose stricter requirements by amending our rules, but we cannot do so by holding that the statute imposes limits it simply does not impose." An opinion that merely states that the court of appeals considered the petition and denied it might not be sufficient.	"The plurality and dissent spend dozens of thoughtful pages analyzing the appellate courts' discretion to deny permissive appeals. One word would have been enough, and we have already said it. The discretion is 'absolute.'"	Would have held that the courts of appeals' discretion is not "absolute," but must adhere to guiding principles and cannot be exercised arbitrarily or unreasonably. Would have held that the courts of appeals do not have discretion in their analysis of the statutory requirements. Would have held that the court of appeals' opinion was not adequate. Points out that there is a lack of authority about the statutory requirements and about the factors courts of appeals should consider in exercising their discretion to grant or deny permission to appeal.

C. Considerations and Concerns

The Court's referral asks the Committee to consider first *whether* the rules should be amended to require more than "basic" reasons for denial of a petition for permission to appeal.

The Subcommittee discussed several possible issues that weigh against requiring additional detail. There was a concern that an amendment would increase the burdens on already busy courts of appeals. Moreover, the Subcommittee did not want to propose an amendment that would micromanage how the courts of appeals write their orders or that would require a full opinion (especially because the record will not be fully developed at the petition stage). Moreover, the statute expressly grants discretion to the courts of appeals over whether to grant permission to appeal and the Subcommittee does not want to propose an amendment that would interfere with that discretion.

Some members of the Subcommittee also expressed concerned about whether a detailed order (particularly an order explaining why there is not a substantial ground for difference of opinion) could be treated as law of the case and affect further proceedings in the case even though the issues are not

fully briefed. For example, an order saying that there is not a ground for difference of opinion because the law is settled could be interpreted as law of the case on that issue.

On the other hand, as noted in the dissent in *Industrial Specialists*, there is a lack of authority interpreting the statutory and procedural requirements for a permissive interlocutory appeal. Parties and trial courts need additional guidance about how these requirements are being interpreted and applied by the appellate courts. Moreover, as the unanimous Court noted in *Sabre Travel*, permissive interlocutory appeals can aid in the "early, efficient resolution of determinative legal issues" in proper cases. An amended rule could encourage courts of appeals to grant permission to appeal in those cases.

Accordingly, the Subcommittee agreed to recommend a narrow rule that requires some additional explanation of the statutory and procedural requirements without imposing too much on the appellate courts' discretion or requiring a full opinion on the merits.

D. Proposed Rule 28.3(*l*)

The Subcommittee first recommends that any rule about the requirements of an opinion denying permission to appeal should be included in Rule 28.3, rather than in Rule 47. Because these requirements would apply only to permissive interlocutory appeals, putting the requirements in the rule that specifically governs these appeals will make it easier for parties and courts to find them and follow them. Moreover, there was some disagreement among the justices in *Industrial Specialists* about whether Rule 47 even applies to the denial of a petition for permission to appeal. Thus, the most natural place for a rule about what a court of appeals must do in denying permission to appeal is Rule 28.3. Moreover, putting the new rule in Rule 28.3 will make clear that its requirements apply only to petitions for permission to appeal under section 51.014(d) and avoid any potential spillover into orders on other discretionary actions like mandamus petitions or petitions for review.

The Subcommittee next considered what aspects of the court of appeals' analysis should be required in the opinion. The Subcommittee recommends that the rule require specific identification of any statutory or procedural requirement it finds not to be satisfied and an explanation for why it is not satisfied. The dissent in *Industrial Specialists* noted the scarcity of appellate authority interpreting and applying the statutory and procedural requirements. And as noted in "*Permissive Appeals in the Wake of* Sabre Travel," there is inconsistency in decisions that do address the requirements. In particular, it is not clear when there is "substantial ground for difference of opinion." Some courts have held that if it is matter of first impression, this requirement is met. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied). Others have held that if it is a matter of first impression, it is not met. *See Devillier v. Leonards*, No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.). A rule requiring courts of appeals to identify and analyze compliance with the statutory and procedural requirements will help parties and trial courts better understand their meaning and application.

The Subcommittee also considered a provision that would require courts of appeals to explain a decision to exercise their discretion not to grant permission to appeal even when the statutory and

procedural requirements are met. The Subcommittee rejected that provision in light of the concerns discussed in section C, above.

E. HB 1561

After the Supreme Court's referral to the Committee, Representative Smithee filed HB 1561, "An Act relating to the decision of a court of appeals not to accept certain interlocutory appeals." A copy of HB 1561 (as introduced) is attached to this memo. The bill has not yet been assigned to a committee. HB 1561 would add section 51.014(g) and (h):

> (g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).
>
> (h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) under an abuse of discretion standard.

The Subcommittee does not recommend using this formulation of a requirement for the court of appeals to explain its reasoning. Arguably, a court of appeals that issues an opinion similar to the opinion at issue in *Industrial Specialists* would satisfy proposed subsection (g). In stating that the statutory requirements are not met, the court of appeals would state the specific reason for finding that the appeal is not warranted. Moreover, proposed subsection (f) seems superfluous because it is consistent with the decision in *Industrial Specialists* that the Supreme Court has the power to review a decision to deny permission to appeal.

F. TRAP 28.2

In addition to adding Rule 28.3(*l*), the Subcommittee recommends that the Court consider repealing Rule 28.2 As noted above, Rule 28.2 was adopted to provide procedures for agreed interlocutory appeals under the former version of section 51.014(d). The 2011 comments to Rule 28.3 note that "Rule 28.2 applies only to appeals in cases that were filed in the trial court before September 1, 2011." Given that it has been nearly 12 years since September 1, 2011, it is unlikely that there are any remaining cases to which Rule 28.2 could apply. To avoid confusion about the proper procedures under section 51.014(d), the Court should consider repealing Rule 28.2.

PRESENTED AT

32nd Annual Conference on State and Federal Appeals

June 16-17, 2022
Austin, Texas

Permissive Appeals in the Wake of *Sabre Travel*

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I. Introduction

Interlocutory orders cannot be appealed absent specific authority to do so. *E.g.*, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). "Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal." *De La Torre v. AAG Props., Inc.*, No. 14-15-00874-CV, 2015 WL 9308881, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.); *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 140 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In addition to granting authority for interlocutory appeals from an ever-increasing list of specific orders, the Legislature has also granted trial courts the authority to certify other orders for immediate appeal if certain criteria are met. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d).

The current version of section 51.014(d) was enacted in 2011. The prior version permitted an interlocutory appeal only with the parties' agreement. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 1051, § 1, 2005 Tex. Gen. Laws 3512, 3513. The 2011 amendment made section 51.014(d) similar to federal law. *See* Act of May 25, 2011, 82d Leg., ch. 203, § 3.01, 2011 Tex. Gen. Law 758 (current version at Tex. Civ. Prac. & Rem. Code § 51.014(d)); Tex. R. App. P. 28.3 cmt.; *see also* 28. U.S.C. § 1292(b).

This article outlines the requirements of a permissive interlocutory appeal under section 51.014(d) and examines how appellate courts have applied those requirements. While the case authority is still somewhat scant on the exact application of some of the statutory requirements, there are cases that provide some guidance.

A prior version of this article also looked at how often appellate courts granted permission to appeal and looked at common reasons for denial. That article found that statewide, about 40% of petitions for permission to appeal were granted and that many denials were based on the courts' conclusion that one or more statutory requirements were not met. The statistics also showed that grant rates tended to be higher in the smaller appellate courts.[1]

In 2019, the Supreme Court of Texas decided *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 729 (Tex. 2019). While the Supreme Court confirmed that appellate courts have discretion over whether to grant permission to appeal, the Court strongly encouraged courts to grant permission when the statutory requirements are met. Thus, this version of the article looks at some statistics about how appellate courts have responded to *Sabre Travel*. It will also look at some lessons that can be drawn from post-*Sabre Travel* decisions on petitions for permission to appeal.

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[1] That article also noted that the statistical analysis was limited by the fact that the appellate courts do not always track or report how many petitions for permission to appeal were filed or granted.

II. Section 51.014(d) and Related Rules

The amendment to section 51.014(d) was introduced as part of tort reform legislation aimed at lowering the costs of litigation and improving judicial efficiency by allowing appellate courts to address and answer controlling questions of law without the need for the parties to incur the expense of a full trial. *See* House Research Organization, Bill Analysis, H.B. 274, 82d Leg., R.S. (2011).[2]

As amended, section 51.014(d) authorizes a trial court, on the motion of a party or on its own initiative, to permit an appeal from an order that is not otherwise appealable if (1) the order involves a controlling question of law as to which there is a substantial ground for disagreement; and (2) an immediate appeal will materially advance the termination of the litigation. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d). The amendment eliminates the previous requirement that the parties agree to an immediate appeal and allows the trial court to grant an appeal on its own initiative or on the motion of a party. The amendment also imposes a two-tiered approval process in which both the trial court and the appellate court must authorize the appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(f).

Section 51.014(f) specifies the procedure for bringing a permissive interlocutory appeal under section 51.014(d):

> (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

Tex. Civ. Prac. & Rem. Code § 51.014(f).

The Rules of Appellate Procedure were also amended in 2011 to address the new permissive interlocutory appeal procedure. *See* Tex. R. App. P. 28.3 cmt. (noting that the amendment to section 51.014(d) necessitated the addition of Rule 28.3 and the adoption of Rule of Civil Procedure 168). Appellate Rule 28.3 was added to provide in part:

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[2] The amendment was deemed an important component of tort reform legislation aimed at making the Texas civil justice system "more efficient, less expensive, and more accessible." C.S.H.B. 274, Committee Report, Bill Analysis; *see* Tex. Civ. Prac. & Rem. Code § 51.014(d). *See also* Lynne Liberato, Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 App. Advoc. 287, 287 (2013).

> (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
>
> (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

Tex. R. App. P. 28.3(a), (b). In addition, Rule 28.3(e) specifies the required contents for a petition for permission to appeal. Under this rule, the petition must:

> (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
>
> (2) attach a copy of the order from which appeal is sought;
>
> (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
>
> (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Tex. R. App. P. 28.3(e).

Texas Rule of Civil Procedure 168 was also added in 2011 to implement the new permissive-appeal procedure. The rule states:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

Tex. R. Civ. P. 168. Under this rule, the trial court's permission, the controlling legal issue, and the reasons why an immediate appeal will materially advance the litigation must be stated in the order to be appealed. Tex. R. Civ. P. 168.

In sum, following the 2011 amendments to section 51.014, the amendment to Texas Rule of Appellate Procedure 28, and the related adoption of Texas Rule of Civil Procedure 168, the following must occur to perfect a permissive interlocutory appeal:

(1) on a party's motion or on its own initiative, the trial court must issue a written order (or amend a prior order) that includes both an interlocutory order that is not otherwise appealable and a statement of the trial court's permission to appeal this order under Texas Civil Practice and Remedies Code § 51.014(d);

(2) in this statement of permission, the trial court must identify and rule on the controlling question of law as to which there is a substantial ground for difference of opinion and must state why an immediate appeal may materially advance the ultimate termination of the litigation;

(3) after the trial court signs the order granting permission in accordance with Texas Civil Practice and Remedies Code § 51.014(f) and Texas Rule of Appellate Procedure 28.3, the appellant must timely file a petition seeking permission from the court of appeals to appeal; and

(4) the court of appeals must grant the petition for permission to appeal.

See TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f); TEX. R. APP. P. 28.3 & cmt; TEX. R. CIV. P. 168. The procedure for bringing a permissive appeal is discussed in greater detail in the following section.

III. SECTION 51.014(D) IN PRACTICE

A. Step One: The Trial Court's Permission to Appeal

The appeal process under section 51.014(d) begins in the trial court. After an interlocutory order is entered, a party seeking appeal should file a motion with the trial court for permission to appeal. TEX. R. CIV. P. 168. The motion should explain how the order to be appealed involves "a controlling question of law" as to which there is a substantial ground for difference of opinion and why an immediate appeal may "materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. The rules do not set a deadline for a party to ask the trial court to amend an order to grant permission to appeal. *Id.* The trial court may also grant permission to appeal on its own initiative. TEX. R. CIV. P. 168.

If the trial court grants permission to appeal, it must state its permission in the order being appealed, not in a separate order. TEX. R. CIV. P. 168. The court may amend a previously entered interlocutory order to include the required information. TEX. R. CIV. P. 168.

The trial court's order must "identify," but does not have to explain or discuss, the controlling legal question as to which there is a substantial ground for difference of opinion. But the order must explain the basis for the court's finding that the order to be appealed involves a controlling issue of law, and it must state why an immediate appeal may materially advance the ultimate termination of the litigation. *See* TEX. R. CIV. P. 168.

B. Step Two: The Court of Appeals' Permission to Appeal

After the trial court enters the order granting permission to appeal, the appellant must file a petition for permissive appeal in the court of appeals. Prior to the 2011 amendment, when the trial court authorized an agreed permissive appeal, the court of appeals could not reject the appeal unless it lacked jurisdiction. Under the new statute and amended rules, the court of appeals ultimately decides whether an interlocutory appeal may proceed. *See* TEX. R. APP. P. 28.2.

The petition for permission to appeal must be filed with the clerk of the court having jurisdiction over the action. TEX. R. APP. P. 28.3(b). For appeals that would go to either the First or the Fourteenth Court of Appeals, the petition should be filed with the clerk of the First Court during the first half of the calendar year and with the clerk of the Fourteenth Court during the second half of the calendar year. 1st & 14th Tex. App. Loc. R. 1.6. The petitions are then assigned to either the First or the Fourteenth Court on an alternating basis. *Id.*

The time period to file the petition is relatively short: the petition must be filed within 15 days after the order to be appealed is signed, unless the order is amended to add the permission to appeal, in which case the 15-day period runs from the date on which the amended order is signed. TEX. R. APP. P. 28.3(c); . An extension may be granted if the party files the petition within 15 days after the deadline and files a motion complying with Texas Rule of Appellate Procedure 10.5(b).

The petition for permission to appeal must: (1) contain the information required for a notice of appeal Texas Rule of Appellate Procedure 25; (2) attach a copy of the order from which appeal is sought; (3) contain a table of contents, an index of authorities, issues presented, and a statement of facts; and (4) argue "clearly and concisely" why the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion." TEX. R. APP. P. 28.3(e). The petition must also explain "how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e). In the First and Fourteenth Courts, the petition must also state whether a related appeal or original proceedings has previously been filed in or assigned to either the First or the Fourteenth Court. 1st & 14th Tex. App. Loc. R. 6.1(d).

The briefing schedule for a petition for permission is abbreviated, although the court has discretion to grant extensions. A cross-petition may be filed within 10 days after an initial petition is filed. TEX. R. APP. P. 28.3(f). A response to a petition or cross-petition

is due 10 days after the petition or cross-petition is filed. Tex. R. App. P. 28.3(f). A petitioner or cross-petitioner may reply to any matter in a response within 7 days after the day on which the response is filed. Tex. R. App. P. 28.3(f). The petition and any cross-petitions, responses, and replies, must comply with the word-count and page limitations for petitions generally. Tex. R. App. P. 28.3(g). This means a petition and response cannot exceed 4,500 words, and a reply is limited to 2,400 words. *See* Tex. R. App. P. 9.4(i)(2)(D)–(E).

The court will generally rule on a petition without oral argument "no earlier than 10 days after the petition is filed." Tex. R. App. P. 28.3(j). In some cases, the court may order additional jurisdictional briefing from the parties. *See generally, Double Diamond-Del., Inc. v. Walkinshaw*, No. 05-12-01140-CV, 2013 WL 3327523, at *1 (Tex. App.—Dallas June 27, 2013, no pet.) (requesting additional jurisdictional briefing); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 594 (Tex. App.—Dallas 2012, no pet.) (requesting additional briefing under former 51.014(d)).

If the petition for permissive appeal is granted, the notice of appeal is deemed to have been filed under Appellate Rule 26.1(b) on the date the petition is granted, and the appellant is not required to file a separate notice of appeal. Tex. R. App. P. 28.3(k). The case is considered an accelerated appeal with the appellant's brief on the merits due 20 days after filing of the clerk's record. Tex. R. App. P. 28.3(i).

Granting permission to appeal does not automatically stay proceedings in the trial court. Either the parties must agree to a stay or the trial court or court of appeals must order a stay. Tex. Civ. Prac. & Rem. Code § 51.014(e)(1), (2).

IV. Recent Cases Addressing 51.014(d) Appeals

A. What is the scope of the appellate court's discretion?

In 2019, the Supreme Court of Texas issued its decision in *Sabre Travel*, a case in which the court of appeals had denied permission to appeal. 567 S.W.3d at 729. The Supreme Court first held that because the court of appeals had discretion to grant or deny review, the Court could not hold that the court had abused its discretion in denying permission. *Id.* at 732. But at the same time, the Court also expressly encouraged intermediate appellate courts to exercise their discretion to grant permission to appeal when the statutory requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of

> appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33. Finally, the Court held that it had jurisdiction to grant a petition for review even if the court of appeals had denied permission to appeal. *Id.* at 736.

Then, in June 2022, the Supreme Court decided *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, No. 20-0174, ___ S.W.3d ___, 2022 WL 2082236 (Tex. June 10, 2022). The trial court granted permission to appeal, but the court of appeals denied the petition with just a cursory statement that the statutory requirements were not met. *Id.* at *1. Both parties argued in the Supreme Court that the court of appeals had abused its discretion in denying permission to appeal. *Id.* at *3. The Supreme Court disagreed. Justice Boyd authored a plurality opinion (joined by Justice Devine and Justice Huddle), noting that "the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal." *Id.* at *3. Thus, the plurality reasoned that the court of appeals did not (and could not) abuse its discretion in denying permission to appeal. *Id.* at *6. The plurality also rejected the parties' contention that the court of appeals was required to give a more detailed explanation for its decision to deny permission to appeal. *Id.* at *7. It was sufficient that the court stated that it found that the statutory requirements were not met. *Id.*[3]

Justice Blacklock wrote a concurring opinion (joined by Justice Bland), agreeing with the plurality's conclusion that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Id.* at *7–9. Otherwise, Justice Blacklock and Justice Bland concurred in the judgment.

Justice Busby (joined by Chief Justice Hecht and Justice Young) dissented. *Id.* at *9–23. The dissent notes that *Sabre Travel*'s admonition did not appear to have the desired effect of encouraging courts of appeals to grant permission to appeal when the statutory requirements are met. *Id.* The dissenters would have held that the court of appeals abused its discretion by not adequately advising the parties of the basis for its decision. *Id.* They also would have held that the court of appeals abused its discretion in finding that the

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[3] In a footnote, the plurality notes that an opinion that simply states "Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal," may not be sufficient. *Id.* at *6 n.13.

statutory requirements were not met. *Id.* They would have remanded the case for the court of appeals to exercise its discretion in deciding whether to accept an appeal where the statutory requirements are met. *Id.*

Thus, the Supreme Court has held that the courts of appeal have discretion to deny permission to appeal even if the statutory requirements are met. Moreover, the court of appeals does not have to fully explain the basis of its decision to deny permission to appeal. But a mere statement that the court has considered the petition and denies it, may not be sufficient. The dissenters in *Industrial Specialists* recognize that the courts of appeals have discretion to deny permission to appeal even if the statutory requirements are met but did not elaborate on how to review that exercise of that discretion.

B. What is the scope of the appeal?

The Supreme Court addressed the scope of a permissive appeal in *Elephant Insurance Co., LLC v. Kenyon*, 644 S.W.3d 137 (Tex. 2022). The controlling question of law at issue was whether the insurance company owed a duty to its insured "to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request." *Id.* at 140. The court of appeals "constrained its principal analysis to only a portion of the duty inquiry—whether any duty exists at all." *Id.* at 147. The Supreme Court held that this was too narrow. Instead, "when an appellate court—this or any other—accepts a permissive interlocutory appeal, the court should do what the Legislature has authorized and "address the merits of the legal issues certified." *Id.* And this means, just as with any other appeal, that the appellate court can address and resolve "all fairly included subsidiary issues and ancillary issues pertinent to resolving the controlling legal issue." *Id.*

C. How should the statutory requirements be analyzed?

The dissent in *Industrial Specialists* noted that one reason for requiring a more detailed explanation for denying permission to appeal is "to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future case." 2022 WL 2082236, at *10. There has been relatively little development in the case law about what some of the statutory requirements mean or how they should be applied. In particular, there is not much guidance about how to determine whether there is a substantial ground for difference of opinion.

(1) What constitutes a controlling question of law?

The meaning of "question of law" is fairly straightforward. Courts consistently hold that if the trial court's decision turns on fact issues, there is no controlling question of law to support a permissive appeal. *E.g.*, *Progressive Cty. Mut. Ins. Co. v. Wade*, No. 03-21-00415-CV, 2022 WL 406360, at *2 (Tex. App.—Austin Feb. 10, 2022, no pet.) (denying permission to appeal because the legal issue turned on determinations of fact issues); *Estate of Barton*, No. 06-21-00009-CV, 2021 WL 1031540, at *4 (Tex. App.—Texarkana Mar. 18,

2021, no pet.) (determining certified question does not constitute controlling question of law because "the fact-intensive nature of the question before the trial court" resulted in "a controlling fact issue, not a legal one"); *Pueblitz v. Lemen*, No. 13-21-00395-CV, 2021 WL 6060980, at *2 (Tex. App.—Corpus Christi Dec. 21, 2021, no pet.) ("A permissive appeal to a denial of summary judgment on that issue would be inappropriate because whether Lemen used due diligence and brought his suit within reasonable time is a fact question."); *R&T Ellis Excavating, Inc. v. Page*, No. 09-20-00080-CV, 2020 WL 1592977, at *3 (Tex. App.—Beaumont Apr. 2, 2020, pet. denied) (denying permissive appeal because "whether immunity applies depends on the outcome of issues that involve unresolved questions of fact").

But the meaning of "controlling" is still not as clear. The observation that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue about which there is a difference of opinion and the resolution of which disposes of primary issues in the case" still holds true. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, No. No. 14–13–00991–CV, 2015 WL 393407 at *4 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.).

One commentator has suggested a few characteristics of a "controlling question of law:"

- The issue "deeply affects the ongoing process of litigation."
- Resolution of the issue "will considerably shorten the time, effort, and expense of fully litigating the case."
- "[T]he viability of a claim rests upon the court's determination" of the question.

Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747–49 (1998) (cited with approval by *Gulf Coast Asphalt*, 2015 WL 393049 at *4)).

One court found that the identified question of law—whether Texas law or New Mexico law governed the dispute—was not "controlling." *JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *3 (Tex. App.—San Antonio Dec. 29, 2021, no pet.). The court noted that the petitioners did not establish a "material variance" in Texas law and New Mexico law. *Id.* Moreover, the petitioners argued only that the choice of law issues "may" be outcome determinative. *Id.* Ultimately, whether a legal issue is "controlling" is still within the eye of the beholder.

Texas courts have apparently still not resolved whether a permissive appeal may involve more than one controlling question of law. In *Johnson v. Walters*, 14-15-00759-CV, 2015 WL 9957833, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2015, no pet.), the panel denied the petition for permissive appeal because the summary judgment order at issue required the court to consider and decide more than just a "single" controlling question of law. Strictly construing the plain language of the statute, the court found that

the use of the singular, in referring to controlling "issue" of law, required that any permissive appeal only involve a single issue. *See also Armour Pipe Line Co. v. Sandel Energy, Inc.,* No. 14-16-00010-CV, 2016 WL 514229, at *3 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.) (questioning whether the court has jurisdiction to hear more than one controlling question of law). In contrast, other courts have accepted permissive appeals presenting multiple questions. *See Ho v. Johnson*, No. 09-15-00077-CV, 2016 WL 638046, at *1 (Tex. App.—Beaumont Feb. 18, 2016, pet. filed) (accepting permissive appeal of multiple issues in healthcare liability suit); *Landmark Am. Ins. Co. v. Eagle Supply & Manufacturing L.P.*, No. 11-14-00262-CV (accepting permissive appeal of multiple issues arising out of trial court orders denying motions for summary judgment).

(2) When is there a substantial ground for difference of opinion?

Whether there is a substantial ground for difference of opinion is even less clear. The fact that the trial court disagreed with the appellant's position is not sufficient to satisfy the threshold for "substantial ground for difference of opinion." *WC Paradise Cove Marina, LP v. Herman*, No. 03-13-00569-CV, 2013 WL 4816597, at *1 (Tex. App.—Austin Sept. 6, 2013, no pet.) ("The fact that the trial court ruled against petitioners does not mean that the court decided a controlling question of law about which there is substantial ground for a difference of opinion.").

Some courts have held that if the issue is one of first impression, there is a substantial ground for difference of opinion. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied) (granting review of interlocutory permissive appeal and noting that issue presented was matter of first impression). But more recently, in *Devillier v. Leonards*, the court held that the mere fact that the issue was one of first impression was *not* sufficient to show that there was a substantial ground for a difference of opinion. No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.).

And in *Snowden v. Rivkin*, the court held that there was not a substantial ground for difference of opinion because the petitioner's arguments were based on settled law. No. 05-20-00188-CV, 2020 WL 3445812, at *1 (Tex. App.—Dallas June 24, 2020, no pet.). *See also Target Corp. v. Ko*, No. 05-14-00502-CV, 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (holding that because the law was well-settled on the issue, "the fact that the trial court may have erred in not granting summary judgment is not a basis for permissive appeal").

The most obvious scenario for a substantial ground for difference of opinion is a split of authority. But short of that, it is not clear how to demonstrate that this requirement is met. In any event, the petition must attempt to show why the legal issue is open to interpretation or disagreement. *See also Barton*, 2021 WL 1031540, at *4 (denying petition and observing that "nothing in the record suggests that the issue before the trial court presented a novel or difficult legal question or one that presents a conflict among the courts of appeals").

(3) When will an immediate appeal materially advance termination of the litigation?

The requirement of a controlling question of law is tethered to the question of whether an immediate appeal "may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). That is, there must be a "controlling legal question as to which there is a substantial ground for difference of opinion," the immediate appeal of which will "materially advance the ultimate termination of the litigation." *Id.* § 51.014(d)(1)&(2). Noting the interplay between these requirements, courts and commentators have (as noted above) described the latter portion as being satisfied "when resolution of the legal question dramatically affects recovery in a lawsuit.":

> If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling... Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling ... law is doubtful, when controlling ... law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely.... *Generally, a district court will make [a finding that the appeal will facilitate final resolution of the case] when resolution of the legal question dramatically affects recovery in a lawsuit.*

Barton, 2021 WL 1031540, at *4 (quoting *Gulf Coast Asphalt*, 457 S.W.3d at 545 and Renee F. McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747 (1998) (emphasis added)); *ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, No. 05-15-00646-CV, 2015 WL 4554519, at *2 (Tex. App.—Dallas July 29, 2015, no pet.).

Courts have observed, however, that, even if the ultimate appeal is successful, the presence of "other" legal issues counsels against granting a permissive appeal. *See Barton*, 2021 WL 1031540, at *5 (collecting cases); *see Harden Healthcare, LLC v. OLP Wyo. Springs, LLC*, No. 03-20-00275-CV, 2020 WL 6811994, at *1 (Tex. App.—Austin Nov. 20, 2020, no pet.) (collecting cases and denying petition because, even if appeal were successful, issue of liability would remain pending to be tried with other remaining issues); *Trailblazer Health Enters. v. Boxer F2, L.P.*, No. 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.) (mem. op.) (noting that "there are several other issues in the litigation; there is no evidence that the ultimate termination of the litigation would be advanced by allowing this appeal").

The critical inquiry seems to be whether granting the appeal would be dispositive of most or all of the issues in any given case. *See Barton*, 2021 WL 1031540, at *5 ("[A] permissive appeal should provide a means for expedited appellate disposition of focused and potentially dispositive legal questions.") (citation omitted); *see also Triple P.G. Sand Dev., LLC v. Nelson*, No. 14-21-00066-CV, 2022 WL 868868, at *2 n.1 (Tex. App.—Houston [14th Dist.] Mar. 24, 2022, no pet. h.) (granting permission to appeal and noting that "resolution of over seventy percent of the pending claims in the MDL litigation would be a material advancement in the ultimate termination of the litigation.").

As noted, both the trial court's order, *see* TEX. R. CIV. P. 168, and the petition, *see* TEX. R. APP. P. 28.3(e), must explain how an immediate appeal may materially advance the ultimate termination of the litigation—courts will deny petitions where either of these requirements are not satisfied. *E.g.*, *Devillier v. Leonards*, No. 01-20-00223-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020), *reh'g denied* (Dec. 31, 2020) ("Further, the trial court's orders do not explain how the determination of the appeals would materially advance the ultimate termination of the litigation. Nor do appellants explain in their petitions how resolution of the issue would materially advance the ultimate termination of the litigation."); *Feagan v. Wilson*, No. 11-21-00032-CV, 2021 WL 1134804, at *1 (Tex. App.—Eastland Mar. 25, 2021, no pet.) (denying petition because "the trial court's order d[id] not comply with the requirements of Rule 168").

Some courts require the trial court's order to contain more in the way of analysis. In *International Business Machines Corp. v. Lufkin Industries, Inc.*, for example, the trial court's order identified three "novel issues under Texas law," and stated that an immediate appeal "may materially advance the ultimate termination of the litigation because it will foreclose duplicative litigation costs and remove years of litigation expense and effort from this case." No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, pet. dism'd). The Sixth Court dismissed the petition, however, noting the lack of substantive rulings on the issues of law and that the order "d[id] not state why an immediate appeal may materially advance the ultimate termination of the litigation." *Id.* On the other end of the spectrum, some courts require less in the way of explanation. *E.g.*, *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (granting petition where order stated only that immediate appeal may materially advance the ultimate termination of this litigation because remaining damages claims were based on duty to defend).

All things considered, whether an immediate appeal will materially advance the litigation's ultimate resolution may be largely conditioned on the presence of a controlling question of law. Indeed, one dissenting opinion appears to suggest that the presence of a controlling question of law necessarily means that the litigation's ultimate termination would be materially advanced. *Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting) ("The petitions clearly seek a ruling on a controlling question of law as to which there is substantial ground for difference of opinion, so granting the petitions would materially advance the ultimate resolution of the litigation, with substantial savings of litigation and judicial resources.").

V. STATISTICS SINCE *SABRE TRAVEL*

In *Industrial Specialists*, the dissent noted that even after *Sabre Travel*, courts of appeals were still frequently denying permission to appeal. 2022 WL 2082236, at *20. One purposes of this updated article is to look at statistics since *Sabre Travel* to evaluate the impact, if any, of the Supreme Court's encouragement to the appellate courts to grant review when the statutory requirements are met.

The statistical analysis is hampered somewhat by record-keeping differences among the courts of appeals. Some of the courts use the "permissive appeal" event in TAMES, which allows easier searching of cases in which petitions were filed. But most do not. As a result, in preparing this paper, we used a combination of Westlaw and the Texas Courts online database to search for any Texas case, written order, or written opinion citing to section 51.014(d), 51.014(f), or Texas Rule of Appellate Procedure 28.3. We then removed opinions and orders arising out of petitions filed before February 1, 2019 (*i.e.*, before *Sabre Travel* was decided). We also contacted the clerks of the intermediate appellate courts to see if they had better information than we had been able to find; some were able to provide their internal statistics. We are grateful to the clerks for their assistance. Note this statistical analysis is subjected to variances. The first complexity is that while denials tend to be issued through memorandum opinions, grants are issued through orders that do not generally show up on Westlaw. Thus, we generally found grants only for cases in which the court has issued an opinion on the merits. We are aware of some permissive appeals that have been granted but are awaiting a decision. We have included those we are aware of in our statistics. But it is likely that there are other grants that we were unable to find. Further, docket-equalization orders and consolidations may affect these statistics.

A. Petitions for Permissive Appeal Post-*Sabre Travel*

We found 129 petitions for permissive appeal have been filed in Texas courts under amended section 51.014(d) between February 1, 2019, when *Sabre Travel* was decided, and the date of this article. The following chart breaks down the number of petitions addressed by each court of appeals and the outcomes for those petitions.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Houston [1st]	18	15	2[4]	11%
Fort Worth [2nd]	22	20	2	9%
Austin [3rd]	16	8	7[5]	44%
San Antonio [4th]	9	7	2	22%
Dallas [5th]	17	15	2	12%

[4] As of the date of this article, one of the petitions for permission to appeal remains pending.

[5] As of the date of this article, one of the petitions for permission to appeal remains pending.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Texarkana [6th]	1	1	0	0%
Amarillo [7th]	2	1	1	50%
El Paso [8th]	5	1[6]	4	80%
Beaumont [9th]	6	3	3	50%
Waco [10th]	1	1	0	0%
Eastland [11th]	4	3	1	25%
Tyler [12th]	6	2	4	67%
Corpus Christi [13th]	11	6	5	45%
Houston [14th]	11	9	2	18%
Totals	**129**	**92**	**35**	**27%**

B. Lessons from Post-*Sabre Travel* Cases

(1) Limitations of the Statistics

The raw numbers above seem to bear out the concern expressed in the dissent in *Industrial Specialists.* In fact, while the prior version of this paper found that from 2011 through 2016, the statewide grant rate was around 40%. And the analysis above suggests that the grant rate has fallen since *Sabre Travel* to around 26%. But these numbers may not reflect the appellate courts' willingness to grant review for several reasons.

First, a sizable portion of the denials relate to procedural defects, rather than the appellate court's discretion. The prior version of this paper noted that one of the most common reasons for denial was failure to satisfy procedural requirements. This continues to be a common theme in decisions that explain the denial of permission to appeal. For example, in several cases, the appellant simply failed to establish that the trial court granted permission to appeal, *see e.g., Estate of Tenison, v. Brookshire Grocery Co.*, No. 05-21-00455-CV, 2021 WL 3160522, at *1 (Tex. App.—Dallas July 26, 2021, no pet.) (dismissing appeal

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[6] This one was initially granted but was later dismissed as improvidently granted. *El Paso Tool & Die Co., Inc. v. Mendez*, 593 S.W.3d 800, 805–06 (Tex. App.—El Paso 2019, no pet.).

where trial court did not grant permission); *Hudnall v. Smith & Ramirez Restoration, L.L.C.*, No. 08-19-00217-CV, 2019 WL 4668508, at *1 (Tex. App.—El Paso Sept. 25, 2019, no pet.) (dismissing appeal where trial court did not grant permission); *Progressive County Mut. Ins. Co. v. McCormack*, No. 04-21-00001-CV, 2021 WL 186675, at *2 (Tex. App.—San Antonio Jan. 20, 2021, pet. denied) (per curiam) (no permission from trial court).

Other petitions were dismissed where the trial court failed to rule on the ultimate issue to be appealed. *See, e.g., Mid-Continent Cas. Co. v. Harris Cty. Mun. Util. Dist. No. 400*, No. 09-21-00326-CV, 2021 WL 6138974, at *2 (Tex. App.—Beaumont Dec. 30, 2021, no pet.) (denying petition for permissive appeal where "nothing in the record show[ed] the trial court made a substantive ruling on any of the issues presented"); *Scott v. West*, 594 S.W.3d 397, 401 n. 5 (Tex. App.—Fort Worth 2019, pet. denied) (refusing to rule on issues the trial court did not rule on).

The fact that so many denials hinge on procedural failures means that the overall grant rate likely does not accurately reflect the appellate courts' willingness to accept permissive appeals. Removing the procedural default cases from the analysis would increase the grant rate. Accurately removing those denials is not possible because some of the denial orders do not distinguish between procedural issues and other statutory issues (such as a controlling question of law). Moreover, it is not clear (and is, in fact, unlikely) that the courts would have granted permission to appeal in all cases in which the procedural failures were cured. But the appellate courts are likely somewhat more willing to grant permission to appeal than the raw statistics would suggest.

Second, as discussed above, one limitation in searching for cases is that some grants can only be "found" when the court issues its opinion on the merits. Until then, only the parties and the court know about the grant and we have not found a good way to find those orders. So, it is almost certain that there are an additional number of granted petitions that won't be searchable until the court issues its opinion on the merits.

In short, while the statistics have value, it is important to understand these limitations before relying on them to make any conclusions about the likelihood that a particular court will or won't grant permission to appeal.

(2) Other Issues

A few other lessons can be drawn from these post-*Sabre Travel* decisions. First, as noted above, careful attention to exact compliance with the procedural issues is essential. In particular, there appears to still be some confusion about the timing for filing a petition for permission to appeal in the court of appeals. More than one petition was denied because the petitioner filed in the court of appeals before the trial court granted permission to appeal, mistakenly believing that the deadline to seek permission was about to expire. For example, in *Houston Foam Plastics, Inc. v. Anderson*, the trial court had not granted permission to appeal. No. 01-20-00714-CV, 2020 WL 7349090 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020). The petitioner explained that it filed without permission because,

even though it was in the process of seeking permission from the trial court, "it was necessary for appellant to file its petition now because the fifteen-day time period provided under Section 51.014(d) for filing the petition [in the appellate court] runs from the signing of the 'the order to be appealed.'" *Id.* at *1. The court of appeals denied the petition, explaining that the 15-day deadline to file the petition in the court of appeals did not start to run until after the trial court amended the order at issue to grant permission to appeal. *Id.*

Second, the trial court must actually decide the legal issue that is the subject of the appeal; it is not sufficient merely to identify the issue. For example, in *IBM v. Lufkin*, the trial court denied summary judgment and identified three issues of law. No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, no pet.) But the trial court did not actually decide any of the three issues. *Id.* The court of appeals noted that:

> The order sets forth no substantive ruling on any of the three issues identified therein. Nor does the record otherwise indicate the trial court's substantive ruling on each issue. As such, the order serves as nothing more than an attempt to certify three legal questions for our review.

Id. Accordingly, the court denied the petition for permission to appeal. *See also Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00196-CV, 2019 WL 3293699, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (denying permission to appeal because "the trial court's order identified 'the controlling question[ ] of law decided by the [c]ourt' but did not include a substantive ruling on that issue").

Third, if you find that there may be a procedural issue after you have filed a petition for permission to appeal, all may not be lost. In *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, the court of appeals noted that the trial court had not granted permission for an appeal. No. 03-21-00244-CV, 2021 WL 2604053, at *1 (Tex. App.—Austin June 25, 2021, no pet.). But the court noted that "the record reflects that Duncan has sought permission to appeal and we have been informed the trial court has conducted a hearing and rendered an oral ruling on Duncan's motion." *Id.* The court therefore abated the appeal to allow the petitioner to secure a written ruling and to supplement the record on appeal with that written order granting permission to appeal. *Id.* at *2.[7]

Finally, the Supreme Court has rejected a party's attempt to use the theoretical availability of a permissive interlocutory appeal to avoid mandamus relief. In *In re American Airlines, Inc.*, the real party in interest argued that the relator had an adequate remedy by appeal because it could have sought to appeal under section 51.014(d). 634 S.W.3d 38, 43 (Tex. 2021). The Supreme Court found that the relator did not have an adequate remedy by appeal because the requirements of section 51.014(d) were not met. *Id.* The order at

[7] After the record was supplemented, the court granted permission to appeal. *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, No. 03-21-00244-CV, 2021 WL 3118420, at *2 (Tex. App.—Austin July 22, 2021, no pet.)

issue allowed an apex deposition. So, it is not hard to see why that order would not satisfy the requirements. The Supreme Court's opinion seems to leave open the possibility that the availability of a permissive appeal could preclude mandamus relief. But since the Court has now repeatedly held that appellate courts have discretion to deny permissive appeals even if the statutory requirements are met, it seems unlikely that the Court would hold that the mere possibility of a permissive appeal would preclude mandamus relief.

VI. CONCLUSION

Just over 10 years after section 51.014(d) was adopted, courts are still wrestling with how it should be applied. The fractured opinion in *Industrial Specialties* illustrates these difficulties. The statute grants appellate courts discretion in whether to accept permissive appeals, but does not set the parameters of that discretion. It appears that the Supreme Court's encouragement to intermediate appellate courts to accept these appeals has not had the desired effect. But because of the number of denials based on procedural defects, the raw numbers likely do not tell the whole story.

Because opinions denying review have tended to be fairly short, the case law has not really developed about what the statutory requirements mean or how they should be applied. This is particularly true for the requirement that there be a substantial ground for difference of opinion and the requirement that an immediate appeal may materially advance the termination of the litigation. Nor has there been any development of the factors that might inform the decision to grant review when all of the factors are met.

The main lessons from the first decade of permissive interlocutory appeals are: (1) follow the procedures in the statute and the rules to the letter; (2) make sure that the trial court expressly decides the controlling issues of law; and (3) in explaining how the statutory requirements are met, be sure to give the court of appeals a good reason to exercise its discretion to grant review. That is, a petition for permission to appeal needs to look a bit like a petition for review; it will need to convince the court of appeals that an immediate appeal is a good use of judicial resources. Merely showing compliance with the statutory requirements will not be enough.

INDUSTRIAL SPECIALISTS, LLC, Petitioner,

v.

BLANCHARD REFINING COMPANY LLC and Marathon Petroleum Company LP, Respondents

No. 20-0174

Supreme Court of Texas.

Argued February 1, 2022

OPINION DELIVERED: June 10, 2022

Background: Refinery owner brought action against turnaround-services company to recover under indemnity provision of the parties' contract, which demand stemmed from refinery owner's settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel. The 212th District Court, Galveston County, Patricia Grady, J., denied the parties' competing summary-judgment motions but granted refinery owner's unopposed motion to pursue a permissive interlocutory appeal. In a one-page memorandum decision, the Houston Court of Appeals, First District, 634 S.W.3d 760, denied refinery owner's petition for permissive interlocutory appeal. Refinery owner petitioned for review.

Holdings: The Supreme Court, Boyd, J., held that:

(1) the Court of Appeals did not abuse its discretion by denying the petition for permissive appeal, and

(2) the Court of Appeals' memorandum decision, although brief, sufficiently explained its reasons for denying the petition.

Affirmed.

Blacklock, J., concurred in part, concurred in the judgment, and filed opinion, which Bland, J., joined.

Busby, dissented and filed opinion, which Hecht, C.J., and Young, J., joined.

1. Appeal and Error ⚷366

Court of Appeals did not abuse its discretion by denying refinery owner's petition for permissive interlocutory appeal of trial court's denial of summary judgment on its claim that turnaround-services company was contractually required to indemnify it for settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel; despite argument that the two statutory requirements were satisfied, i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation, nothing in the interlocutory-appeal statute or in the rules implementing that statute provided that the courts had to permit and accept an interlocutory appeal when the requirements were met. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4).

2. Appeal and Error ⚷366

Interlocutory-appeal statute permits appellate courts to accept a permissive interlocutory appeal when the two statutory requirements—i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation—are met, but it grants the courts discretion to reject the appeal even when the requirements are met. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

3. Courts ⚷89

A trial court's conclusion that the statutory requirements for an interlocutory appeal are met has no bearing on a Court of Appeals' subsequent evaluation of the requirements. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

4. Appeal and Error ⚷4785

Court of Appeals' memorandum decision sufficiently explained its reasons for denying refinery owner's petition for permissive interlocutory appeal of trial court's denial of summary judgment on its claim that turnaround-services company was contractually required to indemnify it for settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel; although brief, the decision stated that the statutory requirements i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation, were not met, and that sufficed. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4), 47.1, 47.4.

5. Appeal and Error ⚷4785

Opinions issued solely to deny permissive interlocutory appeals must be memorandum opinions. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4), 47.4.

6. Appeal and Error ⚷4117

The Supreme Court may review an interlocutory appeal that the trial court has permitted even when the Court of Appeals has refused to hear it. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

7. Appeal and Error ⚷4117

The Supreme Court has broad discretion in choosing whether to exercise jurisdiction over a permissive interlocutory appeal. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

On Petition for Review from the Court of Appeals for the First District of Texas

Matthew H. Frederick, Lehotsky Keller LLP, Austin, Scott Keller, Lehotsky Keller LLP, Dallas, for Amici Curiae The American Petroleum Institute, The National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, The Texas Oil & Gas Association.

Dylan B. Russell, Hoover Slovacek LLP, Houston, for Amici Curiae Mosaic Baybrook One, L.P., Mosaic Baybrook Two, L.P.

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Joel Zane Montgomery, Jonathan Bruce Smith, Zachary Alex Rodriguez, Amy Douthitt Maddux, Shipley Snell Montgomery LLP, Houston, for Respondents.

Justice Boyd announced the Court's judgment and delivered an opinion in which Justice Devine and Justice Huddle joined.

After denying the parties' competing summary-judgment motions, the trial court entered an order permitting an interlocutory appeal. The court of appeals, however, refused the application for permissive appeal, stating that the application failed to establish the statutory requirements. Both parties contend the court of appeals abused its discretion, both by refusing the permissive appeal and by failing to adequately explain its reasons. We disagree with both arguments and affirm.

I.

Background

Blanchard Refining Company[1] hired Industrial Specialists to provide turnaround services at Blanchard's refinery in Texas City. Three years into the five-year contract, a fire occurred in a regenerator vessel, injuring numerous Industrial Specialists employees and one employee of another contractor. The employees sued Blanchard and all of its other contractors, but they did not sue Industrial Specialists.[2] Blanchard demanded a defense and indemnity from Industrial Specialists pursuant to an indemnity provision in the parties' contract. Industrial Specialists rejected the demand.

Blanchard and the other contractors ultimately settled all the employees' claims for $104 million. Blanchard paid $86 million of that total. Blanchard then filed this suit against Industrial Specialists, seeking to enforce the indemnity provision. Blanchard and Industrial Specialists filed competing summary-judgment motions. The trial court denied both without explaining its reasons but granted Industrial Specialists' unopposed motion to pursue a permissive interlocutory appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code.

The court of appeals denied Industrial Specialists' petition for permissive appeal. 634 S.W.3d 760, 760 (Tex. App.—Houston [1st Dist.] 2019). In a one-page memorandum opinion, the court concluded that "the petition fail[ed] to establish each requirement" for a permissive appeal. *Id.* (citing TEX. R. APP. P. 28.3(e)(4)). We granted Industrial Specialists' petition for review.

II.

Permissive Interlocutory Appeals

Since at least as early as the federal Judiciary Act of 1789, American law has generally permitted appeals only from "final decrees and judgments."[3] We have honored this final-judgment rule in Texas, recognizing that it promotes "[c]onsistency, finality, and judicial economy" and ensures that courts decide cases expediently and on a full record. *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 730 (Tex. 2019).

1. Blanchard is a wholly owned subsidiary of Blanchard Holdings Company, LLC, which is owned by Marathon Petroleum Company. Blanchard and Marathon are both parties and respondents in this case. We will refer to them collectively as Blanchard.

2. The Workers' Compensation Act barred the Industrial Specialists employees from suing their employer. *See* TEX. LABOR CODE § 408.001(a). The other contractor's employee apparently elected not to sue Industrial Specialists.

3. *See* Judiciary Act of 1789, ch. XX, § 22, 1 Stat. 73, 84 (codified at 28 U.S.C. § 1291 (2012)) (permitting circuit courts to review "final decrees and judgments" from district courts).

The final-judgment rule, however, has its exceptions.[4] The Texas Legislature has created numerous exceptions through the years, first allowing interlocutory appeals in a few narrow circumstances as early as 1892.[5] In 1985, the legislature enacted section 51.014(a) of the Texas Civil Practice and Remedies Code, gathering into one subsection the four types of then-existing interlocutory appeals by right.[6] By 2001, those original four had doubled to eight, prompting then-JUSTICE HECHT to observe a "recent and extensive legislative expansion of the jurisdiction of the courts of appeals over a wider variety of interlocutory orders." *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 350 (Tex. 2001) (HECHT, J., dissenting) (citing TEX. CIV. PRAC. & REM. CODE §§ 15.003, 51.014(a)(7), (8)).

That same year, however, we continued to characterize the final-judgment rule as "the general rule, with a few mostly statutory exceptions." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). But the legislature continued to create additional exceptions, expanding section 51.014(a) by 2019 to permit appeals from fourteen different types of interlocutory orders. We acknowledged the shifting legal landscape that year, observing that the practice of "[l]imiting appeals to final judgments can no longer be said to be the general rule." *Dall. Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019). In 2021, the legislature amended section 51.014(a) to authorize interlocutory appeals in three additional circumstances, increasing the total to seventeen.[7]

In addition to authorizing appeals from specific types of interlocutory orders, the legislature added a broader exception in 2011, authorizing permissive appeals from interlocutory orders that are "not otherwise appealable." TEX. CIV. PRAC. & REM. CODE § 51.014(d). Subsection (d) says trial courts "may" permit an appeal from an interlocutory order that is not otherwise appealable if (1) the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* And subsection (f) provides that, if a trial court permits such an appeal, the court of appeals "may" accept the appeal if the appealing party timely files "an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d)." *Id.* § 51.014(f).

We enacted two new procedural rules in 2011 to accommodate this new permissive-appeal exception. First, we enacted rule 168 of the Texas Rules of Civil Procedure, requiring that trial-court orders authorizing permissive appeals "identify the con-

4. For example, article V, section 3-b of the Texas Constitution, adopted in 1940, authorizes the legislature to permit appeals directly to this Court from "an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." TEX. CONST. art. V, § 3-b.

5. *See* Elizabeth L. Thompson, *Interlocutory Appeals in Texas: A History*, 48 ST. MARY'S L.J. 65, 69–70 (2016).

6. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3280.

7. *See* Act effective Sept. 1, 2021, 87th Leg., R.S., ch. 167, § 1, 2021 Tex. Gen. Laws ——, ——; Act effective June 14, 2021, 87th Leg., R.S., ch. 528, § 1, 2021 Tex. Gen. Laws ——, ——; Act effective June 16, 2021, 87th Leg., R.S., ch. 813, § 1, 2021 Tex. Gen. Laws ——, —— (collectively codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(15)).

trolling question of law as to which there is a substantial ground for difference of opinion" and "state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. We then enacted rule 28.3 of the Texas Rules of Appellate Procedure, addressing the procedural requirements for perfecting a permissive appeal in the courts of appeals. *See* TEX. R. APP. P. 28.3. Subsection (e) of rule 28.3 requires that a petition for permission to appeal must "argue clearly and concisely why the order to be appealed" meets those two requirements. TEX. R. APP. P. 28.3(e)(4).

In this case, the trial court granted Industrial Specialists' unopposed motion for permission to appeal, and the parties do not dispute that the court's order complied with rule 168. The court of appeals, however, declined to accept the appeal and issued a memorandum opinion stating its conclusion "that the petition fails to establish each requirement of Rule 28.3[ ](e)(4)." 634 S.W.3d at 760. In this Court, Industrial Specialists argues (and Blanchard agrees) that the court of appeals abused its discretion by refusing to accept the appeal and by failing to adequately explain its reasons for that decision. Based on the plain language of section 51.014(f) and the applicable rules, we disagree.

A. Discretion to Refuse a Permissive Appeal

[1] As explained, section 51.014(d) provides that a trial court "*may* . . . permit an appeal from an order that is not otherwise appealable *if*" the two requirements are met, and section 51.014(f) provides that a court of appeals "*may* accept" such an appeal "*if* the appealing party" timely files an application "explaining why an appeal is warranted under Subsection (d)." TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (emphases added). Similarly, the rules this Court enacted to implement subsections (d) and (f) provide that "a trial court *may* permit" a permissive appeal, TEX. R. CIV. P. 168 (emphasis added), and an appeal "is deemed" filed "[i]f" the court of appeals grants the petition, TEX. R. APP. P. 28.3(k).

We recently reviewed these provisions for the first time in *Sabre Travel.* We held in a unanimous opinion that the use of the phrase "may accept" in section 51.014(f) "convey[s] a discretionary function in the court of appeals," and the phrase "may . . . permit" in subsection (d) grants similar discretion to the trial court. 567 S.W.3d at 731. Based on the statute's unambiguously permissive language, we held that "courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d)," and added that "[o]ur procedural rules make that clear." *Id.* at 732.

Nevertheless, Industrial Specialists argues that the court of appeals abused its discretion by refusing this permissive appeal because the trial court concluded that the two requirements are satisfied and both parties agree with that conclusion. Arguing that the court of appeals' discretion "cannot be unlimited," Industrial Specialists insists that the court's actions were "arbitrary and unreasonable" because, as both parties agree, "this case falls squarely within" subsection (d)'s requirements "and is precisely the type of case for which [the permissive-appeal] process was designed."

[2] We agree that section 51.014 limits courts' discretion when addressing permissive appeals. But the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal. A trial court may permit an appeal only "if" subsection (d)'s two requirements are met, and the court of appeals "may accept" the appeal only if the application explains "why an appeal is warranted under Subsection (d)." TEX. CIV.

PRAC. & REM. CODE § 51.014(d), (f). The courts have no discretion to permit or accept an appeal if the two requirements are not satisfied. But if the two requirements *are* satisfied, the statute then grants courts vast—indeed, unfettered—discretion to accept or permit the appeal. Nothing in the statute or in our rules implementing the statute can be read to provide that the courts *must* permit and accept an appeal when the requirements are met.

Nor do the "guiding principles" recognized by our precedent—which cabin discretion by prohibiting arbitrary and unreasonable acts—impose a limit here. *See, e.g., Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985) (describing abuse of discretion as "a question of whether the court acted without reference to any guiding rules and principles"). Section 51.014 does not expound on the guiding principles that limit a court of appeals' discretion, but its application does not intrinsically implicate them. The statute instead defines *when* a court of appeals "may" exercise discretion and when it may not. Even if we, like our dissenting colleagues, believe that guiding principles are "particularly important" in these circumstances, we cannot rewrite a statute that imposes no such principles. *Post* at 24 (BUSBY, J., dissenting). Section 51.014 addresses whether discretion exists at all; it does not impose principles to guide the exercise of that discretion when it does exist.

Industrial Specialists argues that a court of appeals would act arbitrarily and unreasonably if it were to accept or refuse a permissive appeal without considering whether the two requirements are satisfied. In response to this point, we note that subsection (f)'s requirement that the appealing party explain in its application "why an appeal is warranted under subsection (d)" is not accompanied by any express command that the courts of appeals then consider the appealing party's explanation. But given that this obligation would be rendered essentially meaningless if the statute did not implicitly charge courts of appeals with the duty to consider the party's explanation, a court of appeals might abuse its discretion by failing to do so. But here, the court of appeals' opinion confirms that the court did consider the two requirements and concluded that the petition did not satisfy them. The statute does not expressly state whether more or less is required. Our dissenting colleagues would require more, *post* at 39 (BUSBY, J., dissenting); our concurring colleagues would require less, *post* at 22 (BLACKLOCK, J., concurring). Which view is correct is not a question we must resolve today. The court of appeals' opinion states that it considered the statute's two requirements and determined they were not satisfied, so we need not decide whether it would have abused its discretion if it had rejected the appeal without considering the requirements.

[3] We do not agree that a trial court's conclusion that the requirements are met (or the parties' agreement with that conclusion) somehow constrains the court of appeals' discretion. Under subsection (f), the trial court's decision to permit the appeal is merely the prerequisite for the court of appeals to exercise its discretion at all. The trial court's conclusion regarding the two requirements has no bearing on the court of appeals' subsequent evaluation of the requirements under subsection (f).[8]

8. Our dissenting colleagues agree with the trial court's conclusion that the two requirements "have been met," *post* at 25 (BUSBY, J., dissenting), but that assertion—even if true—is irrelevant. Our disagreement with the result of the court of appeals' properly exercised discretion as to the two requirements cannot, standing alone, establish abuse of discretion.

Nor does the federal permissive-appeals statute impose or suggest a limit on the discretion of Texas courts of appeals. As we explained in *Sabre Travel*, "the Legislature modeled section 51.014(d) after the federal counterpart to permissive interlocutory appeals," and the United States Supreme Court has interpreted that counterpart "as providing federal circuit courts *absolute discretion* to accept or deny permissive appeals." *Sabre Travel*, 567 S.W.3d at 731–32 (emphasis added) (addressing 28 U.S.C. § 1292(b)). Industrial Specialists suggests that section 1292(b) is distinguishable, however, because it states that a court of appeals "may … *in its discretion*, permit an appeal to be taken." 28 U.S.C. § 1292(b) (emphasis added). But the legislature's choice to omit "in its discretion" while retaining the word "may" cannot be read as diminishing the fundamentally discretionary nature of the word "may." *See* TEX. GOV'T CODE § 311.016(1) ("'May' creates discretionary authority or grants permission or a power."); *May*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/may (last visited May 27, 2022) (defining "may" as an auxiliary verb "used to indicate possibility or probability" and meaning to "have permission to" or "be free to"); *May*, DICTIONARY.COM, https://www.dictionary.com/browse/may (last visited May 27, 2022) (defining "may" as an auxiliary verb "used to express possibility" or "opportunity or permission"). Discretion is the indispensable precondition for meaningful judgment, and as such it cannot be capped by a party's own wishful revisionism, self-serving interpretation, or impatience with time-tested methods of just and measured adjudication. We cannot interpose a firm limit on a court of appeals' discretion under section 51.014(f) when the statute itself grants the court discretion and imposes no such limit.

In our comment accompanying rule 28.3(e)(4), we noted that it was "intended to be similar" to rule 53.1, which governs petitions for review in this Court. TEX. R. APP. P. 28.3 cmt. Rule 53.1, which states that this Court "*may* review" properly filed petitions for review, does not require that we grant any particular petition, even if the lower courts and the parties all agree that we should grant it. *See* TEX. R. APP. P. 53.1, 56.1(a) ("Whether to grant review is a matter of judicial discretion."). As we concluded in *Sabre Travel*, "the courts of appeals can similarly accept or deny a permissive interlocutory appeal as we can a petition for review." 567 S.W.3d at 731 (citing TEX. R. APP. P. 28.3 cmt.).

In this case, the court of appeals acknowledged subsection (d)'s requirements and concluded that this appeal fails to satisfy either of them. We need not analyze whether the court of appeals reached the correct conclusion because it acted within its discretion in exercising its independent judgment. But we note that its conclusion was, at a minimum, plausible. Although both Blanchard and Industrial Specialists filed summary-judgment motions and the trial court denied them both, only Industrial Specialists requested and received permission to appeal. *If* the court of appeals concluded that the trial court correctly denied Industrial Specialists' summary-judgment motion, subsection (d)'s second requirement would not be satisfied because granting the permissive appeal simply to affirm the trial court's denial of a summary-judgment motion would not have materially advanced the litigation. In any event, the abuse-of-discretion stan-

And if we believe the court of appeals objectively erred, as our dissenting colleagues believe, our procedural rules permit us to accept the appeal ourselves even though the court of appeals declined it. *See Sabre Travel*, 567 S.W.3d at 729–30. Ironically, our dissenting colleagues do not even suggest that we should do so here.

dard does not permit us to second-guess the court's judgment on that question.

The parties highlight the admonition we expressed in *Sabre Travel*: "Just because courts of appeals *can* decline to accept permissive interlocutory appeals does not mean they *should*." *Id.* at 732–33 (emphases added). As they note, the court of appeals' denial of Industrial Specialists' permissive interlocutory appeal follows a clear trend: since our 2019 decision in *Sabre Travel*, this same court of appeals has reviewed requests from nine parties that received a trial court's permission to pursue an interlocutory appeal under section 51.014(d).[9] The court denied permission in eight of the nine cases, twice incurring a dissent from denial of rehearing,[10] and tellingly published an identical typographical error—"Rule 28.3(3)(e)(4)" instead of "Rule 28.3(e)(4)"—in four of those eight orders.[11] The court's duplicative denials could at least be read to indicate its disagreement with our exhortation in *Sabre Travel.*

We observed in *Sabre Travel* that "[i]f all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted." *Id.* at 732. But our warning in *Sabre Travel* was issued to "caution," not to command. *Id.* The court of appeals' recurring rejections may signify disrespect for the line between discretion and dereliction, but that is a line the legislature chose to draw quite loosely in section 51.014(f). We could, perhaps, impose stricter requirements by amending our rules, but we cannot do so by holding that the statute imposes limits it simply does not impose. We thus conclude that the court of appeals did not abuse its discretion by refusing to accept this permissive interlocutory appeal.

B. Explanations for Refusals

[4, 5] Industrial Specialists argues that, even if the court of appeals did not

9. *See Devillier v. Leonards*, Nos. 01-20-00223-CV & 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.) (per curiam) (mem. op.); *Quintanilla v. Mosequeda*, No. 01-20-00387-CV, 2020 WL 3820256, at *1 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.) (per curiam) (mem. op.); *Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00923-CV, 2020 WL 536013, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2020, pet. denied) (per curiam) (mem. op.); 634 S.W.3d at 760; *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied); *By the Sea Council of Co-owners, Inc. v. Tex. Windstorm Ins. Ass'n*, No. 01-19-00415-CV, 2019 WL 3293701, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (per curiam) (mem. op.); *Thien Nguyen v. Garza*, No. 01-19-00090-CV, 2019 WL 1940802, at *1 (Tex. App.—Houston [1st Dist.] May 2, 2019, pet. denied) (per curiam) (mem. op.); *Thompson v. Landry*, No. 01-19-00203-CV, 2019 WL 1811087, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 2019, no pet.) (per curiam) (mem. op.); *Mosaic Baybrook One, L.P. v. Simien*, No. 01-18-00995-CV, 644 S.W.3d 671, 671–72 (Tex. App.—Houston [1st Dist.] Feb. 12, 2019, pet. granted) (per curiam) (mem. op.).

10. *See Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *1–3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting from denial of rehearing) (arguing that review was necessary because the case involved an issue of first impression); *Mosaic Baybrook One, L.P. v. Simien*, No. 01-18-00995-CV, 650 S.W.3d 1, 3–4 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. granted) (Keyes, J., dissenting from denial of rehearing en banc) (arguing that the court abused its discretion by denying appeal of a controlling issue of law that would determine a class-certification issue).

11. *See Devillier*, 2020 WL 5823292, at *1; *Sealy Emergency Room*, 2020 WL 536013, at *1; 634 S.W.3d at 760; *Mosaic Baybrook One,* 644 S.W.3d at 671– 72.

abuse its discretion by refusing the appeal, it did abuse its discretion by failing to adequately explain its reasons for doing so. For support, it relies on Texas Rule of Appellate Procedure 47.1, which requires courts of appeals to "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal," and rule 47.4, which requires that memorandum opinions be "no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TEX. R. APP. P. 47.1, 47.4.[12] Blanchard agrees, asserting that "the court of appeals erred in denying [Industrial Specialists'] request for a permissive interlocutory appeal without giving any reason for its ruling."

But the court of appeals' opinion in this case complied with these rules. The court's "decision" was to reject the interlocutory appeal, and its opinion explained that its decision was based on its conclusion that "the petition fails to establish each requirement of Rule 28.3[ ](e)(4)." 634 S.W.3d at 760. The opinion addressed the only issue "raised and necessary to final disposition of the appeal," as rule 47.1 requires, and advised the parties "of the court's decision [to refuse the appeal] and the basic reasons for it," as rule 47.4 requires. According to the opinion, the court of appeals did not refuse the appeal without having considered whether (or despite a finding that) the requirements were met; rather, it refused the appeal *because* it concluded they were not met.[13] And the opinion explained this while remaining "as brief as practicable" and "no longer than necessary," as the rules also require.

Our dissenting colleagues demand far more from the court of appeals' opinion than our rules and our precedent require. Critically, the dissent interprets rule 47.4 as requiring the opinion to "explain the basic reasons" it disagreed with the parties' arguments that "the two requirements for a permissive appeal were met." *Post* at 25 (BUSBY, J., dissenting). But the court's decision and disposition were to reject the interlocutory appeal, and its opinion duly described its basic reason for doing so: "Because we conclude the petition fails to establish [the two requirements], we deny the petition for permissive appeal." 634 S.W.3d at 760. This was the basic, and only, reason for the court's decision not to accept the appeal.[14] But our

12. Opinions issued solely to deny permissive interlocutory appeals must be memorandum opinions, which are required where the opinion does not establish or modify a rule of law, apply a rule to novel facts likely to recur, involve constitutional or other important legal issues, criticize existing law, or resolve an apparent conflict of authority. *See* TEX. R. APP. P. 47.4(a)–(d).

13. It is the presence of *reasoning*—not a "boilerplate conclusion," as envisioned by the dissent—that separates the court of appeals' opinion here from the seven other opinions cited by the dissent, *see post* at 34 (BUSBY, J., dissenting), all of which fail to state the "basic reasons" for their decision. *See, e.g., BPX Operating Co. v. 1776 Energy Partners, LLC*, No. 04-21-00054-CV, 2021 WL 1894830, at *1 (Tex. App.—San Antonio May 12, 2021, no pet.) (per curiam) (mem. op.) ("Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal.").

14. The dissenting opinion describes four issues that might motivate a court of appeals to deny permission for permissive appeal, only one of which concerns whether the two requirements of section 51.014(d) are met. *Post* at 25–28 (BUSBY, J., dissenting). Had the court of appeals' opinion here relied on one of these other reasons, such as untimely filing, there would of course be no need to address the two requirements. And given section 51.014(f)'s instruction that the court of appeals may accept the appeal if the application explains "why an appeal is *warranted*," the dissent is correct to note that other factors beyond the two requirements might prompt a court to deny permissive appeal. TEX. CIV. PRAC.

dissenting colleagues would require more, demanding that the court engage with the parties' arguments against those reasons. *Post* at 30 (Busby, J., dissenting). Rule 47.4 imposes no such requirement, and our precedent—contrary to the dissenting opinion's characterizations—does not require more, either. *See, e.g., Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam) (holding court of appeals violated rule 47.4 by "failing to give *any reason whatsoever* for its conclusion that the evidence established a finding of nonpayment" (emphasis added)).

Industrial Specialists and Blanchard raise various policy reasons why the Court should require courts of appeals to provide more than the "basic" reasons for their decision to reject a permissive appeal. We have imposed similar requirements in other circumstances. *See, e.g., In re Columbia Med. Ctr.*, 290 S.W.3d 204, 212–13 (Tex. 2009) (requiring trial courts to give reasons for disregarding a jury verdict and granting a new trial); *Gonzalez v. McAllen Med. Ctr.*, 195 S.W.3d 680, 680–81 (Tex. 2006) (per curiam) (requiring courts of appeals to explain reasons for concluding that factually sufficient evidence supports a jury verdict); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (requiring courts of appeals to detail relevant evidence and "clearly state" their reasons for finding the evidence factually insufficient to support a jury verdict). Although these decisions are distinguishable because they aimed to protect the sanctity of the constitutional right to jury trial, we do not completely disregard the parties' point. And in a similar vein, the dissenting opinion supplies an abundance of policy considerations to support its view that we "should" require explanations from courts denying permissive appeals, including ensuring meaningful deliberation, facilitating appellate review, developing Texas jurisprudence, fostering predictability, and furthering the statute's purpose. *Post* at 34 (Busby, J., dissenting). To the extent we agree with these policy arguments, or believe that more thorough explanations are desirable, we may consider amending rule 47 to revise its requirements. But we will not supplant our proven and principled method of revising our rules by imposing such a change today by judicial fiat.

We are asked whether the court of appeals abused its discretion, and we cannot conclude that it did so by failing to comply with what the rules *ought* to say. We thus conclude that the court of appeals did not abuse its discretion by failing to more thoroughly explain its reasons for refusing to accept this permissive appeal.

C. This Court's Discretion

[6] Finally, as we explained in *Sabre Travel*, a trial court's conclusion that subsection (d)'s two requirements are satisfied and decision to permit an appeal under section 51.014(d) "permits an appeal" from the order, "and this Court's jurisdiction is then proper under [Texas Government Code] section 22.225(d) regardless of how the court of appeals exercises its discretion over the permissive appeal." *Sabre Travel*, 567 S.W.3d at 733. Thus, we may review an interlocutory appeal that a trial court has permitted even when the court of appeals has refused to hear it.[15] Both parties urge

& Rem. Code § 51.014(f) (emphasis added); *post* at 26 (Busby, J., dissenting). And as noted, we expressly decline to rule further than necessary by opining on whether a court of appeals that failed to consider the two requirements would abuse its discretion. Here, the court unequivocally rested its denial on the petition's failure to establish the two requirements, 634 S.W.3d at 760, so by stating they were unmet, the court gave its "basic reasons." Tex. R. App. P. 47.4.

15. Although we exercised jurisdiction in *Sabre Travel* under the now-superseded section 22.225(d), we have interpreted section

us to exercise our jurisdiction here, arguing that "[j]udicial efficiency weighs in favor of this Court deciding those issues now, rather than remanding for the court of appeals."

[7] Like the courts of appeals, we have broad discretion in choosing whether to exercise our jurisdiction. We are reluctant, however, to intervene at the summary-judgment stage, with an incomplete record, and before the courts below have resolved the case on the merits. *See, e.g., Pidgeon v. Turner*, 538 S.W.3d 73, 81 & n.15 (Tex. 2017). The final-judgment rule may entail "inevitable inefficiencies," *Sabre Travel*, 567 S.W.3d at 732, and permissive appeals may reduce those inefficiencies, but we are not inclined to allow the permissive-appeal process to morph into an alternative process for direct appeals to this Court, particularly from orders denying summary-judgment motions. A just and deliberate judicial system remains far preferable to a merely efficient one.

III.

Conclusion

We hold that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.[16] And rule 47 requires the courts to state only their basic reasons for their decision to accept or reject the appeal. Accordingly, we conclude that the court of appeals did not abuse its discretion by refusing to accept this permissive interlocutory appeal or by failing to provide more thorough reasons for that decision. We decline to reach the merits of the underlying case, affirm the court of appeals' judgment, and remand the case to the trial court for further proceedings.

Justice Blacklock filed a concurring opinion in which Justice Bland joined.

Justice Busby filed a dissenting opinion in which Chief Justice Hecht and Justice Young joined.

Justice Lehrmann did not participate in the decision.

Justice Blacklock, joined by Justice Bland, concurring.

The plurality and dissent spend dozens of thoughtful pages analyzing the appellate courts' discretion to deny permissive appeals. One word would have been enough, and we have already said it. The discretion is "absolute." *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019). This Court held unanimously three years ago that "Texas courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d), *just as federal circuit courts do.*" *Id.* (emphasis added). This, we said, is because "the [Texas] Legislature modeled section 51.014(d) after

22.001(a)'s jurisdictional grant as being broader than section 22.225(d), *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 549 (Tex. 2019), ensuring that *Sabre Travel* is still both relevant and instructive here. *Sabre Travel*, 567 S.W.3d at 733–34 (holding that a trial court's certification of an interlocutory order under section 51.014(d) was sufficient to implicate our jurisdiction even where the appellate court denied permissive appeal).

16. Our concurring colleagues join in this holding, making it a holding of the Court. *See post* at 23 (Blacklock, J., concurring). And even the dissenting opinion, for all of its bluster, agrees that "nothing in the statute or our rules requires a court to accept the appeal when section 51.014(d)'s requirements are met." *See post* at 27 (Busby, J., dissenting). Considering we unanimously said this just three years ago in *Sabre Travel*, our unanimous agreement today should be no surprise.

the federal counterpart to permissive interlocutory appeals." *Id.* at 731. *Compare* 28 U.S.C. § 1292(b), *with* Tex. Civ. Prac. & Rem. Code § 51.014 (d), (f). In the federal system, courts of appeals may "deny review on the basis of *any* consideration." *Microsoft Corp. v. Baker*, ––– U.S. ––––, 137 S. Ct. 1702, 1710, 198 L.Ed.2d 132 (2017) (quotation omitted) (emphasis in original). Thus, Texas courts of appeals, like federal courts of appeals, have "absolute discretion" to accept or deny an appeal under section 51.014(f). *Sabre Travel*, 567 S.W.3d at 732.

If the Legislature wants to require courts of appeals to take more interlocutory appeals, it can certainly do so. I tend to think that earlier and quicker appellate review of dispositive legal issues would be a salutary thing. But the Legislature has not amended section 51.014(f) in response to our observation in *Sabre Travel* that Texas's permissive appeal scheme mirrors its well-known federal counterpart. Nor has this Court amended the Rules of Appellate Procedure. When we decided *Sabre Travel*, we thought that "[o]ur procedural rules make [courts of appeals' absolute discretion] clear." *Id.* The rules have not changed, so resolving the issue today ought to require nothing more than a citation to *Sabre Travel.*

Sabre Travel is not just this Court's precedent. It is correct. A court of appeals "may" accept a permissive appeal. Tex. Civ. Prac. & Rem. Code § 51.014(f). Not "shall" or "must" or "should," but "may." The dissent is right, of course, that "may" does not always confer unfettered discretion. *Post* at 31–32. But it often does. One place it does is in the rules governing petitions for review in this Court: "The Supreme Court *may* review a court of appeals' final judgment on a petition for review." Tex. R. App. P. 53.1 (emphasis added). Elsewhere, the rules state that "[w]hether to grant [a petition for] review is a matter of judicial discretion." Tex. R. App. P. 56.1(a). *Sabre Travel*, section 51.014, and the procedural rules together make clear that whether to grant a petition for permissive appeal is likewise a matter of judicial discretion. *See* 567 S.W.3d at 732.

Absolute discretion to decide whether to review another judge's decision *right now*—instead of later—is a far cry from absolute discretion to, for instance, set aside a jury verdict. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (requiring a trial court "to give its reasons for disregarding the jury verdict"). Indeed, unreviewable discretion *to decide which cases to hear* is well within the confines of traditional appellate judging. Contrary to the dissent's concerns, unfettered discretion over which cases to hear is not an abandonment of reasoned decision-making or an impediment to confidence in the rule of law. And if it is, then we are in trouble. Deciding which cases to hear—with absolute discretion and without explanation—is the daily business of this Court. Under section 51.014 and the Rules of Appellate Procedure, it is also, occasionally, the business of the courts of appeals.

I am not the first to note the similarity between this Court's absolute discretion to deny petitions for review and an appellate court's absolute discretion to deny petitions for permission to appeal. We described it in *Sabre Travel. See* 567 S.W.3d at 731. And the comments to Rule 28.3, which governs permissive appeals, explain succinctly that "[t]he petition procedure in Rule 28.3 is intended to be similar to the Rule 53 procedure governing petitions for review in the Supreme Court."[1] The com-

1. One difference, which we recognized in *Sabre Travel,* is that this Court may take up a

ment's guidance is well supported by the statute and the rules, and we reinforced it in *Sabre Travel.* We need say no more to explain our decision today. I would hold that a court of appeals' decision to grant or deny a petition for permissive appeal is entirely discretionary and need not be explained.[2] If that is a bad rule, the Legislature should amend the statute, or this Court should amend the appellate rules within the confines of the statute.[3]

I join the Court's holding that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Ante* at 21. Otherwise, I respectfully concur in the judgment.

Justice Busby, joined by Chief Justice Hecht and Justice Young, dissenting.

For many years, this Court has demonstrated its commitment to the efficient administration of justice, transparency, and a substance-over-form approach to procedure. Regrettably, the plurality and concurrence sound a retreat on all these fronts today, allowing courts of appeals to avoid hearing permissive appeals at their pleasure and with no explanation so long as their standard-form denials recite the following pass-phrase: "the petition fails to establish each requirement." *See ante* at 19.

The plurality recognizes that this approach thwarts the statute's express goal of advancing the termination of litigation, but it concludes that the Legislature sig-

permissive appeal that the court of appeals has declined to hear, whereas when this Court denies a petition for review there is usually no further recourse. *See* 567 S.W.3d at 733.

2. Both the dissent and the plurality interpret Rule 47.1 to require courts of appeals to issue written opinions explaining the denial of permissive appeals. I disagree. Rule 47.1 requires a "written opinion" explaining the "final disposition of the appeal." Under section 51.014 and the Rules of Appellate Procedure, however, there is no "appeal" to be finally disposed of under Rule 47.1 until the court of appeals accepts a permissive appeal. A permissive appeal "is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal," but this is only "[i]f the court of appeals accepts the appeal." Tex. Civ. Prac. & Rem. Code § 51.014(f). Likewise, "[t]he date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal." *Id.* In other words, the statute indicates that only after the petition to appeal is accepted do the usual procedures governing appeals apply. The Rules indicate the same. A notice of appeal is "deemed to have been filed" when the petition for permission to appeal is granted, not when the petition is filed. Tex. R. App. P. 28.3(k). Thus, until the court of appeals accepts the appeal, there is no appeal. There is only a "petition" for "permission to appeal." Tex. R. App. P. 28.3(a).

Such a petition is akin to a motion, to which Rule 47.1's written-opinion requirement does not apply. An even closer analogue is this Court's disposition of petitions for review, which very rarely includes a written explanation—even though, like the courts of appeals, this Court is obligated to explain in writing its decisions on cases it has chosen to hear. *See* Tex. R. App. P. 63. As with permissive appeals, the procedural rules describe factors this Court considers when ruling on a petition for review. *See* Tex. R. App. P. 56.1(a). The existence of these factors—like the two factors courts of appeals should consider when deciding whether to hear permissive appeals—does not constrain this Court's discretion or require it to explain why the factors were not satisfied when it denies a petition for review. The same is true for courts of appeals deciding petitions for permission to appeal.

3. Parties and judges ought to be able to know exactly how to approach a procedural question of this nature by consulting the relevant statutes and procedural rules. They should not also have to consult, and attempt to harmonize, multiple opinions of this Court.

naled an intent to sabotage its own work by including the word "may" in the statute. That conclusion is wrong: our cases have held in many contexts that "may" alone does not confer unreviewable discretion. And our appellate rules independently require courts of appeals to explain why each requirement was not met. I respectfully dissent.

Section 51.014(d) of the Civil Practice and Remedies Code authorizes an appeal from an interlocutory order that (1) "involves a controlling question of law as to which there is a substantial ground for difference of opinion" when (2) "an immediate appeal ... may materially advance the ultimate termination of the litigation." Tex. Civ. Prac. & Rem. Code § 51.014(d). After obtaining the trial court's written permission to appeal, the appealing party must file "an application for interlocutory appeal" in the court of appeals. *Id.* § 51.014(f). Assuming the application is timely filed, the court of appeals "may accept [the] appeal." *Id.*

A majority of the Court reads into the word "may" a grant of unfettered discretion that empowers a court of appeals to deny a permissive interlocutory appeal for any reason (according to the plurality), or even for no expressed reason at all (according to the concurrence). This decision rests on a misreading of our rules, which require a court of appeals to issue a written opinion that explains—as to "every issue ... necessary to final disposition of the appeal"—"the court's decision and the basic reasons for it." Tex. R. App. P. 47.1, 47.4.

The Court's embrace of discretion to shield such a denial from any scrutiny is a straw man. What little the court of appeals did say in its opinion shows that the only issue it decided—whether subsection (d)'s two prerequisites were satisfied—is not an issue committed to the court of appeals' discretion, as the plurality concedes. *Ante* at 15–16 (explaining that "courts have no discretion" unless "the two requirements *are* satisfied"). And it cannot be disputed that the court of appeals failed to advise the parties of the reasons why it concluded those prerequisites were not met.

Yet even if discretion were implicated here, neither text nor precedent supports insulating that discretion from review; our cases require courts exercising discretion to follow guiding principles and refrain from acting arbitrarily or unreasonably. The only contrary example that the plurality and concurrence identify is our discretion to deny petitions for review. But the rules expressly authorize us to do so with a brief notation rather than an opinion, and as a matter of jurisdiction and court structure we have the last word on state-law procedural matters.

The opposite is true in the intermediate courts of appeals. And in the context of permissive appeals, it is particularly important that their opinions discuss and apply guiding principles for three reasons: (1) to facilitate each panel's reasonable consideration of whether the requirements selected by the Legislature have been met in a particular case; (2) to reveal whether the panel is denying permission to appeal on discretionary or non-discretionary grounds and enable further review when necessary; and (3) to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future cases.

Finally, the Court casts aside the Legislature's recognized goal of providing for early, efficient appellate resolution of determinative legal issues—which the plurality candidly acknowledges courts of appeals are flouting with their "recurring rejections." *Ante* at 18–19. In 2019, we

cautioned courts of appeals to accept permissive interlocutory appeals when section 51.014(d)'s requirements are satisfied. *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019). But as the parties and amici note, courts of appeals continue to deny the vast majority of permissive appeals—and they do so without giving any explanation of the reasons for their actions. The plurality at least acknowledges in passing our original admonition to the courts of appeals, but there is no reason to think that finger-wagging will have any more effect this time than it did in *Sabre Travel.*

The parties and the trial court in this case were unanimous in concluding that the requirements for a permissive appeal were met and that addressing the merits would promote the efficient resolution of this dispute. Yet the court of appeals disagreed that the requirements were met without even providing them the courtesy of an explanation, and the plurality's effort to imagine what the reason might have been does not withstand scrutiny. To the contrary, the trial court's determination that subsection (d)'s requirements have been met is legally correct. Because the court of appeals' opinion does not comply with our rules, and there are also compelling reasons grounded in the statute and our precedent for requiring the court to advise the parties of its reasons for denying a permissive appeal, I would reverse.

I. By failing to disclose its basic reasons for deciding that the petition did not meet each requirement for a permissive appeal, the court of appeals violated Appellate Rule 47.

In this Court, all parties contend that the court of appeals erred by failing to hand down an opinion that explained the basic reasons for its decision on each issue necessary to its denial of permission to appeal. A careful examination of our statutes, rules, and precedents demonstrates that they are correct. The plurality's opinion skips some key steps in this inquiry, which must take into account what issues are necessary to dispose of a petition for permission to appeal, as well as what sort of explanation our rules require as to each of those issues.

Here, as the plurality recognizes, the disputed issue necessary to the court of appeals' denial of the petition was whether it established the two predicate requirements for a permissive appeal. *Ante* at 14–15. The court of appeals provided no explanation whatsoever for its decision that the petition "fails to establish each requirement." 634 S.W.3d 760 (Tex. App.—Houston [1st Dist.] 2019).

A. There are four issues a court of appeals may encounter in determining whether to accept a section 51.014(d) appeal.

The Legislature has granted our courts of appeals jurisdiction to hear appeals of certain otherwise unappealable interlocutory orders if the trial court's order permits the appeal and the appealing party timely files an application—or, as our rules call it, a petition for permission to appeal—in the court of appeals. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f); TEX. R. APP. P. 28.3; TEX. R. CIV. P. 168. There are at least four types of issues that can be presented to a court of appeals considering whether to accept an appeal permitted by the trial court.

First, the parties may dispute whether the trial court followed the requirements for an order granting permission to appeal. The order must decide "a controlling question of law." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *Orion Marine Constr., Inc. v. Cepeda*, No. 01-18-00323-CV, 2018 WL 3059756, at *3 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.)

(Bland, J.) ("The courts of appeals are not statutorily authorized to decide controlling questions of law in the first instance.").[1] In addition, the trial court's permission "must be stated in the order to be appealed," and "[t]he permission must identify the controlling question of law . . . and . . . state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. Failure to satisfy these requirements will result in rejection of the appeal.[2] And appellate courts generally decline to address issues not specified in the trial court's order. *E.g., BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189, 195 n.4 (Tex. 2021).

Second, there may be a question about whether the appellant timely filed a petition for permission to appeal the order. "[N]ot later than the 15th day after the date the trial court signs the order to be appealed," the appealing party must file an "application for interlocutory appeal" in the court of appeals. TEX. CIV. PRAC. & REM. CODE § 51.014(f); *see also* TEX. R. APP. P. 28.3(c) (detailing requirements for "petition" for permission to appeal), 28.3(d) (providing for extension of time to file petition). When the appealing party fails to do so, courts of appeals have concluded that they lack jurisdiction over the appeal entirely. *E.g., Progressive Cnty. Mut. Ins. Co. v. McCormack*, No. 04-21-00001-CV, 2021 WL 186675, at *2 (Tex. App.—San Antonio Jan. 20, 2021, pet. denied) (per curiam) (mem. op.).

Third, there are two minimum requirements that must be met before the court of appeals may accept an appeal permitted by the trial court, and there may be a dispute about whether one or both of those prerequisites are satisfied. Section 51.014(f) provides that the court of appeals "may accept" the appeal "*if* the appealing party . . . files . . . an application for interlocutory appeal explaining why an appeal is warranted under [section 51.014(d)]." TEX. CIV. PRAC. & REM. CODE § 51.014(f) (emphasis added). As discussed above, the two requirements of subsection (d)—echoed in Rule of Appellate Procedure 28.3(e)(4)—are that (1) the trial court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and (2) an immediate appeal from that order may materially advance the ultimate termination of the litigation.[3]

Because courts of appeals may accept a permissive interlocutory appeal only "if" section 51.014(d)'s requirements are met, *see id.*, I agree with the plurality that courts of appeals "have no discretion to permit or accept an appeal" when section 51.014(d)'s "requirements are not satis-

1. *See also, e.g., Garcia v. Garcia*, No. 14-19-00375-CV, 2019 WL 2426680, at *2 (Tex. App.—Houston [14th Dist.] June 11, 2019, no pet.) (per curiam) (mem. op.); *Borowski v. Ayers*, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.) (collecting cases); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 597 (Tex. App.—Dallas 2012, no pet.).

2. *See Patel v. Nations Renovations, LLC*, No. 02-21-00031-CV, 2021 WL 832719, at *1 (Tex. App.—Fort Worth Mar. 4, 2021, no pet.) (per curiam) (mem. op.) (rejecting interlocutory appeal where trial court's order neither identified controlling question of law nor stated why immediate appeal would materially advance litigation's termination); *Cather v. Dean*, No. 05-20-00737-CV, 2020 WL 5554924, at *1 (Tex. App.—Dallas Sept. 17, 2020, no pet.) (mem. op.) (rejecting interlocutory appeal due to order's lack of "statement of permission").

3. Subsection (e)(4) tracks section 51.014(d)'s language and requires that the petition "argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e)(4).

fied." *Ante* at 15–16. Indeed, there is no reason for us to review the court of appeals' views regarding those requirements deferentially as an exercise of discretion; we are in an equally good position to determine whether there are substantial grounds for a difference of legal opinion and whether immediate review would materially speed the resolution of the litigation. *E.g.*, TEX. R. APP. P. 56.1(a)(1)–(2) (listing factors this Court may consider in granting review, including disagreement on important legal points); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (considering whether mandamus review would "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings").

Fourth, if section 51.014(d)'s requirements are met, the court of appeals can decide whether it wishes to exercise its discretion to accept the appeal. Beyond providing that the court of appeals "may accept an appeal permitted by [section 51.014(d)]," TEX. CIV. PRAC. & REM. CODE § 51.014(f), the statute offers little guidance to courts regarding which appeals to accept.

The plurality and I agree that this fourth issue is the only one involving an exercise of discretion. *Ante* at 16 ("[I]f the two requirements [of subsection (d)] *are* satisfied, the statute then grants courts . . . discretion to accept or permit the appeal."). I also agree with the plurality that nothing in the statute or our rules requires a court to accept the appeal when section 51.014(d)'s requirements are met. *See id.* In such situations, we have said, "[t]he principles that are to guide [the] court's discretionary decision are determined by the purposes of the rule at issue." *Samlowski v. Wooten*, 332 S.W.3d 404, 414 (Tex. 2011) (Guzman, J., concurring); *see id.* at 410 (plurality op.); *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding). Unfortunately, the courts of appeals are not exploring those principles in their opinions.

The failure to distinguish among these four issues has led to some confusion and contradiction in court of appeals decisions. There are several opinions in which courts of appeals have both dismissed a permissive interlocutory appeal for want of jurisdiction—purportedly because section 51.014(d)'s requirements are not satisfied—and denied the petition for permission to appeal, seemingly exercising discretion they believed themselves without jurisdiction to exercise.[4]

B. The court failed to give reasons for its decision on every issue necessary to the final disposition of the appeal.

Understanding the issues at play helps to inform how a court of appeals must

4. *See, e.g., JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *4 (Tex. App.—San Antonio Dec. 29, 2021, no pet.) (per curiam) (mem. op.); *Corley v. Corley*, No. 04-21-00181-CV, 2021 WL 2669343, at *1 (Tex. App.—San Antonio June 30, 2021, pet. denied) (per curiam) (mem. op.); *ConocoPhillips Co. v. Camino Agave, Inc.*, No. 04-20-00282-CV, 2020 WL 4929794, at *1 (Tex. App.—San Antonio July 29, 2020, pet. denied) (per curiam) (mem. op.); *Thompson v. Landry*, No. 01-19-00203-CV, 2019 WL 1811087, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 2019, no pet.) (per curiam) (mem. op.); *Rubicon Representation, LLC v. Johnson*, No. 05-18-00798-CV, 2018 WL 3853475, at *1 (Tex. App.—Dallas Aug. 14, 2018, no pet.) (mem. op.); *Total Highway Maint., LLC v. Sixtos*, No. 05-17-00102-CV, 2017 WL 1020663, at *1 (Tex. App.—Dallas Mar. 16, 2017, no pet.) (mem. op.). Some courts have properly dismissed a permissive appeal for lack of jurisdiction without addressing the petition. *See Hudnall v. Smith & Ramirez Restoration, L.L.C.*, No. 08-19-00217-CV, 2019 WL 4668508, at *2 (Tex. App.—El Paso Sept. 25, 2019, no pet.) (mem. op.).

address those issues under the Rules of Appellate Procedure that govern their opinions. "[C]ourt[s] of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." Tex. R. App. P. 47.1. The requirement that Texas appellate courts explain the reasons for their decisions stretches back more than a century,[5] and its obvious and salutary purposes include promoting respect for court decisions and confidence in the rule of law, enhancing the transparency we strive to achieve in our legal system, and upholding parties' reasonable expectations that their arguments will be fairly heard and reasonably considered. *E.g., In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). There are circumstances in which Rule 47.1 does not apply, *see* Tex. R. App. P. 52.8(d), but those are not present here.

When "the issues are settled," our rules provide that courts of appeals "should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it." Tex. R. App. P. 47.4. But the memorandum-opinion rule does not excuse the court from addressing every issue necessary to the final disposition, as Rule 47.1 requires. *See West v. Robinson*, 180 S.W.3d 575, 576–77 (Tex. 2005) (per curiam) (reviewing memorandum opinion and reversing because court of appeals failed to address every issue in violation of Rule 47.1). Thus, as to each issue necessary to the court's disposition denying a petition for permission to appeal, the court must "advise the parties of the court's decision" on that issue "and the basic reasons for it." Tex. R. App. P. 47.4.

As the cases cited throughout this opinion show, courts of appeals uniformly issue memorandum opinions when they dispose of "[a]n appeal under Subsection (d)"[6] of section 51.014 by denying the petition. I join the plurality in concluding that Rule 47 applies to these opinions denying permissive appeals. But I disagree with the plurality's conclusion that the court of appeals' opinion here complies with the rule. *Ante* at 18–19. The plurality paints an incomplete picture of what Rule 47 requires, and it loses sight of the particular issue that was the basis of the court of appeals' disposition.

Though our memorandum-opinion rule demands brevity, a court of appeals cannot "fail[ ] to give any reason whatsoever for its conclusion." *Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam). "[A] memorandum opinion generally should focus on the basic reasons why the law applied to the facts leads to the court's decision." *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (per curiam). Even when a court of appeals affirms a jury verdict in the face of a factual-sufficiency challenge, "merely stating that [the challenge] *is* overruled does not count as providing the 'basic reasons' for that decision." *Id.*

The court of appeals' three-sentence memorandum opinion in this case does not satisfy these requirements. The opinion identifies the parties and the order that the trial court granted permission to appeal, recites the two requirements "[t]o be

5. *See* Act of March 30, 1905, 29th Leg., R.S., ch. 51, § 1, 1905 Tex. Gen. Laws 71 (requiring courts of appeals "to decide all issues presented to them ... and announce in writing their conclusions so found"). This statute was repealed when the Legislature gave this Court full power to make rules of procedure. *See* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

6. Tex. Civ. Prac. & Rem. Code § 51.014(e).

entitled to a permissive appeal" set out in section 51.014(d) and repeated in Rule of Appellate Procedure 28.3(e)(4), and includes a single sentence stating its analysis and ruling: "Because we conclude that the petition fails to establish each requirement of Rule 28.3(3)(e)(4) [sic], we deny the petition for permissive appeal." 634 S.W.3d at 760.

The issue the court of appeals identified as necessary to its disposition was the third type of issue discussed above: whether "the petition fail[ed] to establish each requirement" of section 51.014(d) and "Rule 28.3[ ](e)(4)." *Id.* The plurality agrees. *Ante* at 19. But as to that issue, the court of appeals merely stated its conclusion that the requirements were not established; it did not offer any reason whatsoever for its decision that the petition failed to do so. *But see Gonzalez*, 195 S.W.3d at 681; *Citizens Nat'l Bank*, 195 S.W.3d at 96.

The plurality attempts to support its departure from the rule and our precedent by misstating my position, suggesting that I would require the court of appeals to engage with each of the parties' arguments underlying a particular disputed issue. *Ante* at 19–20. Not at all. I would simply require the court of appeals to do what Rule 47 plainly says it must: fairly consider and provide the basic reasons for its decision as to "*every issue* raised [by the parties] and necessary to final disposition of the appeal"[7] —in particular, the issue whether the requirements of section 51.014(d) were met here. Nowhere does the plurality explain why those requirements should not be considered a distinct issue for Rule 47 purposes on which a reasoned decision was needed. The plurality's view that the court need only identify a basis for its bottom-line "decision" or "disposition" of the entire appeal [8]—whether to deny, affirm, or reverse—is flatly contrary to our decisions in *West*, *Gonzalez*, and *Citizens National Bank*, cited above.[9]

The concurrence, for its part, concludes that Rule 47 is inapplicable because an application for interlocutory appeal is not an actual "appeal" until it is accepted. *Ante*

7. Tex. R. App. P. 47.1 (emphasis added).

8. *Ante* at 19.

9. Specifically, the court of appeals in *West* reversed the trial court's judgment confirming an arbitration award, giving as the reason for its disposition that the arbitrator had exceeded his authority. No. 11-03-00028-CV, 2004 WL 178586, at *3 (Tex. App.—Eastland Jan. 30, 2004) (mem. op.). We held that the court's memorandum opinion "did not comply with Rule 47.1" because it did not address "modification and waiver as *distinct issues associated with the relief* the parties requested." 180 S.W.3d at 576 (emphasis added). In *Gonzalez*, the court of appeals affirmed the trial court's judgment, explaining that the decision was based on its conclusion "that appellants' factual sufficiency challenge fails because the jury's verdict was not against the great weight of the evidence." No. 13-00-296-CV, 2003 WL 21283132, at *2 (Tex. App.—Corpus Christi–Edinburg June 5, 2003) (mem. op.). We concluded this memorandum opinion "does not count as providing the 'basic reasons' " for the court's holding on the issue of "*why* the jury's verdict can or cannot be set aside." 195 S.W.3d at 681, 682 (emphasis added). And in *Citizens National Bank*, the court of appeals reversed the trial court's judgment on a note, giving as the reason for its disposition that "the evidence conclusively establishes, as a matter of law, all vital facts to support a finding of payment." No. 10-03-00322-CV, 2005 WL 762585, at *2 (Tex. App.—Waco Mar. 30, 2005) (mem. op.). We held that the court's memorandum opinion "fail[ed] to give *any reason whatsoever for its conclusion* that the evidence established a finding of nonpayment." 195 S.W.3d at 96 (emphasis added).

Here, the court of appeals identified section 51.014(d)'s requirements as the distinct issue that formed the basis of its decision to deny the petition. But it likewise failed to give any reason for its conclusion on that issue.

at 23 n.2 (Blacklock, J., concurring). That conclusion is not consistent with the text of section 51.014. For example, subsection (f) refers to "an appeal permitted by Subsection (d)"—that is, "an appeal" permitted "by written order" of "a trial court"—as "*the* appeal" that "[a]n appellate court may accept." TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (emphasis added); *see also id.* § 51.014(e) (referring to "[a]n appeal under Subsection (d)").

Industrial Specialists provided the court of appeals ample support for its position that the requirements of subsection (d) were met here, explaining that each side's competing interpretation of the indemnity provision was supported by authority and that determining its proper interpretation would speed resolution of the case. Courts of appeals have taken different approaches to the merits issue presented by the permissive appeal, which we agreed to review.[10] Notably, Marathon did not oppose Industrial Specialists' motion for permission to appeal the denial of its motion for summary judgment. Nor did Marathon file a response to or otherwise challenge Industrial Specialists' petition for permission to appeal. *See* TEX. R. APP. P. 28.3(f).

Faced with these substantial reasons why the two requirements for a permissive appeal were met, our rules required the court of appeals to explain the basic reasons for its contrary conclusion on this issue. This requirement "is mandatory, and the courts of appeals are not at liberty to disregard it." *West*, 180 S.W.3d at 577. Because the court of appeals did so here, our rules and precedents require that we remand to give the court of appeals another opportunity to provide the explanation to which the parties are entitled. *Id.*; *see also Gonzalez*, 195 S.W.3d at 681; *Citizens Nat'l Bank*, 195 S.W.3d at 96. We should reverse and remand on this basis alone.[11]

II. Though section 51.014(f) gives courts of appeals discretion whether to accept interlocutory appeals that meet the requirements, it does not permit them to act arbitrarily.

Our rules of procedure are not the only reason for requiring courts of appeals to explain their reasons on all issues necessary to the denial of a permissive appeal. Such a requirement is also necessary to ensure that the courts are properly exercising their discretion rather than arbitrarily flouting the clear intent of the Legislature in authorizing such appeals.

Together, the plurality and concurrence form a majority for the holding that courts of appeals have unfettered discretion to grant or deny permissive appeals that meet the criteria set out in the statute and

10. *Compare Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 669 & n.7 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (determining express-negligence test's applicability by looking to whether claims for which indemnity is sought are for indemnitee's negligence), *with Helicopter Textron, Inc. v. Hous. Helicopters, Inc.*, No. 2-09-316-CV, 2010 WL 3928741, at *3 (Tex. App.—Fort Worth Oct. 7, 2010, pet. denied) (mem. op.) (determining whether express-negligence test applies by looking to whether contract at issue indemnifies indemnitee for its own negligence).

11. The plurality expresses a sense of "iron[y]" regarding why I do not advocate that we decide this appeal on the merits ourselves. *Ante* at 16–17 n.8. One reason is that it would take five votes to render such a decision, and neither the plurality nor the concurrence say that they favor doing so. Another reason is that it would be more efficient in the long run for courts of appeals to do their job and decide permissive appeals like this one in the first instance. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519 (Tex. 2015).

rules.[12] Both the plurality and concurrence place abundant emphasis on section 51.014(f)'s use of the word "may," concluding that we "cannot interpose a firm limit on the court of appeals' discretion ... when the statute itself grants the court discretion and imposes no such limit." *Ante* at 16 (plurality op.) (citing Tex. Civ. Prac. & Rem. Code § 51.014(f)); *see also ante* at 22–23 (Blacklock, J., concurring) (characterizing the court's decision as "entirely discretionary"). This emphasis is misplaced because the court of appeals was not exercising discretion here. Rather, as explained in Part I.B., the court decided that the requirements for a permissive appeal were not satisfied. And as the plurality agrees, "courts have no discretion to permit or accept an appeal if the two requirements are not met." *Ante* at 16.

Yet even if the court of appeals were exercising discretion, our cases have held time and again that "may" alone does not confer unreviewable discretion, and they support requiring the court to explain the reasons for its exercise. "While the permissive word 'may' imports the exercise of discretion, 'the court is not vested with unlimited discretion.'" *Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011) (quoting *Womack*, 291 S.W.2d at 683); *see also, e.g., Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008) (observing that "abuse-of-discretion review" is not "the same as no review at all"); *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 683 (Tex. 2007) (orig. proceeding) (Willett, J., concurring) ("Permissive does not mean limitless, and while appellate courts should not second-guess trial court rulings cavalierly, the word 'may' does not render such rulings bulletproof and unreviewable.").[13]

As we have frequently explained, a court's discretionary decisions must not be "arbitrary" or "unreasonable" and must "adhere to guiding principles." *Pirelli Tire*, 247 S.W.3d at 676. Courts are "required to exercise a sound and legal discretion within limits created by the circumstances of the particular case" and "the purpose of the rule" at issue. *Womack*, 291 S.W.2d at 683; *see also Samlowski*, 332 S.W.3d at 410 (plurality op.), 414 (Guzman, J., concurring). Accordingly, we have imposed limits on courts' discretion and required them to explain their reasons even when the source of their authority is silent regarding that discretion's bounds. *E.g., Columbia Med. Ctr.*, 290 S.W.3d at 212–13 (requiring trial court that sets aside jury verdict to explain its reasoning because trial judge cannot "substitute his or her own views for that of the jury without a valid basis"); *Gonzalez*, 195 S.W.3d at 681 (observing that under Rule 47.4, appellate court cannot overrule factual sufficiency challenge to jury verdict without explain-

12. *Ante* at 15–16 (plurality op.); *id.* at 23 (Blacklock, J., concurring).

13. To the extent the plurality and concurrence rely on descriptions of federal courts' discretion to grant permissive appeals as "unfettered," *cf. Microsoft Corp. v. Baker*, — U.S. ——, 137 S. Ct. 1702, 1709, 198 L.Ed.2d 132 (2017), the federal permissive appeal statute is different in that it contains an express reference to discretion. *See* 28 U.S.C. § 1292(b) (providing that court of appeals "may ..., in its discretion, permit an appeal"). And even with this express discretion, federal appellate courts have issued many more substantive opinions on permissive appeals than their Texas counterparts, developing a body of law that provides useful guidance to bench and bar regarding the exercise of that discretion. *See, e.g., ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1131–32 (9th Cir. 2022); *Nice v. L-3 Commc'ns Vertex Aerospace, LLC*, 885 F.3d 1308, 1312–13 (11th Cir. 2018); *Union County v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 646–47 (8th Cir. 2008); *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675–77 (7th Cir. 2000) (Posner, C.J.).

ing why); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) ("[C]ourts of appeals, when reversing on insufficiency grounds, should, in their opinions, ... clearly state why the jury's finding is factually insufficient...."). It is particularly appropriate to require an explanation from an intermediate appellate court—which, after all, is in the business of explaining its decisions.

The plurality asserts that *Columbia Medical Center, Gonzalez*, and *Pool* are "distinguishable because they aimed to protect the sanctity of the constitutional right to jury trial." *Ante* at 20. Yet interestingly, many of the reasons the plurality gives for its decision today mirror those in the *Columbia Medical Center* dissent. *See* 290 S.W.3d at 216 (O'Neill, J., dissenting).

Moreover, the plurality is simply wrong that section 51.014 "grants courts vast—indeed, unfettered—discretion." *Ante* at 16. There are many other instances in which we have concluded that a "grant[ ] of authority couched in permissive terms" does not exempt a court from "adher[ing] to guiding principles" or authorize it to act arbitrarily or unreasonably. *Pirelli Tire*, 247 S.W.3d at 676 (plurality op.). Former section 71.051(a) of the Civil Practice and Remedies Code gave courts discretion to dismiss an action based on forum non conveniens, but we rejected the contention that this discretion was "virtually unlimited." *Id.* at 675. Although trial courts have "broad discretion" in determining whether to dismiss a case on grounds of forum non conveniens, their decision—"as with other discretionary decisions"—is still "subject to review for clear abuse of discretion." *Id.* at 676; *see id.* at 682–83 (Willett, J., concurring) (" '[M]ay' simply confirms that the district court's decision is a matter of discretion, subject to review for abuse of that discretion, or, when the case is before us on mandamus, a *clear* abuse of discretion.").

Similarly, former Rule of Civil Procedure 215a(c) provided that a trial court "may" strike an answer in certain circumstances. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). But we held the court's decision was reviewable for abuse of discretion—that is, for whether the trial court's act was "arbitrary or unreasonable" or taken "without reference to any guiding rules and principles." *Id.* at 241–42; *see Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 138, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807) (Marshall, C.J.))).[14]

In addition, our procedural rules provide that a court "*may* order a separate trial" of a claim or issue. Tex. R. Civ. P. 174(b) (emphasis added). But we have held that its discretion to do so is "not unlimited." *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) (orig. proceeding). Courts also have "broad discretion" to consolidate cases. *Pirelli Tire*, 247 S.W.3d at 676 (citing Tex. R. Civ. P. 174(a)). Yet they can abuse that discretion by failing to consider specific factors. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (per curiam) (orig. proceeding) (granting mandamus relief from trial court's consolidation order in mass tort case). We also afford courts discretion to exclude relevant

14. *See also Alexander v. Smith*, 20 Tex.Civ. App. 304, 49 S.W. 916 (Tex. App.—San Antonio 1899, no writ) ("The judicial discretion is not an arbitrary right to do whatever an individual judge's whim, caprice, or passion may suggest, for what is not reasonable, or not in accordance with common justice, no judge has a right to do.").

evidence when its prejudicial effect outweighs its probative value, *see* TEX. R. EVID. 403, but this discretion is "not boundless." *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 25–26 (Tex. 2008).[15]

The plurality chides us for looking beyond the supposedly plain meaning of the word "may" to discern the limits of the discretion it confers, which the plurality characterizes as an attempt to "rewrite [the] statute" or "revis[e] our rules ... by judicial fiat." *Ante* at 16, 20–21. Yet it is our typical practice to consider context—not merely dictionaries—when the Legislature chooses to employ a word with a legal meaning that we have previously expounded in similar situations. *E.g.*, TEX. GOV'T CODE § 311.011(b); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 106–07 (Tex. 2021); *Phillips v. Bramlett*, 407 S.W.3d 229, 241 (Tex. 2013) ("We therefore must conclude that the Legislature selected the term 'judgment' for the purpose of conveying a meaning consistent with that which we historically afforded to it."). And that is precisely what we did in the cases just discussed, which hold that "may" alone does not confer discretion to act arbitrarily, unreasonably, or without reference to guiding principles and that an explanation may be necessary to ensure that courts are not doing so. It is unclear what is different about today's case.

The only example the plurality and concurrence give in which the word "may" confers unreviewable discretion is this Court's discretion to deny petitions for review without explanation. *See* TEX. R. APP. P. 56.1. But the word "may" *alone* does not produce that result. Rather, our rules expressly authorize us to "deny or dismiss the petition ... with one of the following notations"—"Denied." or "Dismissed w.o.j."—rather than with an explanatory opinion. TEX. R. APP. P. 56.1(b). And a matter of jurisdiction and court structure, we have the last word on state-law procedural matters, which are not subject to review by the Supreme Court of the United States. *See* 28 U.S.C. § 1257(a). On both counts, the opposite is true of our intermediate courts of appeals. *See* TEX. R. APP. P. 47 (requiring reasoned opinions); *ante* at 20–21 & n.15 (addressing our jurisdiction to review permissive appeal after court of appeals has declined to accept it).

Consistent with the authorities just discussed, requiring courts of appeals to explain their rulings on petitions for permission to appeal would ensure that the panel has not acted arbitrarily but has meaningfully and reasonably discharged its "duty to consider" the particular issues raised by the petition—a duty the plurality half-heartedly acknowledges. *Ante* at 16.[16] As discussed in Part I.A. above, many of those issues do not involve any exercise of discretion. An explanation by the court of appeals would also facilitate our review of the court's rulings on the issues in play when necessary. *See, e.g., In re RSR Corp.*, 475 S.W.3d 775, 779 (Tex. 2015) (orig. proceeding) (holding trial court abused discretion because order on attorney disqualification reflected it did not

15. *See also, e.g., McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995) (holding trial court's failure to apply correct law in dismissing juror as disabled was abuse of discretion); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (holding court's "clear failure ... to analyze or apply the law correctly will constitute an abuse of discretion").

16. *Cf. Ahrenholz*, 219 F.3d at 677 (Posner, C.J.) (emphasizing "the duty of the district court and of [the Seventh Circuit] as well to allow an immediate appeal to be taken when [the federal permissive appeal statute's] criteria are met").

consider relevant factors). And an explanation is particularly called for in this case, where the court of appeals "based [its decision] on other reasons not even urged by . . . and still unknown to both parties. [They] should be told why" the court concluded the requirements were not met. *Columbia Med. Ctr.*, 290 S.W.3d at 213.

Requiring courts of appeals to explain their permissive appeal rulings would also develop Texas jurisprudence regarding why such appeals should be accepted or denied, providing guidance for future courts and fostering comparable outcomes in similar cases. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139, 126 S.Ct. 704 (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)).

As it currently stands, Texas precedent on accepting a permitted appeal is quite sparse. *See, e.g., Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 544 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (noting that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue"). Indeed, some courts issue opinions even shorter than the one issued by the court of appeals here, stating simply that "[a]fter considering" the parties' filings, "we deny the petition and dismiss the appeal for want of jurisdiction."[17]

The plurality believes that these opinions fall short of Rule 47's requirements because they "fail to state the 'basic reasons' for their decision." *Ante* at 19 n.13. But it says adding the boilerplate conclusion that "the petition fails to establish each requirement of Rule 28.3(3)(e)(4) [sic]," 634 S.W.3d at 760, is enough to comply with the rule. *Ante* at 19. I fail to see the sense in the line the plurality draws. It certainly cannot be tied to the language of Rule 47, which as explained in Part I.B. above requires the court to give its reasons as to "every issue" necessary to its decision—here, the issue whether each requirement for a permissive appeal has been met.

The plurality eventually acknowledges that it might be arbitrary and unreasonable for a court of appeals to "refuse a permissive appeal without considering whether the two requirements [of section 51.014(d)] are satisfied." *Ante* at 16. Why the plurality harbors any doubt on this point is hard to fathom. It is obvious to me, though apparently not to our concurring colleagues, that a court of appeals would abuse its discretion if it denied a permissive appeal because a flipped coin came up tails or the panel members wanted to take a vacation. But how will anyone know whether a court of appeals acted without properly considering the statute's requirements unless the court is required to say why it decided the issue as it did?

17. *Danylyk v. City of Euless*, No. 05-21-01074-CV, 2022 WL 818964, at *1 (Tex. App.—Dallas Mar. 18, 2022, no pet.) (mem. op.); *see also BioTE Med., LLC v. Carrozzella*, No. 02-21-00272-CV, 2021 WL 4205000, at *1 (Tex. App.—Fort Worth Sept. 16, 2021, no pet.) (per curiam) (mem. op.); *BPX Operating Co. v. 1776 Energy Partners, LLC*, No. 04-21-00054-CV, 2021 WL 1894830, at *1 (Tex. App.—San Antonio May 12, 2021, no pet.) (per curiam) (mem. op.); *Nationstar Mortg. LLC v. Earley*, No. 13-19-00618-CV, 2020 WL 241956, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 16, 2020, no pet.) (mem. op.); *LeBlanc v. Veazie*, No. 09-18-00470-CV, 2019 WL 150947, at *1 (Tex. App.—Beaumont Jan. 10, 2019, no pet.) (mem. op.); *Thompson*, 2018 WL 6540152, at *1 (Tex. App.—Houston [1st Dist.] Dec. 13, 2018, no pet.); *Morgan Stanley & Co. v. Fed. Deposit Ins. Corp.*, No. 14-14-00849-CV, 2014 WL 6679611, at *1 (Tex. App.—Houston [14th Dist.] Nov. 25, 2014, no pet.) (per curiam) (mem. op.).

The plurality offers no answer. Its acknowledgment that a court of appeals might act arbitrarily or unreasonably thus has no real meaning, and the true message its opinion sends to those courts is clear: say as little as possible in denying permission to appeal.

That approach undermines in fact—and tarnishes in appearance—the "just and deliberate judicial system" the plurality claims to prefer. *Ante* at 21. Absent a requirement that the court of appeals share its reasons, there will continue to be no predictability regarding which cases should be heard on permissive interlocutory appeal. Courts of appeals have developed some conflicting understandings of section 51.014(d)'s requirements. *Compare Patel v. Patel*, No. 05-16-00575-CV, 2016 WL 3946932, at *2 (Tex. App.—Dallas July 19, 2016, no pet.) (mem. op.) (concluding "substantial ground for difference of opinion" prong is not satisfied where disagreement is between parties), *with Austin Com., L.P. v. Tex. Tech Univ.*, No. 07-15-00296-CV, 2015 WL 4776521, at *2 (Tex. App.—Amarillo Aug. 11, 2015, no pet.) (per curiam) (suggesting that "substantial ground for difference of opinion" prong can be satisfied by disagreement between parties). That is unlikely to change under our decision today, which both incentivizes courts of appeals not to issue reasoned opinions and fully insulates those opinions from any scrutiny.

Indeed, even the requirement to include the now-approved boilerplate sentence seems rather pointless. According to the plurality, even if the court of appeals concludes that the requirements are perfectly met, it may freely reject the appeal without further discussion. Nor does anything change if the court of appeals is *wrong*—objectively wrong, as-a-matter-of-law wrong—in its recitation that the requirements are not met. If such an error arises, the plurality contends, this Court is powerless to take the modest step of sending the case back so that, shorn of its error, the court of appeals could reconsider.

But for all we know, the court of appeals may have desperately *wanted* to take the appeal, yet believed itself to be without discretion—or even without jurisdiction—to do so because it genuinely thought that one of the statutory requirements was unmet.[18] As I discuss below, the court of appeals' assessment of the requirements in this case was legally wrong. That conclusion would be good news to an appellate court that stayed its hand only because it believed itself to lack jurisdiction to proceed. Under our normal practice, we could correct that error and then remand so that the court of appeals could accept the appeal after all. Or even if the court did not particularly want to decide the appeal, correcting its legal error would at least allow it to provide a non-erroneous ground for denying permission. *Ante* at 15–16.

Yet the plurality's new doctrine of "discretion" would deem Rule 47 satisfied even if a court of appeals were to say the following:

> We have considered the timely application for an interlocutory appeal. We conclude that the trial court's order, which it granted permission to appeal, decided a controlling question of law. We agree that there is a substantial ground for difference of opinion about that question. We also agree that an immediate appeal may materially advance the ultimate termination of the litigation. We nonetheless dismiss the application for

18. I do not take a position here on whether a court of appeals would lack jurisdiction or simply lack discretion to accept an appeal in a case where the statutory requirements are not met. As noted above, courts of appeals have taken both approaches.

want of jurisdiction. *See* TEX. R. APP. P. 28.3(e)(4).

Under the plurality's approach, a self-contradictory opinion like this one must be upheld because it includes what the plurality requires: a statement that the court of appeals has *considered* the statutory factors. If such a gibberish opinion *could* be reversed, it would only be because there must in fact be some limit to the court of appeals' discretion, which would doom the plurality's whole theory. Of course there *is* such a limit. Just a few weeks ago we reiterated the (until today, at least) unquestioned principle that "[a] court clearly abuses its discretion when it makes an error of law." *In re Abbott*, 645 S.W.3d 276, 282, 67 Tex. Sup. Ct. J. 1071, 1074 (Tex. 2022). Only time will tell whether the plurality's error today will tear down any more of that previously venerable principle.[19]

I doubt, of course, that any court of appeals will be quite as blatant as this hypothetical opinion, although some of them have come close. My point is only that the plurality's approach deems any error of law or any act of caprice—blatant or otherwise—to *not* be an abuse of discretion. That approach transforms judicial discretion into judicial fiat.

Another reason we should require courts of appeals to explain their permissive appeal rulings is that doing so furthers "the purpose of the [statute]," which we consider in shaping the principles that should guide the courts' discretion. *Womack*, 291 S.W.2d at 683; *see also Samlowski*, 332 S.W.3d at 410 (plurality op.), 414 (Guzman, J., concurring). The permissive appeal statute is expressly designed to "materially advance the ultimate termination of . . . litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). Thus, in *Sabre Travel*, we explained that the Legislature's evident purpose in enacting section 51.014(d) and (f) was to promote "early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation," 567 S.W.3d at 732, thereby "mak[ing] the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." *Id.* (quoting Senate Comm. on State Affs., Engrossed Bill Analysis, Tex. H.B. 274, 82d Leg., R.S. (2011)).

Yet many courts of appeals continue to deny the vast majority of permissive appeals despite our exhortations in *Sabre Travel.*[20] In doing so, these courts thwart

19. The plurality even says that "the abuse-of-discretion standard does not permit us to second-guess the court [of appeals]' judgment" on the purely legal question whether the statute's requirements have been satisfied. *Ante* at 17–18.

20. As the plurality notes, since *Sabre Travel*, the First Court of Appeals has been denying permission to appeal using a recycled order. *Ante* at 18 & n.9. And the Fifth Court of Appeals has also been issuing recurring denials using what appears to be a recycled form opinion even shorter than that used by the First Court. In some opinions, it cites to section 51.014(f). *See, e.g., Danylyk*, 2022 WL 818964, at *1; *Cae Simuflite, Inc. v. Talavera*, No. 05-21-01022-CV, 2022 WL 202987, at *1 (Tex. App.—Dallas Jan. 24, 2022, pet. filed) (mem. op.); *Novo Point, LLC v. Katz*, No. 05-21-00395-CV, 2021 WL 5027761, at *1 (Tex. App.—Dallas Oct. 29, 2021, no pet.) (mem. op.); *Scott & White Health Plan v. Lowe*, No. 05-20-00049-CV, 2020 WL 4592790, at *1 (Tex. App.—Dallas Aug. 11, 2020, no pet.) (mem. op.); *Heron v. Gen. Supply & Servs., Inc.*, No. 05-20-00491-CV, 2020 WL 2611260, at *1 (Tex. App.—Dallas May 22, 2020, no pet.) (mem. op.); *Driver Pipeline Co. v. Nino*, No. 05-19-01409-CV, 2020 WL 1042648, at *1 (Tex. App.—Dallas Mar. 3, 2020, pet. denied) (mem. op.). In others, the court uses the same basic language but cites to subsection (d). *See, e.g., Snowden v. Ravkind*, No. 05-20-00188-CV, 2020 WL 3445812, at *1 (Tex. App.—Dallas June 24, 2020, no pet.) (mem. op.). Regardless of the statutory provision cited,

the Legislature's intent in enacting the statute. *See Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting) (arguing that panel abused discretion by denying rehearing of petitions for permission to appeal); *Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00923-CV, 2020 WL 536013, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2020, pet. denied) (per curiam) (mem. op.).

It is unclear what good the plurality thinks quoting those exhortations will do. Given the plurality's "prefer[ence]" for a "deliberate judicial system" over an "efficient one," and its dim view of the "impatience with time-tested methods of ... measured adjudication" that the parties and the trial court supposedly displayed by invoking this legislatively created appellate remedy, *ante* at 21, 17, perhaps it is not meant to do any good at all. If nothing else, perhaps today's opinion and the courts of appeals' continued course of thwarting the Legislature's intent will cause the Legislature to reconsider its 2011 decision to restore discretion to the courts of appeals to decline permissive appeals—discretion that the Legislature had previously eliminated in 2005.[21]

Finally, the Court's other justification for refusing to intervene—that the order being appealed is a denial of summary judgment—is unavailing. The Court suggests that it is inappropriate to hear a permissive appeal when the record is incomplete and the lower courts have yet to resolve the case on the merits. *Ante* at 21. But the "controlling question of law" requirement indicates that a full record is unnecessary in permissive interlocutory appeals. *See Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (Posner, C.J.) (observing that federal permissive appeal statute's reference to a "question of law" envisions "something the court of appeals could decide quickly and cleanly without having to study the record").

Moreover, although "[a] denial of summary judgment is a paradigmatic example of an interlocutory order that normally is not appealable," *id.* at 676, that has not dissuaded courts of appeals from hearing such interlocutory appeals when section 51.014(d)'s requirements are satisfied. *E.g., City of Houston v. Hous. Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1, 7–8 (Tex. App.—Houston [14th Dist.] 2021, pet. granted); *State Farm Mut. Auto. Ass'n v. Cook*, 591 S.W.3d 677, 679 (Tex. App.—San Antonio 2019, no pet.). For all these reasons, courts of appeals should be required to explain their decision on the issue whether those requirements are satisfied. I would at minimum reverse and remand for the court of appeals to do so.

III. The court of appeals was incorrect in concluding that the requirements of section 51.014(d) are not satisfied.

Clearing away the plurality's argument regarding the denial of summary judgment reveals a second, independent basis for reversing the court of appeals' decision to deny permission to appeal: not only did that court fail to explain its reasons for concluding that section 51.014(d)'s requirements have not been established, the record shows that its conclusion regarding those requirements is every bit as incor-

each opinion both denies the petition for permission to appeal and—confusingly—dismisses the appeal for want of jurisdiction.

21. *See* Act of May 30, 2005, 79th Leg., ch. 1051, § 2, 2005 Tex. Gen. Laws 3512, 3513 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code § 51.014(f)).

rect as the hypothetical order I described above. As discussed in Part I.A., whether subsection (d)'s two prerequisites are satisfied is not an issue committed to the court of appeals' discretion.

In the disputed contract provision at issue here, Industrial Specialists agreed to indemnify Blanchard "from and against all ... suits and other liabilities ... except to the extent the liability, loss, or damage is attributable to and caused by the negligence of [Blanchard]." Blanchard moved for partial summary judgment on its claim for a declaratory judgment that this provision required Industrial Specialists to indemnify it for amounts it paid to settle liabilities attributable to other parties. And Industrial Specialists moved for summary judgment on various grounds, including that the indemnity is unenforceable because it fails the express-negligence test.

The trial court initially denied both parties' motions. But in its subsequent amended order granting permission to appeal, the court "makes the following substantive ruling" in favor of Blanchard:

> The March 14, 2013 Major Service Contract between [Industrial Specialists] and Plaintiff Blanchard Refining Company LLC does not prohibit Plaintiffs Blanchard and Marathon Petroleum Company LP from seeking indemnity from [Industrial Specialists] for personal-injury settlement payments Plaintiffs made, to the extent those payments were attributable to or caused by the negligence of parties other than Plaintiffs.

The trial court went on to find that there was "substantial ground for difference of opinion" regarding "whether the parties' written agreement prohibits Plaintiffs from seeking indemnity," and that "an immediate appeal of ... this Court's ruling on this controlling question of law" may "materially advance the ultimate termination of this litigation."

The trial court's determinations on the section 51.014(d) requirements are legally correct. Regarding substantial ground for difference of opinion, courts of appeals are divided regarding the enforceability of Industrial Specialists' agreement to indemnify Blanchard. *See* p. 15 n.10, *supra.* We regarded this difference as substantial enough that we granted review to resolve it. And as to advancing termination, reversing the trial court's substantive ruling that indemnity is not prohibited would resolve the case entirely in Industrial Specialists' favor, while affirming it would "considerably shorten the time, effort, and expense of" litigating Blanchard's remaining claim for breach of the indemnity provision. *Gulf Coast Asphalt*, 457 S.W.3d at 544–45 (quoting Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 St. Mary's L.J. 729, 747–49 (1998)).

The plurality is wrong to bless the court of appeals' contrary conclusion as, "at a minimum, plausible." *Ante* at 17. There is no plausible argument that a substantial ground for difference of opinion is lacking; even the plurality pushes no such theory. The second requirement is only that the appeal "*may* materially advance the ultimate termination of the litigation." Tex. Civ. Prac. & Rem. Code § 51.014(d)(2) (emphasis added). The statute does not say that the appeal "will certainly" or even "probably" bring the litigation to a sooner end. There is genuine contradiction in how the plurality treats the word "may" in this statute. It rides "may" to its outermost limit when the statute says that the court of appeals "may accept" the appeal. *Id.* § 51.014(f). But the plurality all but ignores "may" when the Legislature used that word to set a generous threshold for taking permissive appeals. It is implausible to conclude that regardless of how the

court of appeals might rule on the summary judgment, the end of this litigation would not be substantially hastened. The opposite is true.

For these reasons, the court of appeals erred in concluding that "the petition fails to establish each requirement" of section 51.014(d) and Rule 28.3(e)(4). 634 S.W.3d at 760. I would reverse and remand for the court of appeals to exercise its discretion whether to accept this appeal meeting the statutory requirements.

* * *

Although section 51.014(d) appeals are "permissive" in nature, courts of appeals still must adhere to guiding principles in determining whether to accept or deny such an appeal. An error of law can never be a proper exercise of discretion, and it is a modest request that a court of appeals provide enough reasoning to ensure that its broad discretion was not abused. Despite acknowledging that courts of appeals continue to deny permissive appeals without any indication of having meaningfully considered them, the plurality and concurrence conclude the discretion given to those courts is so broad that we cannot intervene. Because the statutory text does not support this conclusion, our procedural rules require more, and these unexplained denials undermine section 51.014(d)'s utility, I respectfully dissent.

Glenn HEGAR, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, Petitioners,

v.

HEALTH CARE SERVICE CORPORATION, Respondent

No. 21-0080

Supreme Court of Texas.

Argued February 3, 2022

OPINION DELIVERED: June 17, 2022

Background: Insurer brought action against Comptroller of State of Texas, seeking refund of premium and maintenance taxes paid over course of year for premiums collected on "stop-loss" policies issued to employers that self-funded health insurance for their employees. The 200th District Court, Travis County, Amy Clark Meachem, J., granted insurer's summary judgment motion. Comptroller appealed. The Austin Court of Appeals, Rose, C.J., 2020 WL 7294614, affirmed. Comptroller petitioned for review.

Holdings: The Supreme Court, Bland, J., held that:

(1) policies covered risks on "individuals" and "groups" within meaning of statute imposing tax on insurance policy premiums;

(2) policies "arose from the business of health insurance" within meaning of statute; and

(3) premiums collected by insurer were subject to maintenance tax.

Reversed.

Blacklock, J., filed dissenting opinion which was joined by Devine, J., Busby, JJ., and Young, JJ.

By: Smithee H.B. No. 1561

A BILL TO BE ENTITLED

1 AN ACT

2 relating to the decision of a court of appeals not to accept certain
3 interlocutory appeals.

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

5 SECTION 1. Section 51.014, Civil Practice and Remedies
6 Code, is amended by adding Subsections (g) and (h) to read as
7 follows:

8 (g) If a court of appeals does not accept an appeal under
9 Subsection (f), the court shall state in its decision the specific
10 reason for finding that the appeal is not warranted under
11 Subsection (d).

12 (h) The supreme court may review a decision by a court of
13 appeals not to accept an appeal under Subsection (f) under an abuse
14 of discretion standard.

15 SECTION 2. The change in law made by this Act applies only
16 to an application for interlocutory appeal filed on or after the
17 effective date of this Act.

18 SECTION 3. This Act takes effect September 1, 2023.

Tab J

1 AN ACT

2 relating to the powers and duties of the State Commission on
3 Judicial Conduct.

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

5 SECTION 1. Subchapter B, Chapter 33, Government Code, is
6 amended by adding Section 33.02105 to read as follows:

7 Sec. 33.02105. CANDIDATE FOR JUDICIAL OFFICE. The
8 commission may accept complaints, conduct investigations, and take
9 any other action authorized by this chapter or Section 1-a, Article
10 V, Texas Constitution, with respect to a candidate for judicial
11 office who is subject to Subchapter F, Chapter 253, Election Code,
12 in the same manner the commission is authorized to take those
13 actions with respect to a judge.

14 SECTION 2. This Act takes effect September 1, 2023.

________________________________ ________________________________

President of the Senate Speaker of the House

I certify that H.B. No. 367 was passed by the House on April 12, 2023, by the following vote: Yeas 147, Nays 0, 2 present, not voting.

____

Chief Clerk of the House

I certify that H.B. No. 367 was passed by the Senate on May 15, 2023, by the following vote: Yeas 30, Nays 1.

____

Secretary of the Senate

APPROVED: ________________________

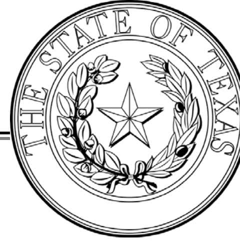
Date

____

Governor

Tab K

Memorandum



To: Supreme Court Advisory Committee

From: Judicial Administration Subcommittee

Date: June 14, 2023

Re: June 3, 2023 Referral Letter relating to HB 367 and Conduct of Judicial Candidates

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I. Matter referred to subcommittee

> **Conduct of Judicial Candidates.** HB 367 adds Government Code § 33.02105 to authorize the State Commission on Judicial Conduct to accept complaints, conduct investigations, and take disciplinary action against judicial candidates. The Committee should consider whether the Code of Judicial Conduct and the Procedural Rules for the Removal or Retirement of Judges should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

II. Relevant materials

Attached are copies of HB 367, the Code of Judicial Conduct, and the Rules for Removal or Retirement of Judges.

III. Subcommittee recommendation

The Subcommittee recommends (1) revisions to Canon 6(G) of the Code of Judicial Conduct to reflect this statutory provision (see below); and (2) further study of the Procedural Rules for the Removal or Retirement of Judges to determine what revisions may be warranted to provide procedures under which the Commission can address misconduct by judicial candidates.

IV. Discussion

HB 367 implements an amendment to the Texas Constitution approved in 2021 pursuant to HJR 165 (passed during the 87th Legislature). This amendment gave the Commission authority to accept complaints or reports, conduct investigations, and take any other authorized action with respect to a ***candidate*** for state judicial office. Before this amendment, the Commission was permitted to take such actions only with respect to persons holding a judicial office.

Canon 5 of the Code of Judicial Conduct, entitled "Refraining From Inappropriate Political Activity," applies to judges and to judicial candidates who are not judges. Although Canon 5 applies to judicial candidates in addition to judges, any violation of Canon 5 by a judicial candidate who was not a judge had to be handled, before the constitutional amendment, by an entity other than the Commission (as set forth in Canon 6). The subcommittee reads HB 367 to add power to the Commission to address conduct by judicial candidates who are not judges; however, the subcommittee does not read HB 367 to remove power from other entities that also are authorized to address conduct by judicial candidates who are not judges (e.g., the State Bar of Texas).

To conform accompanying Canon 6 with the change implemented by HB 367, the following amendment to Canon 6 is recommended. Possible alternative formulations of G(2) are shown below in brackets.

G. Candidates for Judicial Office.

(1) Any person seeking elective judicial office listed in Canon 6(A)(1) shall be subject to the same standards of Canon 5 that are required of member of the judiciary.

(2) Any judge or judicial candidate who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct **[subject to investigation and disciplinary action by the Commission] [subject to disciplinary action]**.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any other candidate for elective judicial office, not subject to paragraph~~s (2) and~~ (3) of this section, who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action.

The subcommittee recommends further discussion and research as to whether (1) additional amendments to the Code of Judicial Conduct are warranted to implement this change as to judicial candidates who are not judges; and (2) revisions to the Rules for Removal or Retirement of Judges are needed to establish procedures and available sanctions for judicial candidates who are not judges.

Tab L

TEXAS CODE OF JUDICIAL CONDUCT

(As amended by the Supreme Court of Texas through July 10, 2019)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

COMMENT

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

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

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

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

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

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

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism.

A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for

the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special

occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Extra-Judicial Appointments. Except as otherwise provided by constitution and statute, a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

COMMENT TO 2000 CHANGE

This change is to clarify that a judge may serve on the Texas Board of Criminal Justice.

I. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

Canon 5: Refraining from Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code §253.151, *et seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

COMMENT

A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 6: Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts, and

(f) statutory county courts.

(2) A full-time commissioner, master, magistrate, or referee of a court listed in (1) above.

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon 5(3).

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to *ex parte* communications; in lieu thereof a justice of

the peace or municipal court judge shall comply with 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canons 5(3).

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* or other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,
(b) uncontested procedural matters,

(c) magistrate duties and functions,

(d) determining where jurisdiction of an impending claim or dispute may lie,

(e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,

(f) mitigating circumstances following a plea of nolo contendere or guilty for a fine-only offense, or

(g) any other matters where *ex parte* communications are contemplated or authorized by law.

D. A Part-time commissioner, master, magistrate, or referee of a court listed in Canon 6A(1) above:

(1) shall comply with all provisions of this Code, except he or she is not required to comply with Canons 4D(2), 4E, 4F, 4G or 4H, and

(2) should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto.

E. A Judge Pro Tempore, while acting as such:

(1) shall comply with all provisions of this Code applicable to the court on which he or she is

serving, except he or she is not required to comply with Canons 4D(2), 4D(3), 4E, 4F, 4G or 4H, and

(2) after serving as a judge pro tempore, should not act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto.

F. Any Senior Judge, or a former appellate or district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:

(1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H, but

(2) should refrain from judicial service during the period of an extra-judicial appointment permitted by Canon 4H.

G. Candidates for Judicial Office.

(1) Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary.

(2) Any judge who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any other candidate for elective judicial office, not subject to paragraphs (2) and (3) of this section, who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action.

H. Attorneys.

Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5, or 6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas.

Canon 7: Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

Canon 8: Construction and Terminology of the Code

A. Construction.

The Code of Judicial Conduct is intended to establish basic standards for ethical conduct of

judges. It consists of specific rules set forth in Sections under broad captions called Canons.

The Sections are rules of reason, which should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

B. Terminology.

(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

(2) "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

(3) "May" denotes permissible discretion or, depending on the context, refers to action that is not covered by specific proscriptions.

(4) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

(5) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(6) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.
(7) "Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(8) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(11) "Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(12) "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

(13) "Retired Judge" means a person who receives from the Texas Judicial Retirement System, Plan One or Plan Two, an annuity based on service that was credited to the system. (Secs. 831.001 and 836.001, V.T.C.A. Government Code [Ch. 179, Sec. 1, 71st Legislature (1989)]

(14) "Senior Judge" means a retired appellate or district judge who has consented to be subject to assignment pursuant to Section 75.001, Government Code. [Ch. 359, 69th Legislature, Reg. Session (1985)]

(15) "Statutory County Court Judge" means the judge of a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, statutory probate courts, county criminal courts, county criminal courts of appeals, and county civil courts at law. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(16) "County Judge" means the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(17) "Part-time" means service on a continuing or periodic basis, but with permission by law to devote time to some other profession or occupation and for which the compensation for that reason is less than that for full-time service.

(18) "Judge Pro Tempore" means a person who is appointed to act temporarily as a judge.

Tab M

PROCEDURAL RULES FOR THE REMOVAL OR RETIREMENT OF JUDGES

(Adopted and Promulgated Pursuant to Article V, Section 1-a(11), Texas Constitution)

RULE 1. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) "Commission" means the State Commission on Judicial Conduct.

(b) "Judge" means any Justice or Judge of the Appellate Courts and District and Criminal District Courts; any County Judge; any Judge of a County Court-at-Law, a Probate Court, or a Municipal Court; any Justice of the Peace; any Judge or presiding officer of any special court created by the Legislature; any retired judge or former judge who continues as a judicial officer subject to assignment to sit on any court of the state; and, any Master or Magistrate appointed to serve a trial court of this state.

(c) "Chairperson" includes the acting Chairperson of the Commission.

(d) "Special Master" means an individual appointed by the Supreme Court upon request of the Commission pursuant to Article V, Section 1-a, Paragraph (8) of the Texas Constitution.

(e) "Sanction" means any admonition, warning, reprimand, or requirement that the person obtain additional training or education, issued publicly or privately, by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution. A sanction is remedial in nature. It is issued prior to the institution of formal proceedings to deter similar misconduct by a judge or judges in the future, to promote proper administration of justice, and to reassure the public that the judicial system of this state neither permits nor condones misconduct.

(f) "Censure" means an order issued by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution or an order issued by a Review Tribunal pursuant to the provisions of Article V, Section 1-a, Paragraph (9) of the Texas Constitution. An order of censure is tantamount to denunciation of the offending conduct, and is more severe than the remedial sanctions issued prior to a formal hearing.

(g) "Special Court of Review" means a panel of three court of appeals justices selected by lot by the Chief Justice of the Supreme Court on petition, to review a censure or sanction issued by the Commission.

(h) "Review Tribunal" means a panel of seven court of appeals justices selected by lot by the Chief Justice of the Supreme Court to review the Commission's recommendation for the removal or retirement of a judge as provided in Article V, Section 1-a, Paragraph (9) of the Texas Constitution.

(i) "Formal Proceeding" means the proceedings ordered by the Commission concerning the possibility of public censure, removal, or retirement of a judge.

(j) "Examiner" means the person, including appropriate Commission staff or Special Counsel, appointed by the Commission to gather and present evidence before a special master, or the Commission, a Special Court of Review or a Review Tribunal.

(k) "Shall" is mandatory and "may" is permissive.

(l) "Mail" means First Class United States Mail.

(m) The masculine gender includes the feminine gender.

RULE 2. MAILING OF NOTICES AND OF OTHER MATTER

Whenever these rules provide for giving notice or sending any matter to a judge, the same shall, unless otherwise expressly provided by the rules or requested in writing by the judge, be sent to him by mail at his office or last known place of residence; provided, that when the judge has a guardian or guardian ad litem, the notice or matter shall be sent to the guardian or guardian ad litem by mail at his office or last known place of residence.

RULE 3. PRELIMINARY INVESTIGATION

(a) The Commission may, upon receipt of a verified statement, upon its own motion, or otherwise, make such preliminary investigation as is appropriate to the circumstances relating to an allegation or appearance of misconduct or disability of any judge to determine that such allegation or appearance is neither unfounded nor frivolous.

(b) If the preliminary investigation discloses that the allegation or appearance is unfounded or frivolous, the Commission shall terminate further proceedings.

RULE 4. FULL INVESTIGATION

(a) If the preliminary investigation discloses that the allegations or appearances are neither unfounded nor frivolous, or if sufficient cause exists to warrant full inquiry into the facts and circumstances indicating that a judge may be guilty of willful or persistent conduct which is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, or that he has a disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature, the Commission shall conduct a full investigation into the matter.

(b) The Commission shall inform the judge in writing that an investigation has commenced and of the nature of the matters being investigated.

(c) The Commission may request the judge's response in writing to the matters being investigated.

RULE 5. ISSUANCE, SERVICE, AND RETURN OF SUBPOENAS

(a) In conducting an investigation, formal proceedings, or proceedings before a Special Court of Review, the Chairperson or any member of the Commission, or a special master when a hearing is being conducted before a special master, or member of a Special Court of Review, may, on his own motion, or on request of appropriate Commission staff, the examiner, or the judge, issue a subpoena for attendance of any witness or witnesses who may be represented to reside within the State of Texas.

(b) The style of the subpoena shall be "The State of Texas". It shall state the style of the proceeding, that the proceeding is pending before the Commission, the time and place at which the witness is required to appear, and the person or official body at whose instance the witness is summoned. It shall be signed by the Chairperson or some other member of the Commission, or by the special master when a hearing is before the special master, and the date of its issuance shall be noted thereon. It shall be addressed to any peace officer of the State of Texas or to a person designated by the Chairperson to make service thereof.

(c) A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein.

(d) Subpoenas may be executed and returned at any time, and shall be served by delivering a copy of such subpoena to the witness; the person serving the subpoena shall make due return thereof, showing the time and manner of service, or service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena.

RULE 6. INFORMAL APPEARANCE

(a) Before terminating an investigation, the Commission may offer a judge an opportunity to appear informally before the Commission.

(b) An informal appearance is confidential except that the judge may elect to have the appearance open to the public or to any person or persons designated by the judge. The right to an open appearance does not preclude placing of witnesses under the rule as provided by Rule 267 of the Texas Rules of Civil Procedure.

(c) No oral testimony other than the judge's shall be received during an informal appearance, although documentary evidence may be received. Testimony of the judge shall be under oath, and a recording of such testimony taken. A copy of such recording shall be furnished to the judge upon request.

(d) The judge may be represented by counsel at the informal appearance.

(e) Notice of the opportunity to appear informally before the Commission shall be given by mail at least ten (10) days prior to the date of the scheduled appearance.

RULE 7. COMMISSION VOTING

(a) A quorum shall consist of seven (7) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, suspension or removal of any Judge shall be by affirmative vote of at least seven (7) members.

RULE 8. RESERVED FOR FUTURE PROMULGATION

RULE 9. REVIEW OF COMMISSION DECISION

(a) A judge who has received from the Commission a sanction in connection with a complaint filed subsequent to September 1, 1987, may file with the Chief Justice of the Supreme Court a written request for appointment of a Special Court of Review, not later than the 30th day after the date on which the Commission issued its sanction.

(b) Within 15 days after appointment of the Special Court of Review, the Commission shall furnish the petitioner and each justice on the Special Court of Review a charging document which shall include a copy of the sanction issued as well as any additional charges

to be considered in the de novo proceeding and the papers, documents, records, and evidence upon which the Commission based its decision. The sanction and other records filed with the Special Court of Review are public information upon filing with the Special Court of Review.

(c) Within 30 days after the date upon which the Commission files the charging document and related materials with the Special Court of Review, the Special Court of Review shall conduct a hearing. The Special Court of Review may, if good cause is shown, grant one or more continuances not to exceed a total of 60 days. The procedure for the hearing shall be governed by the rules of law, evidence, and procedure that apply to civil actions, except the judge is not entitled to trial by jury, and the Special Court of Review's decision shall not be appealable. The hearing shall be held at a location determined by the Special Court of Review, and shall be public.

(d) Decision by the Special Court of Review may include dismissal, affirmation of the Commission's decision, imposition of a lesser or greater sanction, or order to the Commission to file formal proceedings.

(e) The opinion by the Special Court of Review shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

RULE 10. FORMAL PROCEEDINGS

(a) NOTICE

(1) If after the investigation has been completed the Commission concludes that formal proceedings should be instituted, the matter shall be entered in a docket to be kept for that purpose and written notice of the institution of formal proceedings shall be issued to the judge without delay. Such proceedings shall be entitled:

> "Before the State Commission on Judicial Conduct Inquiry Concerning a Judge, No. _______"

(2) The notice shall specify in ordinary and concise language the charges against the judge, and the alleged facts upon which such charges are based and the specific standards contended to have been violated, and shall advise the judge of his right to file a written answer to the charges against him within 15 days after service of the notice upon him.

(3) The notice shall be served by personal service of a copy thereof upon the judge by a member of the Commission or by some person designated by the Chairperson, and the person serving the notice shall promptly notify the Commission in writing of the date on which the same was served. If it appears to the Chairperson upon affidavit that, after reasonable effort during a period of 10 days, personal service could not be had, service may be made by mailing, by registered or certified mail, copies of the notice addressed to the judge at his chambers and at his last known residence, and the date of mailing shall be entered in the docket.

(b) ANSWER

Within 15 days after service of the notice of formal proceedings, the judge may file with the Commission an original answer, which shall be verified, and twelve legible copies thereof.

(c) SETTING DATE FOR HEARING AND REQUEST FOR APPOINTMENT OF A SPECIAL MASTER

(1) Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall set a time and place for hearing before itself or before a special master and shall give notice of such hearing by mail to the judge at least 20 days prior to the date set.

(2) If the Commission directs that the hearing be before a special master, the Commission shall, when it sets a time and place for the hearing, transmit a written request to the Supreme Court to appoint a special master for such hearing, and the Supreme Court shall, within 10 days from receipt of such request, appoint an active or retired District Judge, a Judge of a Court of Civil Appeals, either active or retired, or a retired Justice of the Court of Criminal Appeals or Supreme Court to hear and take evidence in such matters.

(d) HEARING

(1) At the time and place set for hearing, the Commission, or the special master when the hearing is before a special master, shall proceed with the hearing as nearly as may be according to the rules of procedure governing the trial of civil causes in this State, subject to the provisions of Rule 5, whether or not the judge has filed an answer or appears at the hearing. The examiner or other authorized officer shall present the case in support of the charges in the notice of formal proceedings.

(2) The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal or retirement. The failure of the judge to testify in his own behalf or his failure to submit to a medical examination requested by the Commission or the master may be considered, unless it appears that such failure was due to circumstances unrelated to the facts in issue at the hearing.

(3) The proceedings at the hearing shall be reported by a phonographic reporter or by some qualified person appointed by the Commission and taking the oath of an official court reporter.

(4) When the hearing is before the Commission, not less than seven members shall be present while the hearing is in active progress. The Chairperson, when present, the Vice-Chairperson in the absence of the Chairperson, or the member designated by the Chairperson in the absence of both, shall preside. Procedural and other interlocutory rulings shall be made by the person presiding and shall be taken as consented to by the other members unless one or more calls for a vote, in which latter event such rulings shall be made by a majority vote of those present.

(e) EVIDENCE

At a hearing before the Commission or a special master, legal evidence only shall be received as in the trial of civil cases, except upon consent evidenced by absence of objection, and oral evidence shall be taken only on oath or affirmation.

(f) AMENDMENTS TO NOTICE OR ANSWER

The special master, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of

formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

(g) PROCEDURAL RIGHTS OF JUDGES

(1) In the proceedings for his removal or retirement a judge shall have the right to be confronted by his accusers, the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers and other evidentiary matter.

(2) When a transcript of the testimony has been prepared at the expense of the Commission, a copy thereof shall, upon request, be available for use by the judge and his counsel in connection with the proceedings, or the judge may arrange to procure a copy at his expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(3) If the judge is adjudged insane or incompetent, or if it appears to the Commission at any time during the proceedings that he is not competent to act for himself, the Commission shall appoint a guardian ad litem unless the judge has a guardian who will represent him. In the appointment of a guardian ad litem, preference shall be given, so far as practicable, to members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent.

(h) REPORT OF SPECIAL MASTER

(1) After the conclusion of the hearing before a special master, he shall promptly prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings had and his findings of fact based on a preponderance of the evidence with respect to the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, his findings of fact with respect to the allegations in the notice of formal proceedings. The report shall be accompanied by an original and two copies of a transcript of the proceedings before the special master.

(2) Upon receiving the report of the special master, the Commission shall promptly send a copy to the judge, and one copy of the transcript shall be retained for the judge's use.

(i) OBJECTIONS TO REPORT OF SPECIAL MASTER

Within 15 days after mailing of the copy of the special master's report to the judge, the examiner or the judge may file with the Commission an original and twelve legible copies of a statement of objections to the report of the special master, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for removal or retirement. A copy of any such statement filed by the examiner shall be sent to the judge.

(j) APPEARANCE BEFORE COMMISSION

If no statement of objections to the report of the special master is filed within the time provided, the findings of the special master may be deemed as agreed to, and the Commission may adopt them without a hearing. If a statement of objections is filed, or if the Commission

in the absence of such statement proposes to modify or reject the findings of the special master, the Commission shall give the judge and the examiner an opportunity to be heard orally before the Commission, and written notice of the time and place of such hearing shall be sent to the judge at least ten days prior thereto.

(k) EXTENSION OF TIME

The Chairperson of the Commission may extend for periods not to exceed 30 days in the aggregate the time for filing an answer, for the commencement of a hearing before the Commission, and for filing a statement of objections to the report of a special master, and a special master may similarly extend the time for the commencement of a hearing before him.

(l) HEARING ADDITIONAL EVIDENCE

(1) The Commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent to the judge at least ten days prior to the date of the hearing.

(2) The hearing of additional evidence may be before the Commission itself or before the special master, as the Commission shall direct; and if before a special master, the proceedings shall be in conformance with the provisions of Rule 10(d) to 10(g) inclusive.

(m) COMMISSION RECOMMENDATION

If, after hearing, upon considering the record and report of the special master, the Commission finds good cause therefore, it shall recommend to the Review Tribunal the removal, or retirement, as the case may be; or in the alternative, the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition.

RULE 11. REQUEST BY COMMISSION FOR APPOINTMENT OF REVIEW TRIBUNAL

Upon making a determination to recommend the removal or retirement of a judge, the Commission shall promptly file a copy of a request for appointment of a Review Tribunal with the clerk of the Supreme Court, and shall immediately send the judge notice of such filing.

RULE 12. REVIEW OF FORMAL PROCEEDINGS

(a) A recommendation of the Commission for the removal or retirement, of a judge shall be determined by a Review Tribunal of seven Justices selected from the Courts of Appeals. Members of the Review Tribunal shall be selected by lot by the Chief Justice of the Supreme Court from all Appeals Justices sitting at the time of selection. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made, except that no Justice who is a member of the Commission shall serve on the Review Tribunal. The Justice whose name is drawn first shall be chairperson of the Review Tribunal. The clerk of the Supreme Court will serve as the Review Tribunal's staff, and will notify the Commission when selection of the Review Tribunal is complete.

(b) After receipt of notice that the Review Tribunal has been constituted, the Commission shall promptly file a copy of its recommendation certified by the Chairperson or Secretary of the Commission, together with the transcript and the findings and conclusions, with the clerk

of the Supreme Court. The Commission shall immediately send the judge notice of such filing and a copy of the recommendation, findings and conclusions.

(c) A petition to reject the recommendation of the Commission for removal or retirement of a judge or justice may be filed with the clerk of the Supreme Court within thirty days after the filing with the clerk of the Supreme Court of a certified copy of the Commission's recommendation. The petition shall be verified, shall be based on the record, shall specify the grounds relied on and shall be accompanied by seven copies of petitioner's brief and proof of service of one copy of the petition and of the brief on the Chairperson of the Commission. Within twenty days after the filing of the petition and supporting brief, the Commission shall file seven copies of the Commission's brief, and shall serve a copy thereof on the judge.

(d) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the Commission.

(e) Rules 4 and 74, Texas Rules of Appellate Procedure, shall govern the form and contents of briefs except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

(f) The Review Tribunal, may, in its discretion and for good cause shown, permit the introduction of additional evidence, and may direct that the same be introduced before the special master or the Commission and be filed as a part of the record in the Court.

(g) Oral argument on a petition of a judge to reject a recommendation of the Commission shall, upon receipt of the petition, be set on a date not less than thirty days nor more than forty days from the date of receipt thereof. The order and length of time of argument shall, if not otherwise ordered or permitted by the Review Tribunal, be governed by Rule 172, Texas Rules of Appellate Procedure.

(h) Within 90 days after the date on which the record is filed with the Review Tribunal, it shall order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation. The Review Tribunal, in an order for involuntary retirement for disability or an order for removal, may also prohibit such person from holding judicial office in the future.

(i) The opinion by the Review Tribunal shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

RULE 13. APPEAL TO SUPREME COURT

A judge may appeal a decision of the Review Tribunal to the Supreme Court under the substantial evidence rule.

RULE 14. MOTION FOR REHEARING

A motion for rehearing may not be filed as a matter of right. In entering its judgment the Supreme Court or Review Tribunal may direct that no motion for rehearing will be entertained, in which event the judgment will be final on the day and date of its entry. If the

Supreme Court or Review Tribunal does not so direct and the judge wishes to file a motion for rehearing, he shall present the motion together with a motion for leave to file the same to the clerk of the Supreme Court or Review Tribunal within fifteen days of the date of the judgment, and the clerk of the Supreme Court shall transmit it to the Supreme Court or Review Tribunal for such action as the appropriate body deems proper.

RULE 15. SUSPENSION OF A JUDGE

(a) Any judge may be suspended from office with or without pay by the Commission immediately upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. However, the suspended judge has the right to a post-suspension hearing to demonstrate that continued service would not jeopardize the interests of parties involved in court proceedings over which the judge would preside nor impair public confidence in the judiciary. A written request for a post-suspension hearing must be filed with the Commission within 30 days from receipt of the Order of Suspension. Within 30 days from the receipt of a request, a hearing will be scheduled before one or more members or the executive director of the Commission as designated by the Chairperson of the Commission. The person or persons designated will report findings and make recommendations, and within 60 days from the close of the hearing, the Commission shall notify the judge whether the suspension will be continued, terminated, or modified.

(b) Upon the filing with the Commission of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission (under Rule 6), may recommend to the Supreme Court the suspension of such person from office.

(c) When the Commission or the Supreme Court orders the suspension of a judge or justice, with or without pay, the appropriate city, county, and/or state officials shall be notified of such suspension by certified copy of such order.

RULE 16. RECORD OF COMMISSION PROCEEDINGS

The Commission shall keep a record of all informal appearances and formal proceedings concerning a judge. In all proceedings resulting in a recommendation to the Review Tribunal for removal or retirement, the Commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding.

RULE 17. CONFIDENTIALITY AND PRIVILEGE OF PROCEEDINGS

All papers filed with and proceedings before the Commission shall be confidential, and the filing of papers with, and the giving of testimony before the Commission shall be privileged; provided that:

(a) The formal hearing, and all papers, records, documents, and other evidence introduced during the formal hearing shall be public.

(b) If the Commission issues a public sanction, all papers, documents, evidence, and records considered by the Commission or forwarded to the Commission by its staff and related to the sanction shall be public.

(c) The judge may elect to open the informal appearance hearing pursuant to Rule 6(b).

(d) Any hearings of the Special Court of Review shall be public and held at the location determined by the Special Court of Review. Any evidence introduced during a hearing, including papers, records, documents, and pleadings filed in the proceedings, is public.

RULE 18. *EX PARTE* CONTACTS BY MEMBERS OF THE COMMISSION

A Commissioner, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* contacts with any judge who is the subject of an investigation being conducted by the Commission or involved in a proceeding before the Commission

Tab N

Memorandum

To: Supreme Court Advisory Committee

From: Judicial Administration Subcommittee

Date: June 14, 2023

Re: June 3, 2023 Referral Letter relating to HB 2384, Judicial Disclosures and Education

I. Matter Referred to Subcommittee

Judicial Disclosures and Education. HB 2384 imposes ballot application disclosure requirements on judicial candidates and education requirements on judges. Section 2 of the bill adds Government Code § 33.032 to make public any sanction the State Commission on Judicial Conduct issues against a judicial candidate for making false ballot application disclosures, along with related records. Section 3 adds Government Code § 39.003-.004 to provide for the suspension and removal of judges who do not comply with education requirement. The Committee should consider whether the Code of Judicial Conduct and the Procedural Rules for the Removal or Retirement of Judges should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.[1]

II. Relevant Materials

The following materials are attached to this memorandum: (1) the enrolled version of HB 2384, which was signed by Governor Greg Abbott on June 12, 2023; (2) the Code of Judicial Conduct; and (3) the Procedural Rules for the Removal or Retirement of Judges.

III. Subcommittee Recommendation

The Subcommittee recommends (1) revisions to Canons 3 and 5 of the Code of Judicial Conduct to reflect the statutory requirements addressed in the June 3, 2023 referral letter; and (2) further study of the Procedural Rules for the Removal or Retirement of Judges to determine what revisions are needed to provide procedures for the failure to comply with application-disclosure requirements and education requirements.

[1] HB 2384 imposes additional form- and rule-related requirements that will be addressed by entities other than the Supreme Court Advisory Committee. For example, Section 1 adds Election Code § 141.0311 to require judicial candidates to disclose specified information in their applications for a place on the ballot. The Texas Secretary of State will create the form application needed to satisfy these requirements. In addition, a portion of Section 3 of HB 2384 that is not addressed in the June 3, 2023 referral letter adds Government Code § 39.002 to require the adoption of rules regarding judicial education that HB 2384 mandates. The Supreme Court of Texas ("Court") will work with the Court of Criminal Appeals to develop those rules. Next, Section 8 of HB 2384 adds Government Code § 81.075 to require the imposition of a public sanction against a respondent attorney who knowingly makes a false declaration on an application for a place on the ballot as a judicial candidate. The Court will work with the Committee on Disciplinary Rules and Referenda to develop responsive amendments to the Texas Disciplinary Rules of Professional Conduct and/or the Texas Rules of Disciplinary Procedure. Finally, Section 9 of HB 2384 amends Government Code § 82.101 to address a specialty certification for attorneys in the practice area of judicial administration and requires the Court to adopt rules relating to that certification. The Court will work with the Texas Board of Legal Specialization to develop those rules.

IV. Discussion

A. Application Disclosure Requirements

HB 2384 supplements the Election Code's existing ballot-application requirements for "candidates for the following judicial offices: (1) chief justice or justice of the supreme court; (2) presiding judge or judge of the court of criminal appeals; (3) chief justice or justice of a court of appeals; (4) district judge, including a criminal district judge; and (5) judge of a statutory county court." HB 2384, Sec. 1 (providing Tex. Elec. Code § 141.0311(a)). Specifically, in addition to complying with other application requirements, these judicial candidates must (1) disclose specified sanctions and censures, (2) include statements describing aspects of their legal practice and professional courtroom experience for the preceding five years, (3) disclose certain criminal convictions, and—if a candidate for an appellate court "who does not hold or has not previously held a judicial office" in an appellate court—(4) a description of (a) "appellate court briefs the candidate has prepared and filed in the preceding five years; and" (b) "oral arguments the candidate has presented before any appellate court in the preceding five years." *Id.* (providing Tex. Elec. Code § 141.0311(b)–(c)).

HB 2384 also amends the Government Code § 33.032 by adding the following provision pertinent to the Subcommittee's assignment: "Any sanction the commission issues against a judge for knowingly making a false declaration on an application for a place on the ballot as a candidate for a judicial office described by Section 141.0311, Election Code, any withdrawal of such sanction, and all records and proceedings related to the sanction are a matter of public record." *Id.*, Sec. 2 (providing Tex. Gov't Code § 33.032(i)).

Canon 5 of the Code of Judicial Conduct addresses "inappropriate political activity" of judges and judicial candidates. New Government Code § 33.032(i) effectively treats as inappropriate political activity "knowingly making a false declaration on an application for a place on the ballot as a candidate for a judicial office described by Section 141.0311." *Id.* Thus, the following new subpart (5) of Canon 5 is recommended.

> (5) A judicial candidate, including a judge seeking elective judicial office, shall not knowingly make a false declaration on a statutorily required application for a place on the ballot for any of the following offices: (a) chief justice or justice of the Supreme Court; (b) presiding judge or judge of the Court of Criminal Appeals; (c) chief justice or justice of a court of appeals; (d) district judge, including a criminal district judge; and (e) judge of a statutory county court.

The Subcommittee also recommends the adoption of the following comment, explaining the rule change, to direct judicial candidates to the statutory requirements relating to their applications for a place on the ballot.

> Comment: Subpart (5) of Canon 5 is added to reflect new statutory requirements relating to applications for judicial office. *See* Tex. Elec. Code § 141.0311; Tex. Gov't Code § 33.032(i).

The Subcommittee recommends further discussion and research as to (1) whether additional amendments to the Code of Judicial Conduct are needed as a result of Section 2 of HB 2384; and (2) revisions to the Procedural Rules for the Removal or Retirement of Judges that may be needed to address the imposition of public sanctions or censure in relation to judicial candidates who knowingly make false declarations on ballot applications, as well as the "public record" associated with such sanctions or censure.

B. Judicial Education Requirements

HB 2384 adds Chapter 39 of the Government Code, which imposes new education requirements on "a person elected to or holding any of the following judicial offices: (1) chief justice or justice of the supreme court; (2) presiding judge or judge of the court of criminal appeals; (3) chief justice or justice of a court of appeals; (4) district judge, including a criminal district judge; and (5) judge of a statutory county court." HB 2384, Sec. 3 (providing Tex. Gov't Code §§ 39.001–.39.004). Section 39.002 of the Government Code addresses the requirements in some detail and, as noted above, mandates the adoption of rules relating to the particular training and instruction that must be completed. *See id.* (providing Tex. Gov't Code § 39.002).

Pertinent to the Subcommittee's assignment are the following new provisions in HB 2384.

> Sec. 39.003. SUSPENSION. The State Commission on Judicial Conduct shall issue an order suspending any judge who fails to meet the education requirements under Section 39.002 until the judge demonstrates compliance with the requirements.
>
> Sec. 39.004. REMOVAL FROM OFFICE. (a) For purposes of Section 1-a, Article V, Texas Constitution, a judge who is noncompliant with the education requirements under Section 39.002 for more than one year has engaged in wilful *[sic]* or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties sufficient to subject the judge to removal from office.
>
> (b) The attorney general shall file a petition under Section 66.002, Civil Practice and Remedies Code, against a judge who is subject to removal as provided by Subsection (a) if presented with evidence by the State Commission on Judicial Conduct establishing probable grounds that the judge engaged in conduct described by Subsection (a).

Canon 3 of the Code of Judicial Conduct addresses "adjudicative responsibilities" and requires judges to "maintain professional competence" in the law. Tex. Code Jud. Conduct 3B(2). The judicial training and instruction mandated by HB 2384 appears intended, at least in part, to assist judges in maintaining professional competence in the law. Thus, the Subcommittee recommends the following amendment to Canon 3B.

> B. Adjudicative Responsibilities.
> (1) A judge shall hear and decide matters assigned to the judge except those in which is qualification is required or recusal is appropriate.
> (2) A judge should be faithful to the law and shall maintain professional competence in it, <u>including by meeting all judicial-education requirements set forth in governing statutes or rules</u>. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
> (3) A judge shall require order and decorum in proceedings before the judge
>
> . . . .

The Subcommittee recommends further discussion and research as to (1) whether additional amendments to the Code of Judicial Conduct or comments thereto are needed to implement new Sections 39.003–.004 of the Government Code; and (2) revisions to the Procedural Rules for the Removal or Retirement of Judges that may be needed to implement these new statutory provisions.

Tab N1

ATTACHMENT 1

1 AN ACT

2 relating to court administration, including the knowledge,
3 efficiency, training, and transparency requirements for candidates
4 for or holders of judicial offices.

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

6 SECTION 1. Subchapter B, Chapter 141, Election Code, is
7 amended by adding Section 141.0311 to read as follows:

8 Sec. 141.0311. ADDITIONAL REQUIREMENTS FOR APPLICATION FOR
9 JUDICIAL OFFICE. (a) This section applies to candidates for the
10 following judicial offices:

11 (1) chief justice or justice of the supreme court;

12 (2) presiding judge or judge of the court of criminal
13 appeals;

14 (3) chief justice or justice of a court of appeals;

15 (4) district judge, including a criminal district
16 judge; and

17 (5) judge of a statutory county court.

18 (b) In addition to other requirements under this code, a
19 candidate's application for a place on the ballot must:

20 (1) include the candidate's state bar number for:

21 (A) this state; and

22 (B) any other state in which the candidate has
23 been licensed to practice law;

24 (2) disclose any public:

1 (A) sanction or censure, as those terms are
2 defined by Section 33.001, Government Code, the State Commission on
3 Judicial Conduct or a review tribunal has issued against the
4 candidate;
5 (B) disciplinary sanction imposed on the
6 candidate by the state bar; and
7 (C) disciplinary sanction imposed on the
8 candidate by an entity in another state responsible for attorney
9 discipline in that state;
10 (3) include statements describing for the preceding
11 five years:
12 (A) the nature of the candidate's legal practice,
13 including any area of legal specialization; and
14 (B) the candidate's professional courtroom
15 experience; and
16 (4) disclose any final conviction of a Class A or Class
17 B misdemeanor in the 10 years preceding the date the person would
18 assume the judicial office for which the person is filing the
19 application.
20 (c) A candidate for a judicial office described by
21 Subdivision (a)(1), (2), or (3) who does not hold or has not
22 previously held a judicial office described by those subdivisions
23 must, in addition to the other requirements of this section and this
24 code, include in the application a description of:
25 (1) appellate court briefs the candidate has prepared
26 and filed in the preceding five years; and
27 (2) oral arguments the candidate has presented before

1 any appellate court in the preceding five years.
2 (d) Each officially prescribed form for an application
3 under this section must include a statement informing candidates
4 that knowingly providing false information on the application, in
5 addition to other penalties prescribed by law, constitutes
6 professional misconduct subject to public sanctions or censure by
7 the State Commission on Judicial Conduct or the state bar, as
8 applicable.
9 (e) The secretary of state shall prescribe the form and
10 content of the application materials under this section. The
11 secretary of state may consult with the Office of Court
12 Administration of the Texas Judicial System, the supreme court, and
13 the court of criminal appeals when prescribing the form and content
14 of application materials under this section.
15 SECTION 2. Section 33.032, Government Code, is amended by
16 adding Subsection (i) to read as follows:
17 (i) Any sanction the commission issues against a judge for
18 knowingly making a false declaration on an application for a place
19 on the ballot as a candidate for a judicial office described by
20 Section 141.0311, Election Code, any withdrawal of such sanction,
21 and all records and proceedings related to the sanction are a matter
22 of public record.
23 SECTION 3. Subtitle B, Title 2, Government Code, is amended
24 by adding Chapter 39 to read as follows:
25 CHAPTER 39. JUDICIAL EDUCATION REQUIREMENTS
26 Sec. 39.001. APPLICABILITY. This chapter applies to a
27 person elected to or holding any of the following judicial offices:

1 (1) chief justice or justice of the supreme court;
2 (2) presiding judge or judge of the court of criminal
3 appeals;
4 (3) chief justice or justice of a court of appeals;
5 (4) district judge, including a criminal district
6 judge; and
7 (5) judge of a statutory county court.
8 Sec. 39.002. JUDICIAL INSTRUCTION REQUIREMENTS. (a) The
9 supreme court, in consultation with the court of criminal appeals,
10 shall adopt rules on the judicial training a person must complete
11 not later than the first anniversary of the date the person assumes
12 a judicial office, subject to Subsection (b). The rules must
13 require the person to complete at least 30 hours of instruction.
14 (b) Subsection (a) does not apply to a person who has been
15 absent from judicial office for less than one year before assuming a
16 judicial office and who has previously completed the requirements
17 of Subsection (a).
18 (c) A judge must annually complete at least 16 hours of
19 instruction described by Subsection (a) after the first year of the
20 judge's term.
21 (d) The rules adopted under this section may provide for a
22 deferral or exemption for a person who is unable to timely complete
23 the training or instruction due to a medical or physical
24 disability.
25 (e) This section does not affect any funds appropriated to
26 or grants administered by the court of criminal appeals under
27 Chapter 56.

1 Sec. 39.003. SUSPENSION. The State Commission on Judicial
2 Conduct shall issue an order suspending any judge who fails to meet
3 the education requirements under Section 39.002 until the judge
4 demonstrates compliance with the requirements.
5 Sec. 39.004. REMOVAL FROM OFFICE. (a) For purposes of
6 Section 1-a, Article V, Texas Constitution, a judge who is
7 noncompliant with the education requirements under Section 39.002
8 for more than one year has engaged in wilful or persistent conduct
9 that is clearly inconsistent with the proper performance of a
10 judge's duties sufficient to subject the judge to removal from
11 office.
12 (b) The attorney general shall file a petition under Section
13 66.002, Civil Practice and Remedies Code, against a judge who is
14 subject to removal as provided by Subsection (a) if presented with
15 evidence by the State Commission on Judicial Conduct establishing
16 probable grounds that the judge engaged in conduct described by
17 Subsection (a).
18 SECTION 4. Section 72.024, Government Code, is amended by
19 adding Subsection (b-1) to read as follows:
20 (b-1) The director shall develop standards for identifying
21 courts that need additional assistance to promote the efficient
22 administration of justice.
23 SECTION 5. Section 72.082, Government Code, is amended to
24 read as follows:
25 Sec. 72.082. PERFORMANCE REPORT. The office shall annually
26 collect and publish a performance report of information regarding
27 the efficiency of the courts of this state. The report must include

1 disaggregated performance measures for each appellate court,
2 district court, statutory county court, statutory probate court,
3 and county court.
4 SECTION 6. Section 72.083, Government Code, is amended to
5 read as follows:
6 Sec. 72.083. TRIAL COURTS. (a) [~~The office shall report~~
7 ~~the aggregate clearance rate of cases for the district courts.~~] In
8 this section, "clearance rate" means the number of cases disposed
9 of by a court [~~the district courts~~] divided by the number of cases
10 added to the docket [~~dockets~~] of the court [~~district courts~~].
11 (b) The office shall annually report the following
12 performance measures for each district court, statutory county
13 court, statutory probate court, and county court:
14 (1) the court's clearance rate;
15 (2) the average time a case is before the court from
16 filing to disposition; and
17 (3) the age of the court's active pending caseload.
18 SECTION 7. Section 74.046, Government Code, is amended to
19 read as follows:
20 Sec. 74.046. DUTIES OF PRESIDING JUDGE. (a) A presiding
21 judge shall:
22 (1) ensure the promulgation of regional rules of
23 administration within policies and guidelines set by the supreme
24 court;
25 (2) advise local judges on case flow management and
26 auxiliary court services;
27 (3) recommend to the chief justice of the supreme

1 court any needs for judicial assignments from outside the region;
2 (4) recommend to the supreme court any changes in the
3 organization, jurisdiction, operation, or procedures of the region
4 necessary or desirable for the improvement of the administration of
5 justice;
6 (5) act for a local administrative judge when the
7 local administrative judge does not perform the duties required by
8 Subchapter D;
9 (6) implement and execute any rules adopted by the
10 supreme court under this chapter;
11 (7) provide the supreme court or the office of court
12 administration statistical information requested; and
13 (8) perform the duties assigned by the chief justice
14 of the supreme court.
15 (b) A presiding judge may appoint a judicial mentor or
16 arrange for additional administrative personnel to be assigned to a
17 court identified by the Office of Court Administration of the Texas
18 Judicial System as needing additional assistance under Section
19 72.024(b-1).
20 SECTION 8. Section 81.075, Government Code, is amended by
21 adding Subsection (f) to read as follows:
22 (f) If the panel of a district grievance committee finds an
23 attorney knowingly made a false declaration on an application for a
24 place on the ballot as a candidate for judicial office under Section
25 141.0311, Election Code, the committee shall impose a public
26 sanction against the respondent attorney.
27 SECTION 9. Chapter 82, Government Code, is amended by

1 adding Subchapter D to read as follows:

2 SUBCHAPTER D. SPECIALTY CERTIFICATIONS FOR ATTORNEYS

3 Sec. 82.101. SPECIALTY CERTIFICATION IN JUDICIAL
4 ADMINISTRATION. (a) The supreme court shall adopt rules
5 establishing a specialty certification for attorneys in the
6 practice area of judicial administration.

7 (b) For purposes of establishing a specialty certification
8 for attorneys in the practice area of judicial administration, the
9 Texas Board of Legal Specialization shall make recommendations to
10 the supreme court for the specialty certification and a proposed
11 examination for obtaining the specialty certification.

12 (c) The Texas Board of Legal Specialization shall make the
13 specialty certification for attorneys in judicial administration
14 available to each judge of an appellate court, district court,
15 statutory county court, statutory probate court, or county court
16 performing judicial functions who is a licensed attorney and who
17 meets the eligibility requirements established by the board.

18 (d) The supreme court by rule shall require an attorney who
19 holds a specialty certification in judicial administration to
20 annually complete 21 hours of continuing legal education to
21 maintain the certification.

22 (e) A justice or judge who holds a specialty certification
23 in judicial administration or another specialty certification may
24 be entitled to additional compensation if the legislature makes a
25 specific appropriation for that purpose.

26 SECTION 10. (a) As soon as practicable after the effective
27 date of this Act, the Texas Supreme Court shall adopt the rules

1 necessary to implement Chapter 39, Government Code, as added by
2 this Act, and Subchapter D, Chapter 82, Government Code, as added by
3 this Act.

4 (b) As soon as practicable after the effective date of this
5 act, the Texas Judicial Council shall adopt the rules necessary for
6 the Office of Court Administration of the Texas Judicial System to
7 collect the information required under Sections 72.082 and 72.083,
8 Government Code, as amended by this Act.

9 (c) Section 141.0311, Election Code, as added by this Act,
10 applies only to an application for a place on the ballot filed for
11 an election ordered on or after the effective date of this Act. An
12 application for a place on the ballot filed for an election ordered
13 before the effective date of this Act is covered by the law in
14 effect on the date the application was filed, and the former law is
15 continued in effect for that purpose.

16 (d) The changes in law made by Chapter 39, Government Code,
17 as added by this Act, apply to all judges elected, appointed, or
18 holding office on or after the effective date of this Act.

19 SECTION 11. This Act takes effect September 1, 2023.

______________________________ ______________________________

President of the Senate Speaker of the House

I certify that H.B. No. 2384 was passed by the House on April 18, 2023, by the following vote: Yeas 146, Nays 2, 1 present, not voting.

____

Chief Clerk of the House

I certify that H.B. No. 2384 was passed by the Senate on May 17, 2023, by the following vote: Yeas 30, Nays 1.

____

Secretary of the Senate

APPROVED: _____________________

Date

____

Governor

Tab N2

ATTACHMENT 2

TEXAS CODE OF JUDICIAL CONDUCT

(As amended by the Supreme Court of Texas through July 10, 2019)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

COMMENT

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

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

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

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

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

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

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism.

A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for

the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special

occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Extra-Judicial Appointments. Except as otherwise provided by constitution and statute, a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

COMMENT TO 2000 CHANGE

This change is to clarify that a judge may serve on the Texas Board of Criminal Justice.

I. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

Canon 5: Refraining from Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code §253.151, *et seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

COMMENT

A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 6: Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts, and

(f) statutory county courts.

(2) A full-time commissioner, master, magistrate, or referee of a court listed in (1) above.

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon 5(3).

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to *ex parte* communications; in lieu thereof a justice of

the peace or municipal court judge shall comply with 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canons 5(3).

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* or other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,
(b) uncontested procedural matters,

(c) magistrate duties and functions,

(d) determining where jurisdiction of an impending claim or dispute may lie,

(e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,

(f) mitigating circumstances following a plea of nolo contendere or guilty for a fine-only offense, or

(g) any other matters where *ex parte* communications are contemplated or authorized by law.

D. A Part-time commissioner, master, magistrate, or referee of a court listed in Canon 6A(1) above:

(1) shall comply with all provisions of this Code, except he or she is not required to comply with Canons 4D(2), 4E, 4F, 4G or 4H, and

(2) should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto.

E. A Judge Pro Tempore, while acting as such:

(1) shall comply with all provisions of this Code applicable to the court on which he or she is

serving, except he or she is not required to comply with Canons 4D(2), 4D(3), 4E, 4F, 4G or 4H, and

(2) after serving as a judge pro tempore, should not act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto.

F. Any Senior Judge, or a former appellate or district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:

(1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H, but

(2) should refrain from judicial service during the period of an extra-judicial appointment permitted by Canon 4H.

G. Candidates for Judicial Office.

(1) Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary.

(2) Any judge who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any other candidate for elective judicial office, not subject to paragraphs (2) and (3) of this section, who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action.

H. Attorneys.

Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5, or 6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas.

Canon 7: Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

Canon 8: Construction and Terminology of the Code

A. Construction.

The Code of Judicial Conduct is intended to establish basic standards for ethical conduct of

judges. It consists of specific rules set forth in Sections under broad captions called Canons.

The Sections are rules of reason, which should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

B. Terminology.

(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

(2) "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

(3) "May" denotes permissible discretion or, depending on the context, refers to action that is not covered by specific proscriptions.

(4) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

(5) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(6) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(7) "Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(8) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(11) "Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(12) "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

(13) "Retired Judge" means a person who receives from the Texas Judicial Retirement System, Plan One or Plan Two, an annuity based on service that was credited to the system. (Secs. 831.001 and 836.001, V.T.C.A. Government Code [Ch. 179, Sec. 1, 71st Legislature (1989)]

(14) "Senior Judge" means a retired appellate or district judge who has consented to be subject to assignment pursuant to Section 75.001, Government Code. [Ch. 359, 69th Legislature, Reg. Session (1985)]

(15) "Statutory County Court Judge" means the judge of a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, statutory probate courts, county criminal courts, county criminal courts of appeals, and county civil courts at law. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(16) "County Judge" means the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(17) "Part-time" means service on a continuing or periodic basis, but with permission by law to devote time to some other profession or occupation and for which the compensation for that reason is less than that for full-time service.

(18) "Judge Pro Tempore" means a person who is appointed to act temporarily as a judge.

Tab N3

ATTACHMENT 3

PROCEDURAL RULES FOR THE REMOVAL OR RETIREMENT OF JUDGES

(Adopted and Promulgated Pursuant to Article V, Section 1-a(11), Texas Constitution)

RULE 1. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) "Commission" means the State Commission on Judicial Conduct.

(b) "Judge" means any Justice or Judge of the Appellate Courts and District and Criminal District Courts; any County Judge; any Judge of a County Court-at-Law, a Probate Court, or a Municipal Court; any Justice of the Peace; any Judge or presiding officer of any special court created by the Legislature; any retired judge or former judge who continues as a judicial officer subject to assignment to sit on any court of the state; and, any Master or Magistrate appointed to serve a trial court of this state.

(c) "Chairperson" includes the acting Chairperson of the Commission.

(d) "Special Master" means an individual appointed by the Supreme Court upon request of the Commission pursuant to Article V, Section 1-a, Paragraph (8) of the Texas Constitution.

(e) "Sanction" means any admonition, warning, reprimand, or requirement that the person obtain additional training or education, issued publicly or privately, by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution. A sanction is remedial in nature. It is issued prior to the institution of formal proceedings to deter similar misconduct by a judge or judges in the future, to promote proper administration of justice, and to reassure the public that the judicial system of this state neither permits nor condones misconduct.

(f) "Censure" means an order issued by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution or an order issued by a Review Tribunal pursuant to the provisions of Article V, Section 1-a, Paragraph (9) of the Texas Constitution. An order of censure is tantamount to denunciation of the offending conduct, and is more severe than the remedial sanctions issued prior to a formal hearing.

(g) "Special Court of Review" means a panel of three court of appeals justices selected by lot by the Chief Justice of the Supreme Court on petition, to review a censure or sanction issued by the Commission.

(h) "Review Tribunal" means a panel of seven court of appeals justices selected by lot by the Chief Justice of the Supreme Court to review the Commission's recommendation for the removal or retirement of a judge as provided in Article V, Section 1-a, Paragraph (9) of the Texas Constitution.

(i) "Formal Proceeding" means the proceedings ordered by the Commission concerning the possibility of public censure, removal, or retirement of a judge.

(j) "Examiner" means the person, including appropriate Commission staff or Special Counsel, appointed by the Commission to gather and present evidence before a special master, or the Commission, a Special Court of Review or a Review Tribunal.

(k) "Shall" is mandatory and "may" is permissive.

(l) "Mail" means First Class United States Mail.

(m) The masculine gender includes the feminine gender.

RULE 2. MAILING OF NOTICES AND OF OTHER MATTER

Whenever these rules provide for giving notice or sending any matter to a judge, the same shall, unless otherwise expressly provided by the rules or requested in writing by the judge, be sent to him by mail at his office or last known place of residence; provided, that when the judge has a guardian or guardian ad litem, the notice or matter shall be sent to the guardian or guardian ad litem by mail at his office or last known place of residence.

RULE 3. PRELIMINARY INVESTIGATION

(a) The Commission may, upon receipt of a verified statement, upon its own motion, or otherwise, make such preliminary investigation as is appropriate to the circumstances relating to an allegation or appearance of misconduct or disability of any judge to determine that such allegation or appearance is neither unfounded nor frivolous.

(b) If the preliminary investigation discloses that the allegation or appearance is unfounded or frivolous, the Commission shall terminate further proceedings.

RULE 4. FULL INVESTIGATION

(a) If the preliminary investigation discloses that the allegations or appearances are neither unfounded nor frivolous, or if sufficient cause exists to warrant full inquiry into the facts and circumstances indicating that a judge may be guilty of willful or persistent conduct which is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, or that he has a disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature, the Commission shall conduct a full investigation into the matter.

(b) The Commission shall inform the judge in writing that an investigation has commenced and of the nature of the matters being investigated.

(c) The Commission may request the judge's response in writing to the matters being investigated.

RULE 5. ISSUANCE, SERVICE, AND RETURN OF SUBPOENAS

(a) In conducting an investigation, formal proceedings, or proceedings before a Special Court of Review, the Chairperson or any member of the Commission, or a special master when a hearing is being conducted before a special master, or member of a Special Court of Review, may, on his own motion, or on request of appropriate Commission staff, the examiner, or the judge, issue a subpoena for attendance of any witness or witnesses who may be represented to reside within the State of Texas.

(b) The style of the subpoena shall be "The State of Texas". It shall state the style of the proceeding, that the proceeding is pending before the Commission, the time and place at which the witness is required to appear, and the person or official body at whose instance the witness is summoned. It shall be signed by the Chairperson or some other member of the Commission, or by the special master when a hearing is before the special master, and the date of its issuance shall be noted thereon. It shall be addressed to any peace officer of the State of Texas or to a person designated by the Chairperson to make service thereof.

(c) A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein.

(d) Subpoenas may be executed and returned at any time, and shall be served by delivering a copy of such subpoena to the witness; the person serving the subpoena shall make due return thereof, showing the time and manner of service, or service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena.

RULE 6. INFORMAL APPEARANCE

(a) Before terminating an investigation, the Commission may offer a judge an opportunity to appear informally before the Commission.

(b) An informal appearance is confidential except that the judge may elect to have the appearance open to the public or to any person or persons designated by the judge. The right to an open appearance does not preclude placing of witnesses under the rule as provided by Rule 267 of the Texas Rules of Civil Procedure.

(c) No oral testimony other than the judge's shall be received during an informal appearance, although documentary evidence may be received. Testimony of the judge shall be under oath, and a recording of such testimony taken. A copy of such recording shall be furnished to the judge upon request.

(d) The judge may be represented by counsel at the informal appearance.

(e) Notice of the opportunity to appear informally before the Commission shall be given by mail at least ten (10) days prior to the date of the scheduled appearance.

RULE 7. COMMISSION VOTING

(a) A quorum shall consist of seven (7) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, suspension or removal of any Judge shall be by affirmative vote of at least seven (7) members.

RULE 8. RESERVED FOR FUTURE PROMULGATION

RULE 9. REVIEW OF COMMISSION DECISION

(a) A judge who has received from the Commission a sanction in connection with a complaint filed subsequent to September 1, 1987, may file with the Chief Justice of the Supreme Court a written request for appointment of a Special Court of Review, not later than the 30th day after the date on which the Commission issued its sanction.

(b) Within 15 days after appointment of the Special Court of Review, the Commission shall furnish the petitioner and each justice on the Special Court of Review a charging document which shall include a copy of the sanction issued as well as any additional charges

to be considered in the de novo proceeding and the papers, documents, records, and evidence upon which the Commission based its decision. The sanction and other records filed with the Special Court of Review are public information upon filing with the Special Court of Review.

(c) Within 30 days after the date upon which the Commission files the charging document and related materials with the Special Court of Review, the Special Court of Review shall conduct a hearing. The Special Court of Review may, if good cause is shown, grant one or more continuances not to exceed a total of 60 days. The procedure for the hearing shall be governed by the rules of law, evidence, and procedure that apply to civil actions, except the judge is not entitled to trial by jury, and the Special Court of Review's decision shall not be appealable. The hearing shall be held at a location determined by the Special Court of Review, and shall be public.

(d) Decision by the Special Court of Review may include dismissal, affirmation of the Commission's decision, imposition of a lesser or greater sanction, or order to the Commission to file formal proceedings.

(e) The opinion by the Special Court of Review shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

RULE 10. FORMAL PROCEEDINGS

(a) NOTICE

(1) If after the investigation has been completed the Commission concludes that formal proceedings should be instituted, the matter shall be entered in a docket to be kept for that purpose and written notice of the institution of formal proceedings shall be issued to the judge without delay. Such proceedings shall be entitled:

> "Before the State Commission on Judicial Conduct Inquiry Concerning a Judge, No. _______"

(2) The notice shall specify in ordinary and concise language the charges against the judge, and the alleged facts upon which such charges are based and the specific standards contended to have been violated, and shall advise the judge of his right to file a written answer to the charges against him within 15 days after service of the notice upon him.

(3) The notice shall be served by personal service of a copy thereof upon the judge by a member of the Commission or by some person designated by the Chairperson, and the person serving the notice shall promptly notify the Commission in writing of the date on which the same was served. If it appears to the Chairperson upon affidavit that, after reasonable effort during a period of 10 days, personal service could not be had, service may be made by mailing, by registered or certified mail, copies of the notice addressed to the judge at his chambers and at his last known residence, and the date of mailing shall be entered in the docket.

(b) ANSWER

Within 15 days after service of the notice of formal proceedings, the judge may file with the Commission an original answer, which shall be verified, and twelve legible copies thereof.

(c) SETTING DATE FOR HEARING AND REQUEST FOR APPOINTMENT OF A SPECIAL MASTER

(1) Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall set a time and place for hearing before itself or before a special master and shall give notice of such hearing by mail to the judge at least 20 days prior to the date set.

(2) If the Commission directs that the hearing be before a special master, the Commission shall, when it sets a time and place for the hearing, transmit a written request to the Supreme Court to appoint a special master for such hearing, and the Supreme Court shall, within 10 days from receipt of such request, appoint an active or retired District Judge, a Judge of a Court of Civil Appeals, either active or retired, or a retired Justice of the Court of Criminal Appeals or Supreme Court to hear and take evidence in such matters.

(d) HEARING

(1) At the time and place set for hearing, the Commission, or the special master when the hearing is before a special master, shall proceed with the hearing as nearly as may be according to the rules of procedure governing the trial of civil causes in this State, subject to the provisions of Rule 5, whether or not the judge has filed an answer or appears at the hearing. The examiner or other authorized officer shall present the case in support of the charges in the notice of formal proceedings.

(2) The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal or retirement. The failure of the judge to testify in his own behalf or his failure to submit to a medical examination requested by the Commission or the master may be considered, unless it appears that such failure was due to circumstances unrelated to the facts in issue at the hearing.

(3) The proceedings at the hearing shall be reported by a phonographic reporter or by some qualified person appointed by the Commission and taking the oath of an official court reporter.

(4) When the hearing is before the Commission, not less than seven members shall be present while the hearing is in active progress. The Chairperson, when present, the Vice-Chairperson in the absence of the Chairperson, or the member designated by the Chairperson in the absence of both, shall preside. Procedural and other interlocutory rulings shall be made by the person presiding and shall be taken as consented to by the other members unless one or more calls for a vote, in which latter event such rulings shall be made by a majority vote of those present.

(e) EVIDENCE

At a hearing before the Commission or a special master, legal evidence only shall be received as in the trial of civil cases, except upon consent evidenced by absence of objection, and oral evidence shall be taken only on oath or affirmation.

(f) AMENDMENTS TO NOTICE OR ANSWER

The special master, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of

formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

(g) PROCEDURAL RIGHTS OF JUDGES

(1) In the proceedings for his removal or retirement a judge shall have the right to be confronted by his accusers, the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers and other evidentiary matter.

(2) When a transcript of the testimony has been prepared at the expense of the Commission, a copy thereof shall, upon request, be available for use by the judge and his counsel in connection with the proceedings, or the judge may arrange to procure a copy at his expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(3) If the judge is adjudged insane or incompetent, or if it appears to the Commission at any time during the proceedings that he is not competent to act for himself, the Commission shall appoint a guardian ad litem unless the judge has a guardian who will represent him. In the appointment of a guardian ad litem, preference shall be given, so far as practicable, to members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent.

(h) REPORT OF SPECIAL MASTER

(1) After the conclusion of the hearing before a special master, he shall promptly prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings had and his findings of fact based on a preponderance of the evidence with respect to the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, his findings of fact with respect to the allegations in the notice of formal proceedings. The report shall be accompanied by an original and two copies of a transcript of the proceedings before the special master.

(2) Upon receiving the report of the special master, the Commission shall promptly send a copy to the judge, and one copy of the transcript shall be retained for the judge's use.

(i) OBJECTIONS TO REPORT OF SPECIAL MASTER

Within 15 days after mailing of the copy of the special master's report to the judge, the examiner or the judge may file with the Commission an original and twelve legible copies of a statement of objections to the report of the special master, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for removal or retirement. A copy of any such statement filed by the examiner shall be sent to the judge.

(j) APPEARANCE BEFORE COMMISSION

If no statement of objections to the report of the special master is filed within the time provided, the findings of the special master may be deemed as agreed to, and the Commission may adopt them without a hearing. If a statement of objections is filed, or if the Commission

in the absence of such statement proposes to modify or reject the findings of the special master, the Commission shall give the judge and the examiner an opportunity to be heard orally before the Commission, and written notice of the time and place of such hearing shall be sent to the judge at least ten days prior thereto.

(k) EXTENSION OF TIME

The Chairperson of the Commission may extend for periods not to exceed 30 days in the aggregate the time for filing an answer, for the commencement of a hearing before the Commission, and for filing a statement of objections to the report of a special master, and a special master may similarly extend the time for the commencement of a hearing before him.

(l) HEARING ADDITIONAL EVIDENCE

(1) The Commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent to the judge at least ten days prior to the date of the hearing.

(2) The hearing of additional evidence may be before the Commission itself or before the special master, as the Commission shall direct; and if before a special master, the proceedings shall be in conformance with the provisions of Rule 10(d) to 10(g) inclusive.

(m) COMMISSION RECOMMENDATION

If, after hearing, upon considering the record and report of the special master, the Commission finds good cause therefore, it shall recommend to the Review Tribunal the removal, or retirement, as the case may be; or in the alternative, the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition.

RULE 11. REQUEST BY COMMISSION FOR APPOINTMENT OF REVIEW TRIBUNAL

Upon making a determination to recommend the removal or retirement of a judge, the Commission shall promptly file a copy of a request for appointment of a Review Tribunal with the clerk of the Supreme Court, and shall immediately send the judge notice of such filing.

RULE 12. REVIEW OF FORMAL PROCEEDINGS

(a) A recommendation of the Commission for the removal or retirement, of a judge shall be determined by a Review Tribunal of seven Justices selected from the Courts of Appeals. Members of the Review Tribunal shall be selected by lot by the Chief Justice of the Supreme Court from all Appeals Justices sitting at the time of selection. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made, except that no Justice who is a member of the Commission shall serve on the Review Tribunal. The Justice whose name is drawn first shall be chairperson of the Review Tribunal. The clerk of the Supreme Court will serve as the Review Tribunal's staff, and will notify the Commission when selection of the Review Tribunal is complete.

(b) After receipt of notice that the Review Tribunal has been constituted, the Commission shall promptly file a copy of its recommendation certified by the Chairperson or Secretary of the Commission, together with the transcript and the findings and conclusions, with the clerk

of the Supreme Court. The Commission shall immediately send the judge notice of such filing and a copy of the recommendation, findings and conclusions.

(c) A petition to reject the recommendation of the Commission for removal or retirement of a judge or justice may be filed with the clerk of the Supreme Court within thirty days after the filing with the clerk of the Supreme Court of a certified copy of the Commission's recommendation. The petition shall be verified, shall be based on the record, shall specify the grounds relied on and shall be accompanied by seven copies of petitioner's brief and proof of service of one copy of the petition and of the brief on the Chairperson of the Commission. Within twenty days after the filing of the petition and supporting brief, the Commission shall file seven copies of the Commission's brief, and shall serve a copy thereof on the judge.

(d) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the Commission.

(e) Rules 4 and 74, Texas Rules of Appellate Procedure, shall govern the form and contents of briefs except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

(f) The Review Tribunal, may, in its discretion and for good cause shown, permit the introduction of additional evidence, and may direct that the same be introduced before the special master or the Commission and be filed as a part of the record in the Court.

(g) Oral argument on a petition of a judge to reject a recommendation of the Commission shall, upon receipt of the petition, be set on a date not less than thirty days nor more than forty days from the date of receipt thereof. The order and length of time of argument shall, if not otherwise ordered or permitted by the Review Tribunal, be governed by Rule 172, Texas Rules of Appellate Procedure.

(h) Within 90 days after the date on which the record is filed with the Review Tribunal, it shall order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation. The Review Tribunal, in an order for involuntary retirement for disability or an order for removal, may also prohibit such person from holding judicial office in the future.

(i) The opinion by the Review Tribunal shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

RULE 13. APPEAL TO SUPREME COURT

A judge may appeal a decision of the Review Tribunal to the Supreme Court under the substantial evidence rule.

RULE 14. MOTION FOR REHEARING

A motion for rehearing may not be filed as a matter of right. In entering its judgment the Supreme Court or Review Tribunal may direct that no motion for rehearing will be entertained, in which event the judgment will be final on the day and date of its entry. If the

Supreme Court or Review Tribunal does not so direct and the judge wishes to file a motion for rehearing, he shall present the motion together with a motion for leave to file the same to the clerk of the Supreme Court or Review Tribunal within fifteen days of the date of the judgment, and the clerk of the Supreme Court shall transmit it to the Supreme Court or Review Tribunal for such action as the appropriate body deems proper.

RULE 15. SUSPENSION OF A JUDGE

(a) Any judge may be suspended from office with or without pay by the Commission immediately upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. However, the suspended judge has the right to a post-suspension hearing to demonstrate that continued service would not jeopardize the interests of parties involved in court proceedings over which the judge would preside nor impair public confidence in the judiciary. A written request for a post-suspension hearing must be filed with the Commission within 30 days from receipt of the Order of Suspension. Within 30 days from the receipt of a request, a hearing will be scheduled before one or more members or the executive director of the Commission as designated by the Chairperson of the Commission. The person or persons designated will report findings and make recommendations, and within 60 days from the close of the hearing, the Commission shall notify the judge whether the suspension will be continued, terminated, or modified.

(b) Upon the filing with the Commission of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission (under Rule 6), may recommend to the Supreme Court the suspension of such person from office.

(c) When the Commission or the Supreme Court orders the suspension of a judge or justice, with or without pay, the appropriate city, county, and/or state officials shall be notified of such suspension by certified copy of such order.

RULE 16. RECORD OF COMMISSION PROCEEDINGS

The Commission shall keep a record of all informal appearances and formal proceedings concerning a judge. In all proceedings resulting in a recommendation to the Review Tribunal for removal or retirement, the Commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding.

RULE 17. CONFIDENTIALITY AND PRIVILEGE OF PROCEEDINGS

All papers filed with and proceedings before the Commission shall be confidential, and the filing of papers with, and the giving of testimony before the Commission shall be privileged; provided that:

(a) The formal hearing, and all papers, records, documents, and other evidence introduced during the formal hearing shall be public.

(b) If the Commission issues a public sanction, all papers, documents, evidence, and records considered by the Commission or forwarded to the Commission by its staff and related to the sanction shall be public.

(c) The judge may elect to open the informal appearance hearing pursuant to Rule 6(b).

(d) Any hearings of the Special Court of Review shall be public and held at the location determined by the Special Court of Review. Any evidence introduced during a hearing, including papers, records, documents, and pleadings filed in the proceedings, is public.

RULE 18. *EX PARTE* CONTACTS BY MEMBERS OF THE COMMISSION

A Commissioner, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* contacts with any judge who is the subject of an investigation being conducted by the Commission or involved in a proceeding before the Commission

Tab O

1 AN ACT

2 relating to creating a criminal offense for the unauthorized
3 disclosure of non-public judicial opinions and judicial work
4 product.

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

6 SECTION 1. Chapter 21, Government Code, is amended by
7 adding Section 21.013 to read as follows:

8 Sec. 21.013. CONFIDENTIALITY OF JUDICIAL WORK PRODUCT;
9 CRIMINAL OFFENSE. (a) In this section:

10 (1) "Judicial work product" means written,
11 electronic, or oral material prepared or communications made in the
12 course of an adjudicatory proceeding before a court determining
13 legal rights, powers, duties, or privileges. The term includes all
14 drafts of opinions or orders and memoranda of law.

15 (2) "Non-public judicial work product" means:

16 (A) any written or electronic judicial work
17 product other than documents filed with the clerk of a court for
18 release to the public; or

19 (B) any oral statement relating to judicial work
20 product made in a closed session of a court or in judicial chambers.

21 (b) This section applies to:

22 (1) a court established under Section 1, Article V,
23 Texas Constitution, other than a commissioners court; and

24 (2) a court subject to this subtitle.

1 (c) A justice or judge of a court shall comply with supreme
2 court rules governing the confidentiality of non-public judicial
3 work product.
4 (d) A person, other than a justice or judge, who is involved
5 in crafting an opinion or decision for an adjudicatory proceeding,
6 including a court staff attorney, court clerk, or law clerk, shall
7 maintain the confidentiality of all non-public judicial work
8 product in accordance with supreme court rules.
9 (e) A person, other than a justice or judge, with access to
10 non-public judicial work product commits an offense if the person
11 knowingly discloses, wholly or partly, the contents of any
12 non-public judicial work product to a person who is not a justice,
13 judge, court staff attorney, court clerk, law clerk, employee of an
14 agency established under Chapter 71 or 72, or other court staff
15 routinely involved in crafting an opinion or decision for an
16 adjudicatory proceeding.
17 (f) An offense under this section is a Class A misdemeanor.
18 (g) It is a defense to prosecution under this section that
19 the disclosure of the non-public judicial work product is
20 authorized:
21 (1) in writing by the justice or judge for whom the
22 work product is prepared; or
23 (2) under supreme court rules.
24 SECTION 2. As soon as practicable after the effective date
25 of this Act, the Texas Supreme Court shall adopt any rules necessary
26 to implement Section 21.013, Government Code, as added by this Act.
27 SECTION 3. This Act takes effect September 1, 2023.

________________________________ President of the Senate

________________________________ Speaker of the House

I hereby certify that S.B. No. 372 passed the Senate on March 8, 2023, by the following vote: Yeas 31, Nays 0.

________________________________ Secretary of the Senate

I hereby certify that S.B. No. 372 passed the House on May 19, 2023, by the following vote: Yeas 142, Nays 1, two present not voting.

________________________________ Chief Clerk of the House

Approved:

________________________________ Date

________________________________ Governor

Tab P

MEMO

To: Legislative Mandates Subcommittee and Texas SCAC

From: Robert Levy

Date: 6/14/2023

Re: Proposed Rulemaking to Implement SB 372

The Texas Legislature of passed SB 372 on May 21, 2023 and it currently awaits the Governor's signature (or will go into effect without his signature unless it is vetoed).

The Senate bill analysis provides context for the legislation as being prompted by the 2021 leak of the draft of the U.S. Supreme Court's decision in the *Dobbs* case. This language from the analysis is particularly instructive:

> S.B. 372 requires that a person, other than a justice or judge, who is involved in crafting an opinion or decision for an adjudicatory proceeding, shall maintain the confidentiality of all non[1]public judicial work product in accordance with Texas Supreme Court rules. Furthermore, a person, other than a justice or judge, with access to non-public judicial work product commits a Class A misdemeanor offense if the person knowingly discloses, wholly or partly, the contents of any non-public judicial work product. However, it would be a defense to prosecution if the disclosure was authorized either in writing by the justice or judge for whom the work product is prepared, or under Texas Supreme Court rules.

The text of the bill is relatively short and is set out below.

SB 372

AN ACT

relating to creating a criminal offense for the unauthorized disclosure of non-public judicial opinions and judicial work product.

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

SECTION 1. Chapter 21, Government Code, is amended by adding Section 21.013 to read as follows:

Sec. 21.013. CONFIDENTIALITY OF JUDICIAL WORK PRODUCT; CRIMINAL OFFENSE. (a) In this section:

(1) "Judicial work product" means written, electronic, or oral material prepared or communications made in the course of an adjudicatory proceeding before a court determining legal rights, powers, duties, or privileges. The term includes all drafts of opinions or orders and memoranda of law.

(2) "Non-public judicial work product" means:

(A) any written or electronic judicial work product other than documents filed with the clerk of a court for release to the public; or

(B) any oral statement relating to judicial work product made in a closed session of a court or in judicial chambers.

(b) This section applies to:

(1) a court established under Section 1, Article V, Texas Constitution, other than a commissioners court; and

(2) a court subject to this subtitle.

(c) A justice or judge of a court shall comply with supreme court rules governing the confidentiality of non-public judicial work product.

(d) A person, other than a justice or judge, who is involved in crafting an opinion or decision for an adjudicatory proceeding, including a court staff attorney, court clerk, or law clerk, shall maintain the confidentiality of all non-public judicial work product in accordance with supreme court rules.

(e) A person, other than a justice or judge, with access to non-public judicial work product commits an offense if the person knowingly discloses, wholly or partly, the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, employee of an agency established under Chapter 71 or 72, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding.

(f) An offense under this section is a Class A misdemeanor.

(g) It is a defense to prosecution under this section that the disclosure of the non-public judicial work product is authorized:

(1) in writing by the justice or judge for whom the work product is prepared; or

(2) under supreme court rules.

SECTION 2. As soon as practicable after the effective date of this Act, the Texas Supreme Court shall adopt any rules necessary to implement Section 21.013, Government Code, as added by this Act.

SECTION 3. This Act takes effect September 1, 2023.

II.

I recommend that the appropriate rules to implement and effect SB 372 is to amend the Texas Rules of Judicial Administration. The topic of disclosure of court records is found in the current Rule 12.5 exempts from the general principle of open court records, access to judicial work product. The following is a proposed rewrite of Rule 12.5 to specifically recognize the principle of protection of judicial work product and largely tracks the language from SB 372. (Additions to the rule are underlined and deletions are in ~~strikethrough~~.)

Proposed Amended Rule 12.5

12.5 Exemptions from Disclosure. Pursuant to Texas Law, the following records are ~~exempt~~ prohibited from disclosure under this rule: (a) Non-Public Judicial Work Product and Drafts. "Judicial work product" means written, electronic, or oral material prepared or communications made in the course of an adjudicatory proceeding before a court determining legal rights, powers, duties, or privileges. The term includes all drafts of opinions or orders and memoranda of law. ~~Any record that relates to a judicial officer's adjudicative decision-making process prepared by that judicial officer, by another judicial officer, or by court staff, an intern, or any other person acting on behalf of or at the direction of the judicial officer.~~) "Non-public judicial work product" means:

(A) any written or electronic judicial work product other than documents filed with the clerk of a court for release to the public; or

(B) any oral statement relating to judicial work product made in a closed session of a court or in judicial chambers.

12.5.1 A judge or justice of the court may not disclose non-public judicial work product unless authorized by the court.

12.5.2 A person, other than a justice or judge, who is involved in crafting an opinion or decision for an adjudicatory proceeding, including a court staff attorney, court clerk, or law clerk, shall maintain the confidentiality of all non-public judicial work product.

12.5.3 A person, other than a justice or judge, with access to non-public judicial work product commits a criminal offense if the person knowingly discloses, wholly or partly, the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, employee of an agency established under Chapter 71 or 72, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding.

Tab Q

S.B. No. 1179

1 AN ACT

2 relating to sexually violent predators and the prosecution of
3 certain offenses involving prohibited items at correctional or
4 civil commitment facilities; creating a criminal offense.

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

6 SECTION 1. Section 20.02(c), Penal Code, is amended to read
7 as follows:

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

10 (1) a state jail felony if the person restrained was a
11 child younger than 17 years of age;

12 (2) a felony of the third degree if:

13 (A) the actor recklessly exposes the victim to a
14 substantial risk of serious bodily injury;

15 (B) the actor restrains an individual the actor
16 knows is a public servant while the public servant is lawfully
17 discharging an official duty or in retaliation or on account of an
18 exercise of official power or performance of an official duty as a
19 public servant; or

20 (C) the actor, while in custody or committed to a
21 civil commitment facility, restrains any other person; or

22 (3) notwithstanding Subdivision (2)(B), a felony of
23 the second degree if the actor restrains an individual the actor
24 knows is a peace officer or judge while the officer or judge is

1 lawfully discharging an official duty or in retaliation or on
2 account of an exercise of official power or performance of an
3 official duty as a peace officer or judge.
4 SECTION 2. Section 21.07(b), Penal Code, is amended to read
5 as follows:
6 (b) An offense under this section is a Class A misdemeanor,
7 except that the offense is a felony of the third degree if the actor
8 is civilly committed as a sexually violent predator under Chapter
9 841, Health and Safety Code.
10 SECTION 3. Section 21.08(b), Penal Code, is amended to read
11 as follows:
12 (b) An offense under this section is a Class B misdemeanor,
13 except that the offense is a felony of the third degree if the actor
14 is civilly committed as a sexually violent predator under Chapter
15 841, Health and Safety Code.
16 SECTION 4. Section 22.01(b-1), Penal Code, is amended to
17 read as follows:
18 (b-1) Notwithstanding Subsections [~~Subsection~~] (b) and (c),
19 an offense under Subsection (a) [~~(a)(1)~~] is a felony of the third
20 degree if the offense is committed:
21 (1) by an [~~while the~~] actor who is committed to a civil
22 commitment facility; and
23 (2) against:
24 (A) a person the actor knows is an officer or
25 employee of the Texas Civil Commitment Office:
26 (i) while the officer or employee is
27 lawfully discharging an official duty [~~at a civil commitment~~

~~facility~~]; or

(ii) in retaliation for or on account of an exercise of official power or performance of an official duty by the officer or employee; or

(B) a person the actor knows is contracting [~~who contracts~~] with the state to perform a service in a civil commitment facility or an employee of that person:

(i) while the person or employee is engaged in performing a service within the scope of the contract[~~, if the actor knows the person or employee is authorized by the state to provide the service~~]; or

(ii) in retaliation for or on account of the person's or employee's performance of a service within the scope of the contract.

SECTION 5. Section 38.11, Penal Code, is amended by amending Subsections (a), (d), and (k) and adding Subsection (j-1) to read as follows:

(a) A person commits an offense if the person provides, or possesses with the intent to provide:

(1) an alcoholic beverage, controlled substance, or dangerous drug to a person in the custody of a correctional facility or residing in a civil commitment facility, except on the prescription of a practitioner;

(2) a deadly weapon to a person in the custody of a correctional facility or residing in a civil commitment facility;

(3) a cellular telephone or other wireless communications device or a component of one of those devices to a

person in the custody of a correctional facility;

(4) money to a person confined in a correctional facility; or

(5) a cigarette or tobacco product to a person confined in a correctional facility, except that if the facility is a local jail regulated by the Commission on Jail Standards, the person commits an offense only if providing the cigarette or tobacco product violates a rule or regulation adopted by the sheriff or jail administrator that:

(A) prohibits the possession of a cigarette or tobacco product by a person confined in the jail; or

(B) places restrictions on:

(i) the possession of a cigarette or tobacco product by a person confined in the jail; or

(ii) the manner in which a cigarette or tobacco product may be provided to a person confined in the jail.

(d) A person commits an offense if the person:

(1) possesses <u>an alcoholic beverage,</u> [~~a~~] controlled substance<u>,</u> or dangerous drug while in a correctional facility or civil commitment facility or on property owned, used, or controlled by a correctional facility or civil commitment facility; or

(2) possesses a deadly weapon while in a correctional facility or civil commitment facility.

<u>(j-1) A person commits an offense if the person, while residing in a civil commitment facility, possesses a cellular telephone or other wireless communications device or a component of one of those devices unless the device or component is authorized by</u>

1 the Texas Civil Commitment Office.
2 (k) A person commits an offense if, with the intent to
3 provide to or make a cellular telephone or other wireless
4 communications device or a component of one of those devices
5 available for use by a person in the custody of a correctional
6 facility or residing in a civil commitment facility, the person:
7 (1) acquires a cellular telephone or other wireless
8 communications device or a component of one of those devices to be
9 delivered to the person in custody or residing in the facility;
10 (2) provides a cellular telephone or other wireless
11 communications device or a component of one of those devices to
12 another person for delivery to the person in custody or residing in
13 the facility; or
14 (3) makes a payment to a communication common carrier,
15 as defined by Article 18A.001, Code of Criminal Procedure, or to any
16 communication service that provides to its users the ability to
17 send or receive wire or electronic communications.
18 SECTION 6. Chapter 39, Penal Code, is amended by adding
19 Section 39.041 to read as follows:
20 Sec. 39.041. IMPROPER SEXUAL ACTIVITY WITH COMMITTED
21 PERSON. (a) In this section, "deviate sexual intercourse,"
22 "sexual contact," and "sexual intercourse" have the meanings
23 assigned by Section 21.01.
24 (b) An officer or employee of the Texas Civil Commitment
25 Office, a person who contracts with this state to perform a service
26 in a civil commitment facility or an employee of that person, or a
27 volunteer at a civil commitment facility commits an offense if the

person intentionally engages in deviate sexual intercourse, sexual contact, or sexual intercourse with a person committed to a civil commitment facility.

(c) An offense under this section is a felony of the third degree.

(d) It is an affirmative defense to prosecution under this section that, at the time of the offense, the actor was the spouse of the person committed to the civil commitment facility.

(e) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

SECTION 7. Article 13.315, Code of Criminal Procedure, is amended to read as follows:

Art. 13.315. FELONY OFFENSE COMMITTED BY CIVILLY COMMITTED [~~FAILURE TO COMPLY WITH~~] SEXUALLY VIOLENT PREDATOR [~~CIVIL COMMITMENT REQUIREMENT~~]. A felony [~~An~~] offense committed by a person civilly committed under Chapter 841 [~~Section 841.085~~], Health and Safety Code, may be prosecuted in the county in which any element of the offense occurs or in the court that retains jurisdiction over the civil commitment proceeding under Section 841.082, Health and Safety Code.

SECTION 8. Article 62.005(j), Code of Criminal Procedure, is amended to read as follows:

(j) The department, for law enforcement purposes or for supervision and treatment purposes, shall release all relevant information described by Subsection (a), including information that is not public information under Subsection (b), to a peace

1 officer, an employee of a local law enforcement authority, the
2 Texas Civil Commitment Office, or the attorney general on the
3 request of the applicable person or entity.
4 SECTION 9. Article 62.051, Code of Criminal Procedure, is
5 amended by amending Subsections (b), (e), and (f) and adding
6 Subsection (e-1) to read as follows:
7 (b) The department shall provide the Texas Department of
8 Criminal Justice, the Texas Juvenile Justice Department, the Texas
9 Civil Commitment Office, and each local law enforcement authority,
10 authority for campus security, county jail, and court with a form
11 for registering persons required by this chapter to register.
12 (e) Not later than the third day after the registration of a
13 person [a person's registering], the local law enforcement
14 authority with whom the person is registered shall send a copy of
15 the registration form to the department and, if the person resides
16 on the campus of a public or private institution of higher
17 education, to any authority for campus security for that
18 institution.
19 (e-1) The Texas Civil Commitment Office shall register with
20 the applicable local law enforcement authority on behalf of a
21 person who is civilly committed as a sexually violent predator
22 under Chapter 841, Health and Safety Code, and required to reside in
23 a civil commitment center. A person for whom registration is
24 completed under this subsection is not required to verify the
25 registration until the person is authorized to reside outside of
26 the civil commitment center.
27 (f) Not later than the seventh day after the date on which

1 the person is released or, for a person who is civilly committed as
2 a sexually violent predator under Chapter 841, Health and Safety
3 Code, authorized to reside outside of the civil commitment center,
4 a person for whom registration is completed under this chapter
5 shall report to the applicable local law enforcement authority to
6 verify the information in the registration form received by the
7 authority under this chapter. The authority shall require the
8 person to produce proof of the person's identity and residence
9 before the authority gives the registration form to the person for
10 verification. If the information in the registration form is
11 complete and accurate, the person shall verify registration by
12 signing the form. If the information is not complete or not
13 accurate, the person shall make any necessary additions or
14 corrections before signing the form.
15 SECTION 10. Subtitle A, Title 2, Civil Practice and
16 Remedies Code, is amended by adding Chapter 14A to read as follows:
17 CHAPTER 14A. LITIGATION BY CIVILLY COMMITTED INDIVIDUAL
18 SUBCHAPTER A. GENERAL PROVISIONS
19 Sec. 14A.001. DEFINITIONS. In this chapter:
20 (1) "Civilly committed individual" means a sexually
21 violent predator as described by Section 841.003, Health and Safety
22 Code, who has been committed to a facility operated by or under
23 contract with the office.
24 (2) "Claim" means a cause of action governed by this
25 chapter.
26 (3) "Office" means the Texas Civil Commitment Office.
27 (4) "Trust account" means a civilly committed

1 individual's trust account administered by the office or by a
2 facility under contract with the office.
3 (5) "Unsworn declaration" means a document executed in
4 accordance with Chapter 132.
5 Sec. 14A.002. SCOPE OF CHAPTER. (a) This chapter applies
6 only to an action, including an appeal or original proceeding,
7 brought by a civilly committed individual in a district, county, or
8 justice court or an appellate court, including the supreme court or
9 the court of criminal appeals, in which an affidavit or unsworn
10 declaration of inability to pay costs is filed by the civilly
11 committed individual.
12 (b) This chapter does not apply to an action brought under
13 the Family Code.
14 SUBCHAPTER B. DISMISSAL OF AND REQUIREMENTS FOR CLAIM
15 Sec. 14A.051. DISMISSAL OF FALSE, FRIVOLOUS, OR MALICIOUS
16 CLAIM. (a) A court may dismiss a claim, either before or after
17 service of process, if the court finds that:
18 (1) the allegation of poverty in the affidavit or
19 unsworn declaration is false;
20 (2) the claim is frivolous or malicious; or
21 (3) the civilly committed individual filed an
22 affidavit or unsworn declaration required by this chapter that the
23 individual knew was false.
24 (b) In determining whether a claim is frivolous or
25 malicious, the court may consider whether:
26 (1) the claim's realistic chance of ultimate success
27 is slight;

1 (2) the claim has no arguable basis in law or in fact;
2 (3) it is clear that the civilly committed individual
3 cannot prove the facts in support of the claim; or
4 (4) the claim is substantially similar to a previous
5 claim filed by the civilly committed individual because the claim
6 arises from the same operative facts.
7 (c) In determining whether Subsection (a) applies, the
8 court may hold a hearing. The hearing may be held before or after
9 service of process, and it may be held on motion of the court, a
10 party, or the court clerk.
11 (d) On the filing of a motion under Subsection (c), the
12 court shall suspend discovery relating to the claim pending the
13 hearing.
14 (e) A court that dismisses a claim brought by a civilly
15 committed individual housed in a facility operated by or under
16 contract with the office may notify the office of the dismissal and,
17 on the court's own motion or the motion of any party or the court
18 clerk, may advise the office that a mental health evaluation of the
19 individual may be appropriate.
20 Sec. 14A.052. AFFIDAVIT RELATING TO PREVIOUS FILINGS. (a)
21 A civilly committed individual who files an affidavit or unsworn
22 declaration of inability to pay costs shall file a separate
23 affidavit or declaration:
24 (1) identifying the court that ordered the
25 individual's civil commitment under Chapter 841, Health and Safety
26 Code;
27 (2) indicating whether any cause of action or

1 allegation contained in the petition has previously been filed in
2 any other court, and if so, stating the cause of action or
3 allegation previously filed and complying with Subdivision (6) and
4 Subsection (b);
5 (3) identifying each action, other than an action
6 under the Family Code, previously brought by the individual in
7 which the individual was not represented by an attorney, without
8 regard to whether the individual was civilly committed at the time
9 the action was brought;
10 (4) certifying that all grievance processes
11 applicable to the matter that is the basis of the claim, if any,
12 have been exhausted;
13 (5) certifying that no court has found the individual
14 to be a vexatious litigant under Chapter 11; and
15 (6) describing each action that was previously brought
16 by:
17 (A) stating the operative facts for which relief
18 was sought;
19 (B) listing the case name, the cause number, and
20 the court in which the action was brought;
21 (C) identifying each party named in the action;
22 and
23 (D) stating the result of the action, including
24 whether the action or a claim that was a basis for the action was
25 dismissed as frivolous or malicious under Section 13.001, 14.003,
26 or 14A.051 or otherwise.
27 (b) If the affidavit or unsworn declaration filed under this

1 section states that a previous action or claim was dismissed as
2 frivolous or malicious, the affidavit or unsworn declaration must
3 state the date of the final order affirming the dismissal.
4 (c) The affidavit or unsworn declaration must be
5 accompanied by the certified copy of the trust account statement
6 required by Section 14A.054(f).
7 Sec. 14A.053. GRIEVANCE SYSTEM DECISION; EXHAUSTION OF
8 ADMINISTRATIVE REMEDIES. (a) A civilly committed individual who
9 files a claim that is subject to a grievance system established by
10 the office or a facility under contract with the office shall file
11 with the court:
12 (1) an affidavit or unsworn declaration stating the
13 date that the grievance was filed and the date the written decision
14 was received by the individual; and
15 (2) a copy of the written decision from the grievance
16 system.
17 (b) A court shall dismiss a claim if the civilly committed
18 individual fails to file the claim before the 31st day after the
19 date the individual receives the written decision from the
20 grievance system.
21 (c) If a claim is filed before the grievance system
22 procedure is complete, the court shall stay the proceeding with
23 respect to the claim for a period not to exceed 180 days to permit
24 completion of the grievance system procedure.
25 Sec. 14A.054. COURT FEES, COURT COSTS, OTHER COSTS. (a) A
26 court may order a civilly committed individual who has filed a claim
27 to pay court fees, court costs, and other costs in accordance with

1 this section and Section 14A.055. The court clerk shall mail a copy
2 of the court's order and a certified bill of costs to the office or
3 facility under contract with the office, as appropriate.
4 (b) On the court's order, the civilly committed individual
5 shall pay an amount equal to the lesser of:
6 (1) 20 percent of the preceding six months' deposits to
7 the individual's trust account; or
8 (2) the total amount of court fees, court costs, and
9 other costs.
10 (c) In each month following the month in which payment is
11 made under Subsection (b), the civilly committed individual shall
12 pay an amount equal to the lesser of:
13 (1) 10 percent of that month's deposits to the trust
14 account; or
15 (2) the total amount of court fees, court costs, and
16 other costs that remains unpaid.
17 (d) Payments under Subsection (c) shall continue until the
18 total amount of court fees, court costs, and other costs are paid or
19 until the civilly committed individual is released from
20 confinement.
21 (e) On receipt of a copy of an order issued under Subsection
22 (a), the office or facility under contract with the office shall
23 withdraw money from the trust account in accordance with
24 Subsections (b), (c), and (d). The office or facility shall hold the
25 money in a separate account and shall forward the money to the court
26 clerk on the earlier of the following dates:
27 (1) the date the total amount to be forwarded equals

1 the total amount of court fees, court costs, and other costs that
2 remains unpaid; or
3 (2) the date the civilly committed individual is
4 released.
5 (f) The civilly committed individual shall file a certified
6 copy of the individual's trust account statement with the court.
7 The statement must reflect the balance of the account at the time
8 the claim is filed and activity in the account during the six months
9 preceding the date on which the claim is filed. The court may
10 request the office to provide the information required under this
11 subsection.
12 (g) A civilly committed individual may authorize payment in
13 addition to that required by this section.
14 (h) The court may dismiss a claim if the civilly committed
15 individual fails to pay fees and costs assessed under this section.
16 (i) A civilly committed individual may not avoid the fees
17 and costs assessed under this section by nonsuiting a party or by
18 voluntarily dismissing the action.
19 Sec. 14A.055. OTHER COSTS. (a) An order under Section
20 14A.054(a) must include the costs described by Subsection (b) if
21 the court finds that:
22 (1) the civilly committed individual has previously
23 filed an action to which this chapter or Chapter 14 applies; and
24 (2) a final order has been issued that affirms that the
25 action was dismissed as frivolous or malicious under Section
26 13.001, 14.003, or 14A.051 or otherwise.
27 (b) If Subsection (a) applies, costs of court must include

1 expenses incurred by the court or by the office or facility under
2 contract with the office, in connection with the claim and not
3 otherwise charged to the civilly committed individual under Section
4 14A.054, including:
5 (1) expenses of service of process;
6 (2) postage; and
7 (3) transportation, housing, or medical care incurred
8 in connection with the appearance of the individual in the court for
9 any proceeding.
10 Sec. 14A.056. HEARING. (a) The court may hold a hearing
11 under this chapter at a facility operated by or under contract with
12 the office or may conduct the hearing with video communications
13 technology that permits the court to see and hear the civilly
14 committed individual and that permits the individual to see and
15 hear the court and any other witness.
16 (b) A hearing conducted under this section by video
17 communications technology shall be recorded on videotape or by
18 other electronic means. The recording is sufficient to serve as a
19 permanent record of the hearing.
20 Sec. 14A.057. SUBMISSION OF EVIDENCE. (a) The court may
21 request a person with an admissible document or admissible
22 testimony relevant to the subject matter of the hearing to submit a
23 copy of the document or written statement stating the substance of
24 the testimony.
25 (b) A written statement submitted under this section must be
26 made under oath or made as an unsworn declaration under Section
27 132.001.

1 (c) A copy of a document submitted under this section must
2 be accompanied by a certification executed under oath by an
3 appropriate custodian of the record stating that the copy is
4 correct and any other matter relating to the admissibility of the
5 document that the court requires.
6 (d) A person submitting a written statement or document
7 under this section is not required to appear at the hearing.
8 (e) The court shall require that the civilly committed
9 individual be provided with a copy of each written statement or
10 document not later than the 14th day before the date on which the
11 hearing is to begin.
12 Sec. 14A.058. DISMISSAL OF CLAIM. (a) The court may enter
13 an order dismissing the entire claim or a portion of the claim under
14 this chapter.
15 (b) If a portion of the claim is dismissed, the court shall
16 designate the issues and defendants on which the claim may proceed,
17 subject to Sections 14A.054 and 14A.055.
18 (c) An order under this section is not subject to
19 interlocutory appeal by the civilly committed individual.
20 Sec. 14A.059. EFFECT ON OTHER CLAIMS. (a) Except as
21 provided by Subsection (b), on receipt of an order assessing fees
22 and costs under Section 14A.054 that indicates that the court made
23 the finding described by Section 14A.055(a), a court clerk may not
24 accept for filing another claim by the civilly committed individual
25 until the fees and costs assessed under Section 14A.054 are paid.
26 (b) A court may allow a civilly committed individual who has
27 not paid the fees and costs assessed against the individual to file

1 a claim for injunctive relief seeking to enjoin an act or failure to
2 act that creates a substantial threat of irreparable injury or
3 serious physical harm to the individual.
4 Sec. 14A.060. QUESTIONNAIRE. To implement this chapter, a
5 court may develop, for use in that court, a questionnaire to be
6 filed by the civilly committed individual.
7 Sec. 14A.061. REVIEW AND RECOMMENDATION BY MAGISTRATES.
8 (a) The supreme court shall, by rule, adopt a system under which a
9 court may refer a suit governed by this chapter to a magistrate for
10 review and recommendation.
11 (b) The system adopted under Subsection (a) may be funded
12 from money appropriated to the supreme court or from money received
13 by the supreme court through interagency contract or contracts.
14 (c) For the purposes of Section 14A.062, the adoption of a
15 system by rule under Subsection (a) does not constitute a
16 modification or repeal of a provision of this chapter.
17 Sec. 14A.062. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE.
18 Notwithstanding Section 22.004, Government Code, this chapter may
19 not be modified or repealed by a rule adopted by the supreme court.
20 SECTION 11. Title 4, Civil Practice and Remedies Code, is
21 amended by adding Chapter 78B to read as follows:
22 CHAPTER 78B. LIMITED LIABILITY FOR FIRST RESPONDER WELLNESS CHECK
23 AT CIVIL COMMITMENT FACILITY
24 Sec. 78B.001. DEFINITIONS. In this chapter:
25 (1) "First responder" means a law enforcement, fire
26 protection, or emergency medical services employee, volunteer, or
27 agency, including:

1 (A) a peace officer, as defined by Article 2.12, Code of Criminal Procedure;

3 (B) fire protection personnel, as defined by Section 419.021, Government Code;

5 (C) a volunteer firefighter who is:

6 (i) certified by the Texas Commission on Fire Protection or by the State Firefighters' and Fire Marshals' Association of Texas; or

9 (ii) a member of an organized volunteer firefighting unit that provides firefighting services without compensation and conducts a minimum of two drills each month, each two hours long;

13 (D) an individual certified as emergency medical services personnel by the Department of State Health Services; and

15 (E) an agency of this state or a political subdivision of this state authorized by law to employ or supervise personnel described by Paragraphs (A)-(D).

18 (2) "Wellness check" means a request by any person for a first responder to visit a civil commitment facility and determine the current condition of a sexually violent predator who is civilly committed under Chapter 841, Health and Safety Code.

22 Sec. 78B.002. CONSTRUCTION OF CHAPTER. This chapter may not be construed to prohibit a first responder from performing a wellness check.

25 Sec. 78B.003. LIMITED LIABILITY FOR REFUSAL TO PROVIDE WELLNESS CHECK. (a) A first responder is not required to perform a wellness check.

1 (b) A first responder is not liable for damages incurred
2 from the first responder's refusal to perform a wellness check.
3 (c) A court shall immediately dismiss any action asserting a
4 claim described by Subsection (b).
5 Sec. 78B.004. REFERRAL TO TEXAS CIVIL COMMITMENT OFFICE. A
6 first responder may refer a person requesting a wellness check to
7 the Texas Civil Commitment Office, which may provide the person
8 with information regarding the current condition of the civilly
9 committed sexually violent predator if authorized under federal and
10 state law.
11 SECTION 12. Subchapter A, Chapter 411, Government Code, is
12 amended by adding Section 411.0092 to read as follows:
13 Sec. 411.0092. PRIMARY JURISDICTION. The sex offender
14 compliance unit described by Section 411.0091 has primary
15 jurisdiction to investigate a felony offense committed by a
16 sexually violent predator civilly committed under Chapter 841,
17 Health and Safety Code.
18 SECTION 13. Section 420A.008, Government Code, is amended
19 to read as follows:
20 Sec. 420A.008. STAFF. The office may select and employ a
21 general counsel, staff attorneys, a family liaison officer
22 described by Section 420A.012, and other staff necessary to perform
23 the office's functions.
24 SECTION 14. Chapter 420A, Government Code, is amended by
25 adding Sections 420A.012 and 420A.013 to read as follows:
26 Sec. 420A.012. FAMILY LIAISON OFFICER. (a) The office may
27 designate an employee to serve as a family liaison officer. The

1 family liaison officer may, as the office determines appropriate:
2 (1) facilitate the continuation and maintenance of
3 ties between a civilly committed sex offender and the offender's
4 family members who are supportive of the offender's participation
5 in the treatment and supervision program;
6 (2) notify an offender regarding emergencies
7 concerning the offender's family and provide the offender with
8 other necessary information related to the offender's family; and
9 (3) assist in resolving problems that may affect
10 permitted contact with an offender.
11 (b) Before each required quarterly meeting of the board, a
12 family liaison officer designated under this section may provide an
13 update to the board regarding the officer's activities.
14 (c) This section does not:
15 (1) require the office to designate a family liaison
16 officer; or
17 (2) guarantee to a civilly committed sex offender or
18 family member of an offender any additional right or privilege that
19 is not already required by state or federal law.
20 (d) In implementing this section, the office may adopt any
21 policy or impose any limitation the office considers necessary.
22 Sec. 420A.013. FAMILY UNITY AND PARTICIPATION. (a) The
23 office may adopt and implement policies that encourage family unity
24 during a civilly committed sex offender's commitment. In adopting
25 the policies, the office may consider the impact of a telephone,
26 mail, and in-person visitation policy on a family member's ability
27 to provide support to the offender through ongoing, appropriate

1 contact with the offender while the offender participates in the
2 treatment and supervision program.
3 (b) This section does not guarantee to a civilly committed
4 sex offender or family member of an offender any additional right or
5 privilege that is not already required by state or federal law.
6 (c) In implementing this section, the office may adopt any
7 policy or impose any limitation the office considers necessary.
8 SECTION 15. Subchapter C, Chapter 552, Government Code, is
9 amended by adding Section 552.1345 to read as follows:
10 Sec. 552.1345. EXCEPTION: CONFIDENTIALITY OF CERTAIN
11 INFORMATION RELATING TO CIVILLY COMMITTED SEXUALLY VIOLENT
12 PREDATORS. (a) Except as provided by Subsection (b), information
13 obtained or maintained by the Texas Civil Commitment Office is
14 excepted from the requirements of Section 552.021 if it is
15 information about a person who is civilly committed as a sexually
16 violent predator under Chapter 841, Health and Safety Code.
17 (b) Subsection (a) does not apply to statistical or other
18 aggregated information relating to persons civilly committed to one
19 or more facilities operated by or under a contract with the office.
20 SECTION 16. Subchapter I, Chapter 2001, Government Code, is
21 amended by adding Section 2001.227 to read as follows:
22 Sec. 2001.227. TEXAS CIVIL COMMITMENT OFFICE. This chapter
23 does not apply to a rule or internal procedure of the Texas Civil
24 Commitment Office that applies to a person who is civilly committed
25 as a sexually violent predator under Chapter 841, Health and Safety
26 Code, or to an action taken under that rule or procedure.
27 SECTION 17. Section 2155.144(a), Government Code, is

1 amended to read as follows:
2 (a) This section applies only to the Health and Human
3 Services Commission, each health and human services agency, [~~and~~]
4 the Department of Family and Protective Services, and agencies
5 administratively attached to the Health and Human Services
6 Commission. For the purposes of this section, the Department of
7 Family and Protective Services or an agency administratively
8 attached to the Health and Human Services Commission is considered
9 a health and human services agency.
10 SECTION 18. Section 109.051(b), Occupations Code, is
11 amended to read as follows:
12 (b) Notwithstanding Subtitle B, Title 3, of this code or
13 Chapter 611, Health and Safety Code, a person described by
14 Subsection (a), on request or in the normal course of business,
15 shall release information concerning the treatment of a sex
16 offender to:
17 (1) another person described by Subsection (a);
18 (2) a criminal justice agency; [~~or~~]
19 (3) a local law enforcement authority; or
20 (4) the Texas Civil Commitment Office.
21 SECTION 19. Section 109.052, Occupations Code, is amended
22 to read as follows:
23 Sec. 109.052. RELEASE BY CRIMINAL JUSTICE AGENCY. A
24 criminal justice agency, on request or in the normal course of
25 official business, shall release information concerning the
26 treatment of a sex offender to:
27 (1) another criminal justice agency;

1 (2) a local law enforcement authority; [~~or~~]

2 (3) a person described by Section 109.051(a); or

3 (4) the Texas Civil Commitment Office.

4 SECTION 20. Section 109.053, Occupations Code, is amended

5 to read as follows:

6 Sec. 109.053. RELEASE BY LOCAL LAW ENFORCEMENT AUTHORITY.

7 A local law enforcement authority, on request or in the normal

8 course of official business, shall release information concerning

9 the treatment of a sex offender to:

10 (1) another local law enforcement authority;

11 (2) a criminal justice agency; [~~or~~]

12 (3) a person described by Section 109.051(a); or

13 (4) the Texas Civil Commitment Office.

14 SECTION 21. Sections 841.002(1) and (8), Health and Safety

15 Code, are amended to read as follows:

16 (1) "Attorney representing the state" means a district

17 attorney, criminal district attorney, or county attorney with

18 felony criminal jurisdiction who represents the state in a [~~civil~~

19 ~~commitment~~] proceeding under this chapter.

20 (8) "Sexually violent offense" means:

21 (A) an offense under Section 21.02, 21.11(a)(1),

22 22.011, or 22.021, Penal Code;

23 (B) an offense under Section 20.04(a)(4), Penal

24 Code, if the person committed the offense with the intent to violate

25 or abuse the victim sexually;

26 (C) an offense under Section 30.02, Penal Code,

27 if the offense is punishable under Subsection (d) of that section

1 and the person entered the habitation [~~committed the offense~~] with
2 the intent to commit an offense listed in Paragraph (A) or (B) or
3 committed or attempted to commit an offense listed in Paragraph (A)
4 or (B);
5 (D) an offense under Section 19.02 or 19.03,
6 Penal Code, that, during the guilt or innocence phase or the
7 punishment phase for the offense, during the adjudication or
8 disposition of delinquent conduct constituting the offense, or
9 subsequently during a civil commitment proceeding under Subchapter
10 D, is determined beyond a reasonable doubt to have been based on
11 sexually motivated conduct;
12 (E) an attempt, conspiracy, or solicitation, as
13 defined by Chapter 15, Penal Code, to commit an offense listed in
14 Paragraph (A), (B), (C), or (D);
15 (F) an offense under prior state law that
16 contains elements substantially similar to the elements of an
17 offense listed in Paragraph (A), (B), (C), (D), or (E); or
18 (G) an offense under the law of another state,
19 federal law, or the Uniform Code of Military Justice that contains
20 elements substantially similar to the elements of an offense listed
21 in Paragraph (A), (B), (C), (D), or (E).
22 SECTION 22. Section 841.042, Health and Safety Code, is
23 amended to read as follows:
24 Sec. 841.042. ASSISTANCE FROM SPECIAL PROSECUTION UNIT. On
25 request of the attorney representing the state, the special
26 prosecution unit shall provide legal, financial, and technical
27 assistance to the attorney for a [~~civil commitment~~] proceeding

conducted under this chapter.

SECTION 23. Section 841.0834, Health and Safety Code, is amended to read as follows:

Sec. 841.0834. MOVEMENT BETWEEN PROGRAMMING TIERS. (a) The office shall transfer between programming tiers a committed person required to reside in a total confinement facility [~~to less restrictive housing and supervision~~] if the transfer is in the best interests of the person and conditions can be imposed that adequately protect the community.

(b) Without the office's approval, a committed person may file a petition with the court for transfer to the next less restrictive tier [~~housing and supervision~~]. The court shall deny the transfer if the petition is filed before the 180th day after the date an order was entered under Subchapter D, F, or G or a previous order was entered under this section. The court shall grant the transfer if the court determines by clear and convincing evidence that the transfer is in the best interests of the person and that the office can impose conditions [~~can be imposed~~] that adequately protect the community.

(c) A committed person who files a petition under Subsection (b) [~~this subsection~~] shall serve a copy of the petition on the office and the attorney representing the state.

(d) [~~(c)~~] The office shall transfer [~~return~~] a committed person who is not required to reside in a total confinement facility back [~~has been transferred to less restrictive housing and supervision~~] to a more restrictive setting in a total confinement facility if the office considers the transfer necessary to further

1 treatment and to protect the community. The decision to transfer
2 the person must be based on the person's behavior or progress in
3 treatment.
4 (e) [~~(d)~~] Not later than the 90th day after the date a
5 committed person is returned to a more restrictive setting in a
6 total confinement facility under Subsection (d) [~~(c)~~], the
7 committing court shall hold a hearing via videoconference to review
8 the office's determination. The court shall order the office to
9 transfer the person to a less restrictive tier [~~housing and~~
10 ~~supervision~~] only if the court determines by clear and convincing
11 evidence that the office's determination was not made in accordance
12 with Subsection (d) [~~(c)~~]. The committed person may waive the right
13 to a hearing under this subsection.
14 SECTION 24. Section 841.0838, Health and Safety Code, is
15 amended to read as follows:
16 Sec. 841.0838. USE OF RESTRAINTS. (a) An employee of the
17 office, or a person who contracts with the office or an employee of
18 that person, may use mechanical [~~or chemical~~] restraints on a
19 committed person residing in a civil commitment center or while
20 transporting a committed person who resides at the center only if:
21 (1) the employee or person completes a training
22 program approved by the office on the use of mechanical restraints
23 that:
24 (A) includes instruction on the office's
25 approved mechanical restraint techniques and devices and the
26 office's verbal de-escalation policies, procedures, and practices;
27 and

(B) requires the employee or person to demonstrate competency in the use of the mechanical restraint techniques and devices; and

(2) the mechanical restraint is:

(A) considered necessary to maintain the safety and security of the center or staff [~~used as a last resort~~];

(B) considered necessary to maintain the safety of the public [~~necessary to stop or prevent:~~

[~~(i) imminent physical injury to the committed person or another;~~

[~~(ii) threatening behavior by the committed person while the person is using or exhibiting a weapon;~~

[~~(iii) a disturbance by a group of committed persons; or~~

[~~(iv) an absconsion from the center~~]; and

(C) the least restrictive restraint necessary, used for the minimum duration necessary[~~, to prevent the injury, property damage, or absconsion~~].

(b) An employee of the office, or a person who contracts with the office or an employee of that person, may use chemical restraints on a committed person residing in a civil commitment center or while transporting a committed person who resides at the center only if:

(1) the employee or person completes a training program approved by the office on the use of chemical restraints that:

(A) includes instruction on the office's

1 approved chemical restraint techniques and devices and the office's
2 verbal de-escalation policies, procedures, and practices; and
3 (B) requires the employee or person to
4 demonstrate competency in the use of chemical restraint techniques
5 and devices; and
6 (2) the chemical restraint is:
7 (A) used as a last resort;
8 (B) necessary to prevent or stop:
9 (i) physical injury to the committed person
10 or another;
11 (ii) threatening behavior by the committed
12 person;
13 (iii) a disturbance by a group of committed
14 persons; or
15 (iv) an absconsion from the center; and
16 (C) the least restrictive restraint necessary,
17 used for the minimum duration necessary, to prevent injury,
18 property damage, or absconsion.
19 (c) The office shall develop procedures governing the use of
20 mechanical or chemical restraints on committed persons.
21 SECTION 25. Section 841.102(c), Health and Safety Code, is
22 amended to read as follows:
23 (c) The judge shall set a hearing if the judge determines by
24 a preponderance of the evidence at the biennial review that:
25 (1) a requirement imposed on the person under this
26 chapter should be modified; or
27 (2) [~~probable cause exists to believe that~~] the

1 person's behavioral abnormality has changed to the extent that the
2 person is no longer likely to engage in a predatory act of sexual
3 violence.

4 SECTION 26. Sections 841.123(a), (c), and (d), Health and
5 Safety Code, are amended to read as follows:

6 (a) If the committed person files a petition for release
7 without the office's authorization, the person shall serve the
8 petition on the court, [~~and~~] the attorney representing the state,
9 and the office.

10 (c) Except as provided by Subsection (d), the judge shall
11 deny without a hearing a petition for release filed without the
12 office's authorization if [~~the petition is frivolous or if~~]:

13 (1) the judge determines by a preponderance of the
14 evidence that [~~petitioner previously filed without the office's~~
15 ~~authorization another petition for release; and~~

16 [~~(2) the judge determined on review of the previous~~
17 ~~petition or following a hearing that:~~

18 [~~(A) the petition was frivolous; or~~

19 [~~(B)~~] the petitioner's behavioral abnormality
20 has [~~had~~] not changed to the extent that the petitioner is [~~was~~] no
21 longer likely to engage in a predatory act of sexual violence; or

22 (2) the petitioner has filed the petition for release
23 before the 180th day after the date an order was entered under
24 Subchapter D or F or a previous order was entered under this
25 section.

26 (d) The judge is not required to deny a petition under
27 Subsection (c)(2) if the judge determines by a preponderance of the

1 evidence [~~probable cause exists to believe~~] that the petitioner's
2 behavioral abnormality has changed to the extent that the
3 petitioner is no longer likely to engage in a predatory act of
4 sexual violence.

5 SECTION 27. Chapter 841, Health and Safety Code, is amended
6 by adding Subchapter I to read as follows:

7 SUBCHAPTER I. ADMINISTRATION OF CERTAIN MEDICATION TO CERTAIN
8 SEXUALLY VIOLENT PREDATORS

9 Sec. 841.201. DEFINITIONS. In this subchapter:
10 (1) "Capacity" means a committed person's ability to:
11 (A) understand the nature and consequences of a
12 proposed treatment, including the benefits, risks, and
13 alternatives to the proposed treatment; and
14 (B) make a decision whether to undergo the
15 proposed treatment.
16 (2) "Medication-related emergency" means a situation
17 in which it is immediately necessary to administer medication to a
18 committed person to prevent:
19 (A) imminent probable death or substantial
20 bodily harm to the committed person because the committed person:
21 (i) overtly or continually is threatening
22 or attempting to commit suicide or serious bodily harm; or
23 (ii) is behaving in a manner that indicates
24 that the committed person is unable to satisfy the committed
25 person's need for nourishment, essential medical care, or
26 self-protection; or
27 (B) imminent physical or emotional harm to

1 another because of threats, attempted acts, or acts the committed
2 person overtly or continually makes or commits.
3 (3) "Psychoactive medication" has the meaning
4 assigned by Section 574.101.
5 Sec. 841.202. ADMINISTRATION OF MEDICATION TO COMMITTED
6 PERSON. A person may not administer a psychoactive medication to a
7 committed person who refuses to take the medication voluntarily
8 unless:
9 (1) the committed person is having a
10 medication-related emergency; or
11 (2) the committed person is under an order issued
12 under Section 841.205 authorizing the administration of medication
13 regardless of the committed person's refusal.
14 Sec. 841.203. PHYSICIAN'S APPLICATION FOR ORDER TO
15 AUTHORIZE PSYCHOACTIVE MEDICATION; DATE OF HEARING. (a) A
16 physician who is treating a committed person may, on behalf of the
17 state, file an application in a probate court or a court with
18 probate jurisdiction for an order to authorize the administration
19 of a psychoactive medication regardless of the committed person's
20 refusal if:
21 (1) the physician believes that the committed person
22 lacks the capacity to make a decision regarding the administration
23 of the psychoactive medication;
24 (2) the physician determines that the medication is
25 the proper course of treatment for the committed person;
26 (3) the committed person is receiving mental health
27 services under Section 841.0835 or other law; and

1 (4) the committed person, verbally or by other indication, refuses to take the medication voluntarily.

3 (b) An application filed under this section must state:

4 (1) that the physician believes that the committed person lacks the capacity to make a decision regarding administration of the psychoactive medication and the reasons for that belief;

8 (2) each medication the physician wants the court to compel the committed person to take;

10 (3) whether the committed person is receiving mental health services under Section 841.0835 or other law;

12 (4) the physician's diagnosis of the committed person; and

14 (5) the proposed method for administering the medication and, if the method is not customary, an explanation justifying the departure from the customary methods.

17 (c) An application filed under this section is separate from an application for court-ordered mental health services.

19 (d) A hearing on the application must be held not later than the 30th day after the date the application was filed. If the committed person is transferred to a mental health facility in another county, the court may transfer the application to the county where the committed person has been transferred.

24 (e) Subject to the requirement in Subsection (d) that the hearing be held not later than the 30th day after the date the application was filed, the court may grant one continuance on a party's motion and for good cause shown. The court may grant more

1 than one continuance only with the agreement of the parties.
2 Sec. 841.204. RIGHTS OF COMMITTED PERSON. A committed
3 person for whom an application under Section 841.203 is filed is
4 entitled to:
5 (1) representation by a court-appointed attorney who
6 is knowledgeable about issues to be adjudicated at the hearing;
7 (2) meet with that attorney as soon as is practicable
8 to prepare for the hearing and to discuss any of the committed
9 person's questions or concerns;
10 (3) receive, immediately after the time of the hearing
11 is set, a copy of the application and written notice of the time,
12 place, and date of the hearing;
13 (4) be told, at the time personal notice of the hearing
14 is given, of the committed person's right to a hearing and right to
15 the assistance of an attorney to prepare for the hearing and to
16 answer any questions or concerns;
17 (5) be present at the hearing;
18 (6) request from the court an independent expert; and
19 (7) be notified orally, at the conclusion of the
20 hearing, of the court's determinations of the committed person's
21 capacity and best interests.
22 Sec. 841.205. HEARING AND ORDER AUTHORIZING PSYCHOACTIVE
23 MEDICATION. (a) The court may issue an order authorizing the
24 administration of one or more classes of psychoactive medication to
25 a committed person who is receiving mental health services under
26 Section 841.0835 or other law.
27 (b) The court may issue an order under this section only if

1 the court finds by clear and convincing evidence after a hearing
2 that the committed person:
3 (1) lacks the capacity to make a decision regarding
4 the administration of the proposed medication and treatment with
5 the proposed medication is in the best interest of the committed
6 person; or
7 (2) as determined under Section 841.206, presents a
8 danger to the committed person or others in the civil commitment
9 center in which the committed person is being treated.
10 (c) In making the finding that treatment with the proposed
11 medication is in the best interest of the committed person, the
12 court shall consider:
13 (1) the committed person's expressed preferences
14 regarding treatment with psychoactive medication;
15 (2) the committed person's religious beliefs;
16 (3) the risks and benefits, from the perspective of
17 the committed person, of taking psychoactive medication;
18 (4) the consequences to the committed person if the
19 psychoactive medication is not administered;
20 (5) the prognosis for the committed person if the
21 committed person is treated with psychoactive medication;
22 (6) alternative, less intrusive treatments that are
23 likely to produce the same results as treatment with psychoactive
24 medication; and
25 (7) less intrusive treatments likely to secure the
26 committed person's agreement to take the psychoactive medication.
27 (d) A hearing under this subchapter shall be conducted on

1 the record by the probate judge or judge with probate jurisdiction,
2 except as provided by Subsection (e).
3 (e) A judge may refer a hearing to a magistrate or
4 court-appointed associate judge who has training regarding
5 psychoactive medications. The magistrate or associate judge may
6 provide the notice, set hearing dates, and appoint attorneys as
7 required by this subchapter. A record is not required if the
8 hearing is held by a magistrate or court-appointed associate judge.
9 (f) A party is entitled to a hearing de novo by the judge if
10 an appeal of the magistrate's or associate judge's report is filed
11 with the court not later than the third day after the date the
12 report is issued. The hearing de novo must be held not later than
13 the 30th day after the date the application under Section 841.203
14 was filed.
15 (g) If a hearing or an appeal of a magistrate's or associate
16 judge's report is to be held in a county court in which the judge is
17 not a licensed attorney, the committed person or the committed
18 person's attorney may request that the proceeding be transferred to
19 a court with a judge who is licensed to practice law in this state.
20 The county judge shall transfer the case after receiving the
21 request, and the receiving court shall hear the case as if it had
22 been originally filed in that court.
23 (h) As soon as practicable after the conclusion of the
24 hearing, the committed person is entitled to have provided to the
25 committed person and the committed person's attorney written
26 notification of the court's determinations under this section. The
27 notification must include a statement of the evidence on which the

court relied and the reasons for the court's determinations.

(i) An order issued under this section shall authorize the administration to a committed person, regardless of the committed person's refusal, of one or more classes of psychoactive medications specified in the application and consistent with the committed person's diagnosis. The order shall permit an increase or decrease in a medication's dosage, continuation of medication authorized but discontinued during the period the order is valid, or the substitution of a medication within the same class.

(j) The classes of psychoactive medications in the order must conform to classes determined by the Health and Human Services Commission.

(k) An order issued under this section may be reauthorized or modified on the petition of a party. The order remains in effect pending action on a petition for reauthorization or modification. For the purpose of this subsection, "modification" means a change of a class of medication authorized in the order.

Sec. 841.206. FINDING THAT COMMITTED PERSON PRESENTS A DANGER. In making a finding under Section 841.205(b)(2) that the committed person presents a danger to the committed person or others in the civil commitment center in which the committed person is being treated, the court shall consider:

(1) an assessment of the committed person's present mental condition;

(2) whether the committed person has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical or emotional harm to the committed person's

1 self or to another while in the center; and

2 (3) whether the committed person, in the 180-day

3 period preceding the date the committed person was placed in the

4 center, has inflicted, attempted to inflict, or made a serious

5 threat of inflicting substantial physical or emotional harm to

6 another.

7 Sec. 841.207. COSTS. (a) The court shall order the payment

8 of reasonable compensation to attorneys, physicians, language

9 interpreters, sign interpreters, and associate judges appointed

10 under this subchapter. The compensation paid shall be assessed as

11 court costs.

12 (b) The agency responsible for services under Section

13 841.0835(a) shall pay as provided by Subsection (a) the costs of a

14 hearing held under Section 841.205 regarding an order for the

15 administration of psychoactive medication to a committed person.

16 Sec. 841.208. APPEAL. (a) An appeal from an order issued

17 under Section 841.205, or from a renewal or modification of an

18 order, must be filed in the court of appeals for the county in which

19 the order is issued.

20 (b) Notice of appeal must be filed not later than the 10th

21 day after the date on which the order is issued.

22 (c) When an appeal is filed, the clerk shall immediately

23 send a certified transcript of the proceedings to the court of

24 appeals.

25 (d) An order issued under Section 841.205 is effective

26 pending an appeal of the order.

27 (e) The court of appeals and supreme court shall give an

appeal under this section preference over all other cases and shall advance the appeal on the docket. The courts may suspend all rules relating to the time for filing briefs and docketing cases.

Sec. 841.209. EXPIRATION OF ORDER. An order issued under Section 841.205 expires on the first anniversary of the date the order was issued.

SECTION 28. The changes in law made by this Act in amending Sections 20.02, 21.07, 21.08, 22.01, and 38.11, Penal Code, apply only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 29. Chapter 14A, Civil Practice and Remedies Code, as added by this Act, applies only to an action filed on or after the effective date of this Act.

SECTION 30. Chapter 78B, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act.

SECTION 31. Subchapter I, Chapter 841, Health and Safety Code, as added by this Act, applies to a hearing ordering the administration of psychoactive medication to a committed person under that chapter that occurs on or after the effective date of this Act, regardless of whether the applicable conduct of the committed person being evaluated for that purpose occurred before,

1 on, or after the effective date of this Act.

2 SECTION 32. This Act takes effect September 1, 2023.

______________________________ President of the Senate

______________________________ Speaker of the House

I hereby certify that S.B. No. 1179 passed the Senate on April 20, 2023, by the following vote: Yeas 31, Nays 0.

______________________________ Secretary of the Senate

I hereby certify that S.B. No. 1179 passed the House on May 17, 2023, by the following vote: Yeas 142, Nays 2, one present not voting.

______________________________ Chief Clerk of the House

Approved:

______________________________ Date

______________________________ Governor

Tab R

S.B. No. 1180

1 AN ACT

2 relating to civil actions by a civilly committed individual.

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

4 SECTION 1. Subtitle A, Title 2, Civil Practice and Remedies

5 Code, is amended by adding Chapter 14A to read as follows:

6 CHAPTER 14A. LITIGATION BY CIVILLY COMMITTED INDIVIDUAL

7 SUBCHAPTER A. GENERAL PROVISIONS

8 Sec. 14A.001. DEFINITIONS. In this chapter:

9 (1) "Civilly committed individual" means a sexually

10 violent predator as defined by Section 841.003, Health and Safety

11 Code, who has been committed to a facility operated by or under

12 contract with the Texas Civil Commitment Office.

13 (2) "Claim" means a cause of action governed by this

14 chapter.

15 (3) "Office" means the Texas Civil Commitment Office.

16 (4) "Trust account" means a civilly committed

17 individual's trust account administered by the office or by a

18 facility under contract with the office.

19 (5) "Unsworn declaration" means a document executed in

20 accordance with Chapter 132.

21 Sec. 14A.002. SCOPE OF CHAPTER. (a) This chapter applies

22 only to an action, including an appeal or original proceeding,

23 brought by a civilly committed individual in a district, county, or

24 justice court or an appellate court, including the supreme court or

1 the court of criminal appeals, in which an affidavit or unsworn
2 declaration of inability to pay costs is filed by the civilly
3 committed individual.
4 (b) This chapter does not apply to an action brought under
5 the Family Code.
6 SUBCHAPTER B. DISMISSAL OF AND REQUIREMENTS FOR CLAIM
7 Sec. 14A.051. DISMISSAL OF FALSE, FRIVOLOUS, OR MALICIOUS
8 CLAIM. (a) A court may dismiss a claim, either before or after
9 service of process, if the court finds that:
10 (1) the allegation of poverty in the affidavit or
11 unsworn declaration is false;
12 (2) the claim is frivolous or malicious; or
13 (3) the civilly committed individual filed an
14 affidavit or unsworn declaration required by this chapter that the
15 individual knew was false.
16 (b) In determining whether a claim is frivolous or
17 malicious, the court may consider whether:
18 (1) the claim's realistic chance of ultimate success
19 is slight;
20 (2) the claim has no arguable basis in law or in fact;
21 (3) it is clear that the civilly committed individual
22 cannot prove the facts in support of the claim; or
23 (4) the claim is substantially similar to a previous
24 claim filed by the civilly committed individual because the claim
25 arises from the same operative facts.
26 (c) In determining whether Subsection (a) applies, the
27 court may hold a hearing. The hearing may be held before or after

1 service of process, and it may be held on motion of the court, a
2 party, or the court clerk.
3 (d) On the filing of a motion under Subsection (c), the
4 court shall suspend discovery relating to the claim pending the
5 hearing.
6 (e) A court that dismisses a claim brought by a civilly
7 committed individual housed in a facility operated by or under
8 contract with the office may notify the office of the dismissal and,
9 on the court's own motion or the motion of any party or the court
10 clerk, may advise the office that a mental health evaluation of the
11 individual may be appropriate.
12 Sec. 14A.052. AFFIDAVIT RELATING TO PREVIOUS FILINGS.
13 (a) A civilly committed individual who files an affidavit or
14 unsworn declaration of inability to pay costs shall file a separate
15 affidavit or declaration:
16 (1) identifying the court that ordered the
17 individual's civil commitment under Chapter 841, Health and Safety
18 Code;
19 (2) indicating whether any cause of action or
20 allegation contained in the petition has previously been filed in
21 any other court, and if so, stating the cause of action or
22 allegation previously filed and complying with Subdivision (6) and
23 Subsection (b);
24 (3) identifying each action, other than an action
25 under the Family Code, previously brought by the individual in
26 which the individual was not represented by an attorney, without
27 regard to whether the individual was civilly committed at the time

1 the action was brought;
2 (4) certifying that all grievance processes
3 applicable to the matter that is the basis of the claim, if any,
4 have been exhausted;
5 (5) certifying that no court has found the individual
6 to be a vexatious litigant under Chapter 11; and
7 (6) describing each action that was previously brought
8 by:
9 (A) stating the operative facts for which relief
10 was sought;
11 (B) listing the case name, the cause number, and
12 the court in which the action was brought;
13 (C) identifying each party named in the action;
14 and
15 (D) stating the result of the action, including
16 whether the action or a claim that was a basis for the action was
17 dismissed as frivolous or malicious under Section 13.001, 14.003,
18 or 14A.051 or otherwise.
19 (b) If the affidavit or unsworn declaration filed under this
20 section states that a previous action or claim was dismissed as
21 frivolous or malicious, the affidavit or unsworn declaration must
22 state the date of the final order affirming the dismissal.
23 (c) The affidavit or unsworn declaration must be
24 accompanied by the certified copy of the trust account statement
25 required by Section 14A.054(f).
26 Sec. 14A.053. GRIEVANCE SYSTEM DECISION; EXHAUSTION OF
27 ADMINISTRATIVE REMEDIES. (a) A civilly committed individual who

1 files a claim that is subject to a grievance system established by
2 the office or a facility under contract with the office shall file
3 with the court:
4 (1) an affidavit or unsworn declaration stating the
5 date that the grievance was filed and the date the written decision
6 was received by the individual; and
7 (2) a copy of the written decision from the grievance
8 system.
9 (b) A court shall dismiss a claim if the civilly committed
10 individual fails to file the claim before the 31st day after the
11 date the individual receives the written decision from the
12 grievance system.
13 (c) If a claim is filed before the grievance system
14 procedure is complete, the court shall stay the proceeding with
15 respect to the claim for a period not to exceed 180 days to permit
16 completion of the grievance system procedure.
17 Sec. 14A.054. COURT FEES, COURT COSTS, OTHER COSTS. (a) A
18 court may order a civilly committed individual who has filed a claim
19 to pay court fees, court costs, and other costs in accordance with
20 this section and Section 14A.055. The court clerk shall mail a copy
21 of the court's order and a certified bill of costs to the office or
22 facility under contract with the office, as appropriate.
23 (b) On the court's order, the civilly committed individual
24 shall pay an amount equal to the lesser of:
25 (1) 20 percent of the preceding six months' deposits to
26 the individual's trust account; or
27 (2) the total amount of court fees, court costs, and

1 other costs.
2 (c) In each month following the month in which payment is
3 made under Subsection (b), the civilly committed individual shall
4 pay an amount equal to the lesser of:
5 (1) 10 percent of that month's deposits to the trust
6 account; or
7 (2) the total amount of court fees, court costs, and
8 other costs that remains unpaid.
9 (d) Payments under Subsection (c) shall continue until the
10 total amount of court fees, court costs, and other costs are paid or
11 until the civilly committed individual is released from
12 confinement.
13 (e) On receipt of a copy of an order issued under Subsection
14 (a), the office or facility under contract with the office shall
15 withdraw money from the trust account in accordance with
16 Subsections (b), (c), and (d). The office or facility shall hold
17 the money in a separate account and shall forward the money to the
18 court clerk on the earlier of the following dates:
19 (1) the date the total amount to be forwarded equals
20 the total amount of court fees, court costs, and other costs that
21 remains unpaid; or
22 (2) the date the civilly committed individual is
23 released.
24 (f) The civilly committed individual shall file a certified
25 copy of the individual's trust account statement with the court.
26 The statement must reflect the balance of the account at the time
27 the claim is filed and activity in the account during the six months

1 preceding the date on which the claim is filed. The court may
2 request the office to furnish the information required under this
3 subsection.
4 (g) A civilly committed individual may authorize payment in
5 addition to that required by this section.
6 (h) The court may dismiss a claim if the civilly committed
7 individual fails to pay fees and costs assessed under this section.
8 (i) A civilly committed individual may not avoid the fees
9 and costs assessed under this section by nonsuiting a party or by
10 voluntarily dismissing the action.
11 Sec. 14A.055. OTHER COSTS. (a) An order under Section
12 14A.054(a) must include the costs described by Subsection (b) if
13 the court finds that:
14 (1) the civilly committed individual has previously
15 filed an action to which this chapter or Chapter 14 applies; and
16 (2) a final order has been issued that affirms that the
17 action was dismissed as frivolous or malicious under Section
18 13.001, 14.003, or 14A.051 or otherwise.
19 (b) If Subsection (a) applies, costs of court must include
20 expenses incurred by the court or by the office or facility under
21 contract with the office, in connection with the claim and not
22 otherwise charged to the civilly committed individual under Section
23 14A.054, including:
24 (1) expenses of service of process;
25 (2) postage; and
26 (3) transportation, housing, or medical care incurred
27 in connection with the appearance of the individual in the court for

1 any proceeding.

2 Sec. 14A.056. HEARING. (a) The court may hold a hearing
3 under this chapter at a facility operated by or under contract with
4 the office or may conduct the hearing with video communications
5 technology that permits the court to see and hear the civilly
6 committed individual and that permits the individual to see and
7 hear the court and any other witness.

8 (b) A hearing conducted under this section by video
9 communications technology shall be recorded on videotape or by
10 other electronic means. The recording is sufficient to serve as a
11 permanent record of the hearing.

12 Sec. 14A.057. SUBMISSION OF EVIDENCE. (a) The court may
13 request a person with an admissible document or admissible
14 testimony relevant to the subject matter of the hearing to submit a
15 copy of the document or written statement stating the substance of
16 the testimony.

17 (b) A written statement submitted under this section must be
18 made under oath or made as an unsworn declaration under Section
19 132.001.

20 (c) A copy of a document submitted under this section must
21 be accompanied by a certification executed under oath by an
22 appropriate custodian of the record stating that the copy is
23 correct and any other matter relating to the admissibility of the
24 document that the court requires.

25 (d) A person submitting a written statement or document
26 under this section is not required to appear at the hearing.

27 (e) The court shall require that the civilly committed

1 individual be provided with a copy of each written statement or
2 document not later than the 14th day before the date on which the
3 hearing is to begin.
4 Sec. 14A.058. DISMISSAL OF CLAIM. (a) The court may enter
5 an order dismissing the entire claim or a portion of the claim under
6 this chapter.
7 (b) If a portion of the claim is dismissed, the court shall
8 designate the issues and defendants on which the claim may proceed,
9 subject to Sections 14A.054 and 14A.055.
10 (c) An order under this section is not subject to
11 interlocutory appeal by the civilly committed individual.
12 Sec. 14A.059. EFFECT ON OTHER CLAIMS. (a) Except as
13 provided by Subsection (b), on receipt of an order assessing fees
14 and costs under Section 14A.054 that indicates that the court made
15 the finding described by Section 14A.055(a), a court clerk may not
16 accept for filing another claim by the civilly committed individual
17 until the fees and costs assessed under Section 14A.054 are paid.
18 (b) A court may allow a civilly committed individual who has
19 not paid the fees and costs assessed against the individual to file
20 a claim for injunctive relief seeking to enjoin an act or failure to
21 act that creates a substantial threat of irreparable injury or
22 serious physical harm to the individual.
23 Sec. 14A.060. QUESTIONNAIRE. To implement this chapter, a
24 court may develop, for use in that court, a questionnaire to be
25 filed by the civilly committed individual.
26 Sec. 14A.061. REVIEW AND RECOMMENDATION BY MAGISTRATES.
27 (a) The supreme court shall, by rule, adopt a system under which a

1 court may refer a suit governed by this chapter to a magistrate for
2 review and recommendation.
3 (b) The system adopted under Subsection (a) may be funded
4 from money appropriated to the supreme court or from money received
5 by the supreme court through interagency contract or contracts.
6 (c) For the purposes of Section 14A.062, the adoption of a
7 system by rule under Subsection (a) does not constitute a
8 modification or repeal of a provision of this chapter.
9 Sec. 14A.062. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE.
10 Notwithstanding Section 22.004, Government Code, this chapter may
11 not be modified or repealed by a rule adopted by the supreme court.
12 SECTION 2. Chapter 14A, Civil Practice and Remedies Code,
13 as added by this Act, applies only to an action filed on or after the
14 effective date of this Act.
15 SECTION 3. This Act takes effect immediately if it receives
16 a vote of two-thirds of all the members elected to each house, as
17 provided by Section 39, Article III, Texas Constitution. If this
18 Act does not receive the vote necessary for immediate effect, this
19 Act takes effect September 1, 2023.

S.B. No. 1180

______________________________ President of the Senate

______________________________ Speaker of the House

I hereby certify that S.B. No. 1180 passed the Senate on April 12, 2023, by the following vote: Yeas 31, Nays 0.

______________________________ Secretary of the Senate

I hereby certify that S.B. No. 1180 passed the House on May 12, 2023, by the following vote: Yeas 135, Nays 7, two present not voting.

______________________________ Chief Clerk of the House

Approved:

______________________________ Date

______________________________ Governor

Tab S

Memorandum

TO: **Supreme Court Advisory Committee**

FROM: **Subcommittee on Rules 500-510**

RE: **Adoption of Rules for Referral of Chapter 14A action to a Magistrate**

DATE: **June 13, 2023**

I. Matter Referred to Subcommittee:

On June 3, 2023, Chief Justice Nathan Hecht sent a letter to SCAC Chairman Chip Babcock referring the following matter to this subcommittee:

SVP Magistrate Referrals. SB 1179 (Section 10) and SB 1180 (Section 1) add Civil Practice and Remedies Code Chapter 14A to govern actions brought by a sexually violent predator who has filed a Statement of Inability to Afford Payment of Court Costs. New § 14A.061 directs the Court to adopt rules that provides for referral of a Chapter 14A action to a magistrate for review and recommendation. The Committee should draft any recommended rules.

II. Background

This topic was referred to the Subcommittee on Rules 500-510 on June 5, 2023. Since that time, a member of the subcommittee has discussed the new legislation with a representative from Senator Charles Perry's office who confirmed that the legislation was based on Chapter 14 of the Texas Civil Practice and Remedies Code. As the new Section 14A.061 is nearly identical to 14.013 of the Texas Civil Procedure and Remedies Code, the subcommittee member requested any rules that were adopted pursuant to Section 14.013 of the Texas Civil Practice and Remedies Code and was provided with Order of the Supreme Court of Texas Misc. Docket No. 96-9273. This order included rules for a magistrate to review and make recommendations in inmate civil litigation. The subcommittee used these rules as a template to propose rules for magistrates in civil commitment litigation.

III. Comparison of Statutes

Chapter 14 of the Texas Civil Practice and Remedies Code contains the following language that allows the review and recommendation by magistrates in civil inmate litigation:

Section 14.013. REVIEW AND RECOMMENDATION BY MAGISTRATES.

(a) The supreme court shall, by rule, adopt a system under which a court may refer a suit governed by this chapter to a magistrate for review and recommendation.

(b) The system adopted under Subsection (a) may be funded from money appropriated to the supreme court or from money received by the supreme court through interagency contract or contracts.

(c) For the purposes of Section 14.014, the adoption of a system by rule under Subsection (a) does not constitute a modification or repeal of a provision of this chapter.

Added by Acts 1995, 74th Leg., ch. 378, Sec. 2, eff. June 8, 1995.

The new statute in Chapter 14A of the Texas Civil Practice and Remedies Code reads as follows:

Section 14A.061 – REVIEW AND RECOMMENDATION BY MAGISTRATES

(a) The supreme court shall, by rule, adopt a system under which a court may refer a suit governed by this chapter to a magistrate for review and recommendation.

(b) The system adopted under Subsection (a) may be funded from money appropriated to the supreme court or from money received by the supreme court through interagency contract or contracts.

(c) For the purposes of Section 14A.062, the adoption of a system by rule under Subsection (a) does not constitute a modification or repeal of a provision of this chapter.

Added by Acts 2023, Texas Acts of the 88th Leg.- Regular Session, ch. TBD, Sec. 1, eff. 5/24/2023.

IV. Discussion

Because there are no substantive differences in the new 2023 statute and the 1995 statute, the SCAC should use the 1996 Miscellaneous Order as a template for the 2023 rule referral. No subcommittee member expressed a dissenting opinion regarding this approach.

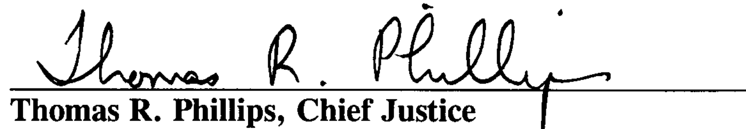
Tab T

ORDER OF THE SUPREME COURT OF TEXAS

Misc. Docket No. 96-9273

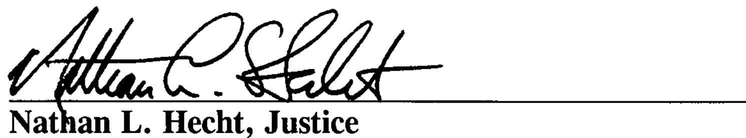
Pursuant to Section 14.013 of the Texas Civil Practice and Remedies Code, the Supreme Court hereby adopts the attached Rule for Magistrates in Inmate Litigation.

In Chambers, this 11th day of December, 1996.

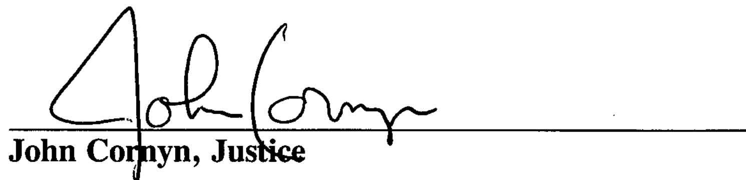


Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

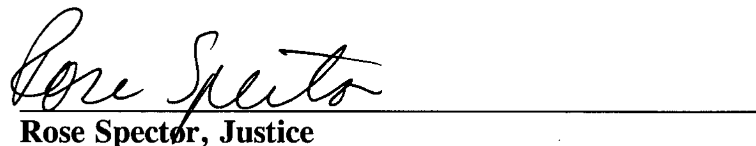


Nathan L. Hecht, Justice

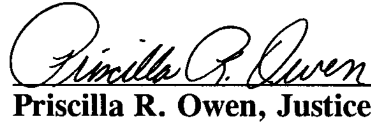


John Cornyn, Justice

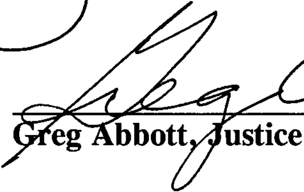
Craig T. Enoch, Justice



Rose Spector, Justice


Priscilla R. Owen, Justice

James A. Baker, Justice


Greg Abbott, Justice

Misc. Docket No. 96-9273

RULE FOR MAGISTRATES IN INMATE LITIGATION

1.01 AUTHORITY

This rule is promulgated under authority of Section 14.013, Civil Practice and Remedies Code.

2.01 APPOINTMENT

(a) A judge of a court having jurisdiction of a suit subject to Chapter 14, Civil Practice and Remedies Code, may appoint a full-time or part-time magistrate to perform the duties authorized by that chapter if the commissioners court of a county in which the court has jurisdiction authorizes the employment of a magistrate.

(b) If a court has jurisdiction in more than one county, a magistrate appointed by that court may serve only in a county in which the commissions court has authorized the magistrate's appointment.

(c) If more than one court in a county has jurisdiction of a suit under Chapter 14 the commissioners court may authorize the appointment of a magistrate for each court or may authorize one or more magistrates to share service with two or more courts.

(d) If a magistrate serves more than one court, the magistrate's appointment must be made with the unanimous approval of all the judges under whom the magistrate serves.

3.01 QUALIFICATIONS

To be eligible for appointment as a magistrate, a person must meet the requirements and qualifications to serve as a judge of the court or courts for which the magistrate is appointed.

4.01 COMPENSATION

(a) If funds are provided to the Supreme Court by appropriation or interagency contracts as provided by Section 14.013 (b), Civil Practice and Remedies Code, a magistrate may be paid a salary, on a hourly basis, on a per-case basis, or on such other basis as may be specified by administrative order of the Supreme Court.

(b) If funds are not provided the Supreme Court, a magistrate may be paid a salary or fees provided in the schedule of fees adopted by the judges of the county pursuant to Article 26.05, Code of Criminal Procedure, as approved by the commissioners court in which the magistrate serves.

(c) If paid a salary, the magistrate's salary is paid from the county fund available for payment of officers' salaries. If paid by fee, the magistrate's fees are paid from the general fund of county.

5.01 TERMINATION OF MAGISTRATE

(a) A magistrate who serves a single court serves at the will of the judge of that court.

(b) The employment of a magistrate who serves more than two courts may only be terminated by a majority vote of all the judges of the courts which the magistrate serves.

(c) The employment of a magistrate who serves two courts may be terminated by either of the judges of the courts which the magistrate serves.

6.01 CASES THAT MAY BE REFERRED

Except as provided by this rule, a judge of a court may refer to a magistrate any suit brought by an inmate in a district, county, justice of the peace, or small claims court in which an affidavit or unsworn declaration of inability to pay costs is filed by the inmate. This rule does not apply to an action brought under the Family Code.

7.01 ORDER OF REFERRAL

(a) In referring a case to a magistrate, the judge of the referring court shall render:

(1) an individual order of referral; or
(2) a general order of referral specifying the class and type of cases to be heard by the magistrate.

(b) The order of referral may limit the power or duties of a magistrate.

8.01 AUTHORITY OF MAGISTRATE

Except as limited by an order of referral, a magistrate has the same jurisdiction, authority, and power as the judge of the referring court under Chapter 14, Civil Practice and Remedies Code, including, but not limited to the authority to:

(1) dismiss a claim pursuant to Sections 14.003, 14.005, 14.006, or 14.010, Civil Practice and Remedies Code,

(2) order payment of costs pursuant to Sections 14.006 and 14.007, Civil Practice and Remedies Code, and

(3) hold hearings as provided in Section 14.008, Civil Practice and Remedies Code.

9.01 POWERS OF MAGISTRATE

A magistrate may:

(1) conduct a hearing;
(2) hear evidence;
(3) compel production of relevant evidence;
(4) rule on the admissibility of evidence;
(5) issue a summons for the appearance of witnesses;
(6) examine a witness;
(7) swear a witness for a hearing;
(8) make findings of fact on evidence;
(9) formulate conclusions of law;
(10) recommend an order to be rendered in a case;
(11) regulate all proceedings in a hearing before the magistrate, and
(12) take action as necessary and proper for the efficient performace of the magistrate's duties.

10.1 ATTENDANCE OF BAILIFF

A bailiff may attend a hearing by a magistrate if directed by the referring court.

11.01 COURT REPORTER

(a) A court reporter is not required during a hearing held by a magistrate appointed under this rule.

(b) A party, the magistrate, or the referring court may provide for a reporter during the hearing.

(c) The record may be preserved by any other means approved by the magistrate.

(d) The referring court or magistrate may tax the expense of preserving the record as costs.

12.01 WITNESS

(a) A witness appearing before a magistrate is subject to the penalties for perjury provided by law.

(b) A referring court may fine or imprison a witness who:

(1) failed to appear before a magistrate after being summoned; or
(2) improperly refused to answer questions if the refusal has been certified to the court by the magistrate.

13.01 REPORT

(a) The magistrate's report may contain the magistrate's findings, conclusion, or recommendations. The magistrate's report must be in writing in the form directed by the referring court. The form may be a notation on the referring court's docket sheet.

(b) After a hearing, the magistrate shall provide the parties participating in the hearing notice of the substance of the magistrate's report.

(c) Notice may be given to the parties:

(1) in open court, or an oral statement or a copy of the magistrate's written report; or
(2) by certified mail, return receipt requested.

(d) The magistrate shall certify the date of mailing of notice by certified mail. Notice is considered given on the third day after the date of mailing.

(e) After a hearing conducted by a magistrate, the magistrate shall send the magistrate's signed and dated report and all other papers relating to the case to the referring court.

14.01 NOTICE OF RIGHT TO APPEAL

(a) Notice of the right of appeal to the judge of the referring court shall be given to all parties.

(b) The notice may be given:

(1) by oral statement in open court;
(2) by posting inside or outside the courtroom of the referring court; or
(3) as otherwise directed by the referring court.

15.01 ORDER OF COURT

(a) Pending appeal of the magistrate's report to the referring court, the decisions and recommendations of the magistrate are in full force and effect and are enforceable as an order of the referring court, except for orders providing for incarceration or for the appointment of a receiver.

(b) If an appeal to the referring court is not filed or the right to an appeal to the referring court is waived, the findings and recommendations of the magistrate become the order of the referring court only on the referring court's signing an order conforming to the magistrate's report.

16.01 JUDICIAL ACTION ON MAGISTRATE'S REPORT

Unless a party files a written notice of appeal, the referring court may:

(1) adopt, modify, or reject the magistrate's report;
(2) hear further evidence; or
(3) recommit the matter to the magistrate for further proceedings.

17.01 APPEAL TO REFERRING COURT

(a) A party may appeal a magistrate's report by filing notice of appeal not later than the third day after the date the party receives notice of the substance of the magistrate's report as provided by 13.01.

(b) An appeal to the referring court must be in writing specifying the findings and conclusions of the magistrate to which the party objects. The appeal is limited to the specified findings and conclusions.

(c) On appeal to the referring court, the parties may present witnesses as in a hearing de novo on the issues raised in the appeal.

(d) Notice of an appeal to the referring court shall be given to the opposing attorney under Rule 21a, Texas Rules of Civil Procedure.

(e) If an appeal to the referring court is filed by a party, any other party may file an appeal to the referring court not later than the seventh day after the date the initial appeal was filed.

(f) The referring court, after notice to the parties, shall hold a hearing on all appeals not later than the 30th day after the date on which the magistrate's report was adopted by the referring court.

(g) The parties may waive the right of appeal to the referring court in writing or on the record.

18.01 APPELLATE REVIEW

(a) Failure to appeal to the referring court, by waiver or otherwise, the approval by the referring court of a magistrate's report does not deprive a party of the right to appeal to or request other relief from a court of appeals or the supreme court.

(b) The date an order or judgment by the referring court is signed is the controlling date for the purposes of appeal to or request for other relief from a court of appeals or the supreme court.

19.01 IMMUNITY

A magistrate appointed under the subchapter has the judicial immunity of a district judge. All existing immunity granted a magistrate by law, express or implied, continues in full force and effect.

Tab U

RULE FOR MAGISTRATES IN CIVIL COMMITMENT LITIGATION

1.01 AUTHORITY

This rule is promulgated under authority of Section 14A.061, Civil Practice and Remedies Code.

2.01 APPOINTMENT

(a) A judge of a court having jurisdiction of a suit subject to Chapter 14A, Civil Practice and Remedies Code, may appoint a full-time or part-time magistrate to perform the duties authorized by that chapter if the commissioners court of a county in which the court has jurisdiction authorizes the employment of a magistrate.

(b) If a court has jurisdiction in more than one county, a magistrate appointed by that court may serve only in a county in which the commissioners court has authorized the magistrate's appointment.

(c) If more than one court in a county has jurisdiction of a suit under Chapter 14A the commissioners court may authorize the appointment of a magistrate for each court or may authorize one or more magistrates to share service with two or more courts.

(d) If a magistrate serves more than one court, the magistrate's appointment must be made with the unanimous approval of all the judges under whom the magistrate serves.

3.01 QUALIFICATIONS

To be eligible for appointment as a magistrate, a person must meet the requirements and qualifications to serve as a judge of the court or courts for which the magistrate is appointed.

4.01 COMPENSATION

(a) If funds are provided to the Supreme Court by appropriation or interagency contracts as provided by Section 14A.061(b), Civil Practice and Remedies Code, a magistrate may be paid a salary, on an hourly basis, on a per-case basis, or on such other basis as may be specified by administrative order of the Supreme Court.

(b) If funds are not provided the Supreme Court, a magistrate may be paid a salary or fees provided in the schedule of fees adopted by the judges of the county pursuant to Article 26.05, Code of Criminal Procedure, as approved by the commissioners court in

which the magistrate serves.

(c) If paid a salary, the magistrate's salary is paid from the county fund available for payment of officers' salaries. If paid by fee, the magistrate's fees are paid from the general fund of county.

5.01 TERMINATION OF MAGISTRATE

(a) A magistrate who serves a single court serves at the will of the judge of that court.

(b) The employment of a magistrate who serves more than two courts may only be terminated by a majority vote of all the judges of the courts which the magistrate serves.

(c) The employment of a magistrate who serves two courts may be terminated by either of the judges of the courts which the magistrate serves.

6.01 CASES THAT MAY BE REFERRED

Except as provided by this rule, a judge of a court may refer to a magistrate any suit brought by a civilly committed individual in a district, county, or justice court in which an affidavit or unsworn declaration of inability to pay costs is filed by the civilly committed individual. This rule does not apply to an action brought under the Family Code.

7.01 ORDER OF REFERRAL

(a) In referring a case to a magistrate, the judge of the referring court shall render:

(1) an individual order of referral; or
(2) a general order of referral specifying the class and type of cases to be heard by the magistrate.

(b) The order of referral may limit the power or duties of a magistrate.

8.01 AUTHORITY OF MAGISTRATE

Except as limited by an order of referral, a magistrate has the same jurisdiction, authority, and power as the judge of the referring court under Chapter 14A, Civil Practice and Remedies Code, including, but not limited to the authority to:

(1) dismiss a claim pursuant to Sections 14A.051(a),

14A.053(b), and 14A.054(h), Civil Practice and Remedies Code,

(2) order payment of costs pursuant to Sections 14A.054 and 14A.055, Civil Practice and Remedies Code, and

(3) hold hearings as provided in Section 14A.051(c) and 14A.056, Civil Practice and Remedies Code.

9.01 POWERS OF MAGISTRATE

A magistrate may:

(1) conduct a hearing;
(2) hear evidence;
(3) compel production of relevant evidence;
(4) rule on the admissibility of evidence;
(5) issue a summons for the appearance of witnesses;
(6) examine a witness;
(7) swear a witness for a hearing;
(8) make findings of fact on evidence;
(9) formulate conclusions of law;
(10) recommend an order to be rendered in a case;
(11) regulate all proceedings in a hearing before the magistrate, and
(12) take action as necessary and proper for the efficient performance of the magistrate's duties.

10.01 ATTENDANCE OF BAILIFF

A bailiff may attend a hearing by a magistrate if directed by the referring court.

11.01 COURT REPORTER

(a) A court reporter is not required during a hearing held by a magistrate appointed under this rule.

(b) A party, the magistrate, or the referring court may provide for a reporter during the hearing.

(c) The record may be preserved by any other means approved by the magistrate.

(d) The referring court or magistrate may tax the expense of preserving the record as costs.

12.01 WITNESS

(a) A witness appearing before a magistrate is subject to the

penalties for perjury provided by law.

(b) A referring court may fine or imprison a witness who:

(1) failed to appear before a magistrate after being summoned; or
(2) improperly refused to answer questions if the refusal has been certified to the court by the magistrate.

13.01 REPORT

(a) The magistrate's report may contain the magistrate's findings, conclusion, or recommendations. The magistrate's report must be in writing in the form directed by the referring court. The form may be a notation on the referring court's docket sheet.

(b) After a hearing, the magistrate shall provide the parties participating in the hearing notice of the substance of the magistrate's report.

(c) Notice may be given to the parties:

(1) in open court, or an oral statement or a copy of the magistrate's written report; or
(2) by certified mail, return receipt requested.

(d) The magistrate shall certify the date of mailing of notice by certified mail. Notice is considered given on the third day after the date of mailing.

(e) After a hearing conducted by a magistrate, the magistrate shall send the magistrate's signed and dated report and all other papers relating to the case to the referring court.

14.01 NOTICE OF RIGHT TO APPEAL

(f) Notice of the right of appeal to the judge of the referring court shall be given to all parties.

(g) The notice may be given:

(1) by oral statement in open court;
(2) by posting inside or outside the courtroom of the referring court; or
(3) as otherwise directed by the referring court.

15.01 ORDER OF COURT

(h) Pending appeal of the magistrate's report to the referring court, the decisions and recommendations of the magistrate

are in full force and effect and are enforceable as an order of the referring court, except for orders providing for incarceration or for the appointment of a receiver.

(i) If an appeal to the referring court is not filed or the right to an appeal to the referring court is waived, the findings and recommendations of the magistrate become the order of the referring court only on the referring court's signing an order conforming to the magistrate's report.

16.01 JUDICIAL ACTION ON MAGISTRATE'S REPORT

Unless a party files a written notice of appeal, the referring court may:

(1) adopt, modify, or reject the magistrate's report;
(2) hear further evidence; or
(3) recommit the matter to the magistrate for further proceedings.

17.01 APPEAL TO REFERRING COURT

(a) A party may appeal a magistrate's report by filing notice of appeal not later than the third day after the date the party receives notice of the substance of the magistrate's report as provided by 13.01.

(b) An appeal to the referring court must be in writing specifying the findings and conclusions of the magistrate to which the party objects. The appeal is limited to the specified findings and conclusions.

(c) On appeal to the referring court, the parties may present witnesses as in a hearing de novo on the issues raised in the appeal.

(d) Notice of an appeal to the referring court shall be given to the opposing attorney under Rule 21a, Texas Rules of Civil Procedure.

(e) If an appeal to the referring court is filed by a party, any other party may file an appeal to the referring court not later than the seventh day after the date of initial appeal was filed.

(f) The referring court, after notice to the parties, shall hold a hearing on all appeals not later than the 30th day after the date on which the magistrate's report was adopted by the referring court.

(g) The parties may waive the right of appeal to the referring court in writing or on the record.

18.01 APPELLATE REVIEW

(a) Failure to appeal to the referring court, by waiver or otherwise, the approval by the referring court of a magistrate's report does not deprive a party of the right to appeal to or request other relief from a court of appeals or the supreme court.

(b) The date an order or judgment by the referring court is signed is the controlling date for the purposes of appeal to or request for other relief from a court of appeals or the supreme court.

19.01 IMMUNITY

A magistrate appointed under the subchapter has the judicial immunity of a district judge. All existing immunity granted a magistrate by law, express or implied, continues in full force and effect.

Tab V

1 AN ACT

2 relating to the creation of a specialty trial court to hear certain
3 cases; authorizing fees.

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

5 SECTION 1. Subtitle A, Title 2, Government Code, is amended
6 by adding Chapter 25A to read as follows:

7 CHAPTER 25A. BUSINESS COURT

8 Sec. 25A.001. DEFINITIONS. In this chapter:

9 (1) "Controlling person" means a person who directly
10 or indirectly controls a governing person, officer, or
11 organization.

12 (2) "Derivative proceeding" means a civil action
13 brought in the right of a domestic or foreign corporation, a
14 domestic or foreign limited liability company, or a domestic or
15 foreign limited partnership, to the extent provided by the Business
16 Organizations Code.

17 (3) "Governing documents" means the instruments,
18 documents, or agreements adopted under an organization's governing
19 law to govern the organization's formation and internal affairs.
20 The term includes:

21 (A) a certificate of formation, articles of
22 incorporation, and articles of organization;

23 (B) bylaws;

24 (C) a partnership agreement;

1 (D) a company agreement or operating agreement;
2 (E) a shareholder agreement;
3 (F) a voting agreement or voting trust agreement;
4 and
5 (G) an agreement among owners restricting the
6 transfer of ownership interests.
7 (4) "Governing law" means the law governing the
8 formation and internal affairs of an organization.
9 (5) "Governing person" means a person who is entitled,
10 alone or as part of a group, to manage and direct an organization's
11 affairs under the organization's governing documents and governing
12 law. The term includes:
13 (A) a member of the board of directors of a
14 corporation or other organization;
15 (B) a general partner of a general or limited
16 partnership;
17 (C) a manager of a limited liability company that
18 is managed by its managers;
19 (D) a member of a limited liability company that
20 is managed by its members;
21 (E) a trust manager of a real estate investment
22 trust; and
23 (F) a trustee of a business trust.
24 (6) "Governmental entity" means:
25 (A) this state; or
26 (B) a political subdivision of this state,
27 including a municipality, a county, or any kind of district.

1 (7) "Internal affairs" means:
2 (A) the rights, powers, and duties of an
3 organization's governing persons, officers, owners, and members;
4 and
5 (B) matters relating to the organization's
6 membership or ownership interests.
7 (8) "Managerial official" means a governing person or
8 officer.
9 (9) "Officer" means a person elected, appointed, or
10 designated as an officer of an organization by the organization's
11 governing persons or governing documents.
12 (10) "Organization" means a foreign or domestic entity
13 or association, regardless of whether the organization is for
14 profit or nonprofit. The term includes:
15 (A) a corporation;
16 (B) a limited partnership;
17 (C) a general partnership;
18 (D) a limited liability partnership;
19 (E) a limited liability company;
20 (F) a business trust;
21 (G) a real estate investment trust;
22 (H) a joint venture;
23 (I) a joint stock company;
24 (J) a cooperative;
25 (K) a bank;
26 (L) a credit union;
27 (M) a savings and loan association;

1 (N) an insurance company; and
2 (O) a series of a limited liability company or of
3 another entity.
4 (11) "Owner" means an owner of an organization. The
5 term includes:
6 (A) a shareholder or stockholder of a corporation
7 or other organization;
8 (B) a general or limited partner of a partnership
9 or an assignee of a partnership interest in a partnership;
10 (C) a member of, or an assignee of a membership
11 interest in, a limited liability company; and
12 (D) a member of a nonprofit organization.
13 (12) "Ownership interest" means an owner's interest in
14 an organization, including an owner's economic, voting, and
15 management rights.
16 (13) "Publicly traded company" means an entity whose
17 voting equity securities are listed on a national securities
18 exchange registered with the United States Securities and Exchange
19 Commission under Section 6, Securities Exchange Act of 1934 (15
20 U.S.C. Section 78f) and any entity that is majority owned or
21 controlled by such an entity.
22 (14) "Qualified transaction" means a transaction,
23 other than a transaction involving a loan or an advance of money or
24 credit by a bank, credit union, or savings and loan institution,
25 under which a party:
26 (A) pays or receives, or is obligated to pay or is
27 entitled to receive, consideration with an aggregate value of at

1 least $10 million; or
2 (B) lends, advances, borrows, receives, is
3 obligated to lend or advance, or is entitled to borrow or receive
4 money or credit with an aggregate value of at least $10 million.
5 Sec. 25A.002. CREATION. The business court is a statutory
6 court created under Section 1, Article V, Texas Constitution.
7 Sec. 25A.003. BUSINESS COURT JUDICIAL DISTRICT; DIVISIONS.
8 (a) The judicial district of the business court is composed of all
9 counties in this state.
10 (b) The business court is composed of divisions as provided
11 by this section.
12 (c) The First Business Court Division is composed of the
13 counties composing the First Administrative Judicial Region under
14 Section 74.042(b).
15 (d) The Second Business Court Division is composed of the
16 counties composing the Second Administrative Judicial Region under
17 Section 74.042(c), subject to funding through legislative
18 appropriations. The division is abolished September 1, 2026, unless
19 reauthorized by the legislature and funded through additional
20 legislative appropriations.
21 (e) The Third Business Court Division is composed of the
22 counties composing the Third Administrative Judicial Region under
23 Section 74.042(d).
24 (f) The Fourth Business Court Division is composed of the
25 counties composing the Fourth Administrative Judicial Region under
26 Section 74.042(e).
27 (g) The Fifth Business Court Division is composed of the

1 counties composing the Fifth Administrative Judicial Region under
2 Section 74.042(f), subject to funding through legislative
3 appropriations. The division is abolished on September 1, 2026,
4 unless reauthorized by the legislature and funded through
5 additional legislative appropriations.

6 (h) The Sixth Business Court Division is composed of the
7 counties composing the Sixth Administrative Judicial Region under
8 Section 74.042(g), subject to funding through legislative
9 appropriations. The division is abolished on September 1, 2026,
10 unless reauthorized by the legislature and funded through
11 additional legislative appropriations.

12 (i) The Seventh Business Court Division is composed of the
13 counties composing the Seventh Administrative Judicial Region
14 under Section 74.042(h), subject to funding through legislative
15 appropriations. The division is abolished on September 1, 2026,
16 unless reauthorized by the legislature and funded through
17 additional legislative appropriations.

18 (j) The Eighth Business Court Division is composed of the
19 counties composing the Eighth Administrative Judicial Region under
20 Section 74.042(i).

21 (k) The Ninth Business Court Division is composed of the
22 counties composing the Ninth Administrative Judicial Region under
23 Section 74.042(j), subject to funding through legislative
24 appropriations. The division is abolished on September 1, 2026,
25 unless reauthorized by the legislature and funded through
26 additional legislative appropriations.

27 (l) The Tenth Business Court Division is composed of the

1 counties composing the Tenth Administrative Judicial Region under
2 Section 74.042(k), subject to funding through legislative
3 appropriations. The division is abolished on September 1, 2026,
4 unless reauthorized by the legislature and funded through
5 additional legislative appropriations.
6 (m) The Eleventh Business Court Division is composed of the
7 counties composing the Eleventh Administrative Judicial Region
8 under Section 74.042(l).
9 (n) This subsection and Subsections (d), (g), (h), (i), (k),
10 and (l) expire September 1, 2026.
11 Sec. 25A.004. JURISDICTION AND POWERS. (a) Subject to
12 Subsections (b), (c), (d), (e), and (f), the business court has the
13 powers provided to district courts by Chapter 24, including the
14 power to:
15 (1) issue writs of injunction, mandamus,
16 sequestration, attachment, garnishment, and supersedeas; and
17 (2) grant any relief that may be granted by a district
18 court.
19 (b) Subject to Subsection (c), the business court has civil
20 jurisdiction concurrent with district courts in the following
21 actions in which the amount in controversy exceeds $5 million,
22 excluding interest, statutory damages, exemplary damages,
23 penalties, attorney's fees, and court costs:
24 (1) a derivative proceeding;
25 (2) an action regarding the governance, governing
26 documents, or internal affairs of an organization;
27 (3) an action in which a claim under a state or federal

1 securities or trade regulation law is asserted against:
2 (A) an organization;
3 (B) a controlling person or managerial official
4 of an organization for an act or omission by the organization or by
5 the person in the person's capacity as a controlling person or
6 managerial official;
7 (C) an underwriter of securities issued by the
8 organization; or
9 (D) the auditor of an organization;
10 (4) an action by an organization, or an owner of an
11 organization, if the action:
12 (A) is brought against an owner, controlling
13 person, or managerial official of the organization; and
14 (B) alleges an act or omission by the person in
15 the person's capacity as an owner, controlling person, or
16 managerial official of the organization;
17 (5) an action alleging that an owner, controlling
18 person, or managerial official breached a duty owed to an
19 organization or an owner of an organization by reason of the
20 person's status as an owner, controlling person, or managerial
21 official, including the breach of a duty of loyalty or good faith;
22 (6) an action seeking to hold an owner or governing
23 person of an organization liable for an obligation of the
24 organization, other than on account of a written contract signed by
25 the person to be held liable in a capacity other than as an owner or
26 governing person; and
27 (7) an action arising out of the Business

1 Organizations Code.
2 (c) The business court has civil jurisdiction concurrent
3 with district courts in an action described by Subsection (b)
4 regardless of the amount in controversy if a party to the action is
5 a publicly traded company.
6 (d) The business court has civil jurisdiction concurrent
7 with district courts in the following actions in which the amount in
8 controversy exceeds $10 million, excluding interest, statutory
9 damages, exemplary damages, penalties, attorney's fees, and court
10 costs:
11 (1) an action arising out of a qualified transaction;
12 (2) an action that arises out of a contract or
13 commercial transaction in which the parties to the contract or
14 transaction agreed in the contract or a subsequent agreement that
15 the business court has jurisdiction of the action, except an action
16 that arises out of an insurance contract; and
17 (3) subject to Subsection (g), an action that arises
18 out of a violation of the Finance Code or Business & Commerce Code
19 by an organization or an officer or governing person acting on
20 behalf of an organization other than a bank, credit union, or
21 savings and loan association.
22 (e) The business court has civil jurisdiction concurrent
23 with district courts in an action seeking injunctive relief or a
24 declaratory judgment under Chapter 37, Civil Practice and Remedies
25 Code, involving a dispute based on a claim within the court's
26 jurisdiction under Subsection (b), (c), or (d).
27 (f) Except as provided by Subsection (h), the business court

1 has supplemental jurisdiction over any other claim related to a
2 case or controversy within the court's jurisdiction that forms part
3 of the same case or controversy. A claim within the business
4 court's supplemental jurisdiction may proceed in the business court
5 only on the agreement of all parties to the claim and a judge of the
6 division of the court before which the action is pending. If the
7 parties involved in a claim within the business court's
8 supplemental jurisdiction do not agree on the claim proceeding in
9 the business court, the claim may proceed in a court of original
10 jurisdiction concurrently with any related claims proceeding in the
11 business court.

12 (g) Unless the claim falls within the business court's
13 supplemental jurisdiction, the business court does not have
14 jurisdiction of:

15 (1) a civil action:

16 (A) brought by or against a governmental entity;
17 or

18 (B) to foreclose on a lien on real or personal
19 property;

20 (2) a claim arising out of:

21 (A) Subchapter E, Chapter 15, and Chapter 17,
22 Business & Commerce Code;

23 (B) the Estates Code;

24 (C) the Family Code;

25 (D) the Insurance Code; or

26 (E) Chapter 53 and Title 9, Property Code;

27 (3) a claim arising out of the production or sale of a

1 farm product, as that term is defined by Section 9.102, Business &
2 Commerce Code;
3 (4) a claim related to a consumer transaction, as that
4 term is defined by Section 601.001, Business & Commerce Code, to
5 which a consumer in this state is a party, arising out of a
6 violation of federal or state law; or
7 (5) a claim related to the duties and obligations
8 under an insurance policy.
9 (h) The business court does not have jurisdiction of the
10 following claims regardless of whether the claim is otherwise
11 within the court's supplemental jurisdiction under Subsection (f):
12 (1) a claim arising under Chapter 74, Civil Practice
13 and Remedies Code;
14 (2) a claim in which a party seeks recovery of monetary
15 damages for bodily injury or death; or
16 (3) a claim of legal malpractice.
17 Sec. 25A.005. JUDICIAL AUTHORITY. A business court judge
18 has all powers, duties, immunities, and privileges of a district
19 judge.
20 Sec. 25A.006. INITIAL FILING; REMOVAL AND REMAND. (a) An
21 action within the jurisdiction of the business court may be filed in
22 the business court. The party filing the action must plead facts to
23 establish venue in a county in a division of the business court, and
24 the business court shall assign the action to that division. Venue
25 may be established as provided by law or, if a written contract
26 specifies a county as venue for the action, as provided by the
27 contract.

1 (b) If the business court does not have jurisdiction of the
2 action, the court shall, at the option of the party filing the
3 action:
4 (1) transfer the action to a district court or county
5 court at law in a county of proper venue; or
6 (2) dismiss the action without prejudice to the
7 party's rights.
8 (c) If, after an action is assigned to a division of the
9 business court, the court determines that the division's geographic
10 territory does not include a county of proper venue for the action,
11 the court shall:
12 (1) if an operating division of the court includes a
13 county of proper venue, transfer the action to that division; or
14 (2) if there is not an operating division of the court
15 that includes a county of proper venue, at the option of the party
16 filing the action, transfer the action to a district court or county
17 court at law in a county of proper venue.
18 (d) A party to an action filed in a district court or county
19 court at law that is within the jurisdiction of the business court
20 may remove the action to the business court. If the business court
21 does not have jurisdiction of the action, the business court shall
22 remand the action to the court in which the action was originally
23 filed.
24 (e) A party to an action filed in a district court or county
25 court at law in a county of proper venue that is not within an
26 operating division of the business court or the judge of the court
27 in which the action is filed may not remove or transfer the action

1 to the business court.
2 (f) A party may file an agreed notice of removal at any time
3 during the pendency of the action. If all parties to the action
4 have not agreed to remove the action, the notice of removal must be
5 filed:
6 (1) not later than the 30th day after the date the
7 party requesting removal of the action discovered, or reasonably
8 should have discovered, facts establishing the business court's
9 jurisdiction over the action; or
10 (2) if an application for temporary injunction is
11 pending on the date the party requesting removal of the action
12 discovered, or reasonably should have discovered, facts
13 establishing the business court's jurisdiction over the action, not
14 later than the 30th day after the date the application is granted,
15 denied, or denied as a matter of law.
16 (g) The notice of removal must be filed with the business
17 court and the court in which the action was originally filed. On
18 receipt of the notice, the clerk of the court in which the action
19 was originally filed shall immediately transfer the action to the
20 business court in accordance with rules adopted by the supreme
21 court, and the business court clerk shall assign the action to the
22 appropriate division of the business court.
23 (h) The filing of an action or a notice of removal in the
24 business court is subject to Section 10.001, Civil Practice and
25 Remedies Code.
26 (i) Removal of a case to the business court is not subject to
27 the statutes or rules governing the due order of pleading.

1 (j) Removal of a case does not waive a defect in venue or
2 constitute an appearance to determine personal jurisdiction.
3 (k) The judge of a court in which an action is filed may
4 request the presiding judge for the court's administrative region
5 to transfer the action to the business court if the action is within
6 the business court's jurisdiction. The judge shall notify all
7 parties of the transfer request and request a hearing on the
8 transfer request. After a hearing on the request, the presiding
9 judge may transfer the action to the business court if the presiding
10 judge finds the transfer will facilitate the fair and efficient
11 administration of justice. The business court clerk shall assign
12 an action transferred under this subsection to the appropriate
13 division of the business court.
14 (l) The business court judge on establishment of
15 jurisdiction and venue over an action shall by order declare the
16 county in which any jury trial for the action will be held as
17 determined under Section 25A.015.
18 Sec. 25A.007. APPEALS. (a) Notwithstanding any other law
19 and except as provided by Subsection (b) and in instances when the
20 supreme court has concurrent or exclusive jurisdiction, the
21 Fifteenth Court of Appeals has exclusive jurisdiction over an
22 appeal from an order or judgment of the business court or an
23 original proceeding related to an action or order of the business
24 court.
25 (b) If the Fifteenth Court of Appeals is not created, an
26 appeal from an order or judgment of the business court or an
27 original proceeding related to an action or order of the business

1 court shall be filed in the court of appeals with appellate
2 jurisdiction of civil cases for the county declared in an order
3 under Section 25A.006(l).
4 (c) The procedure governing an appeal or original
5 proceeding from the business court is the same as the procedure for
6 an appeal or original proceeding from a district court.
7 Sec. 25A.008. QUALIFICATIONS OF JUDGE. (a) A business
8 court judge must:
9 (1) be at least 35 years of age;
10 (2) be a United States citizen;
11 (3) have been a resident of a county within the
12 division of the business court to which the judge is appointed for
13 at least five years before appointment; and
14 (4) be a licensed attorney in this state who has 10 or
15 more years of experience in:
16 (A) practicing complex civil business
17 litigation;
18 (B) practicing business transaction law;
19 (C) serving as a judge of a court in this state
20 with civil jurisdiction; or
21 (D) any combination of experience described by
22 Paragraphs (A)-(C).
23 (b) A business court judge may not have had the judge's
24 license to practice law revoked, suspended, or subject to a
25 probated suspension.
26 Sec. 25A.009. APPOINTMENT OF JUDGES; TERM; PRESIDING JUDGE;
27 EXCHANGE OF BENCHES. (a) The governor, with the advice and consent

1 of the senate, shall appoint:

2 (1) two judges to each of the First, Third, Fourth,

3 Eighth, and Eleventh Divisions of the business court; and

4 (2) one judge to each of the Second, Fifth, Sixth,

5 Seventh, Ninth, and Tenth Divisions of the business court.

6 (b) A business court judge shall serve for a term of two

7 years, beginning on September 1 of every even-numbered year.

8 (c) A business court judge may be reappointed.

9 (d) Not later than the seventh day after the first day of a

10 term, the business court judges by majority vote shall select a

11 judge of the court to serve as administrative presiding judge for

12 the duration of the term. If a vacancy occurs in the position of

13 administrative presiding judge, the remaining business court

14 judges shall select a judge of the court to serve as administrative

15 presiding judge for the remainder of the unexpired term as soon as

16 practicable.

17 (e) A business court judge shall take the constitutional

18 oath of office required of appointed officers of this state and file

19 the oath with the secretary of state.

20 (f) To promote the orderly and efficient administration of

21 justice, the business court judges may exchange benches and sit and

22 act for each other in any matter pending before the court.

23 Sec. 25A.010. VACANCY. If a vacancy occurs in an office of

24 a business court judge, the governor, with the advice and consent of

25 the senate, shall appoint, in the same manner as the original

26 appointment, another person to serve for the remainder of the

27 unexpired term.

1 Sec. 25A.011. JUDGE'S SALARY. The salary of a business
2 court judge is the amount provided by Section 659.012 and shall be
3 paid in equal monthly installments.
4 Sec. 25A.012. REMOVAL; DISQUALIFICATION AND RECUSAL. (a)
5 A business court judge may be removed from office in the same manner
6 and for the same reasons as a district judge.
7 (b) A business court judge is disqualified and subject to
8 mandatory recusal for the same reasons a district judge is subject
9 to disqualification or recusal in a pending case. Disqualification
10 or recusal of a business court judge shall be governed by the same
11 procedure as disqualification or recusal of a district judge.
12 Sec. 25A.013. PRIVATE PRACTICE OF LAW. A business court
13 judge shall diligently discharge the duties of the office on a
14 full-time basis and may not engage in the private practice of law.
15 Sec. 25A.014. VISITING JUDGE. (a) A retired or former
16 judge or justice who has the qualifications prescribed by Section
17 25A.008 may be assigned as a visiting judge of a division of the
18 business court by the chief justice of the supreme court. A
19 visiting judge of a division of the business court is subject to
20 objection, disqualification, or recusal in the same manner as a
21 retired or former judge or justice is subject to objection,
22 disqualification, or recusal if appointed as a visiting district
23 judge.
24 (b) Before accepting an assignment as a visiting judge of a
25 division of the business court, a retired or former judge or justice
26 shall take the constitutional oath of office required of appointed
27 officers of this state and file the oath with the secretary of

1 state.
2 Sec. 25A.015. JURY PRACTICE AND PROCEDURE; VENUE FOR JURY
3 TRIAL. (a) A party in an action pending in the business court has
4 the right to a trial by jury when required by the constitution.
5 (b) Subject to Subsection (d), a jury trial in a case filed
6 initially in the business court shall be held in any county in which
7 the case could have been filed under Section 15.002, Civil Practice
8 and Remedies Code, as chosen by the plaintiff.
9 (c) Subject to Subsections (b) and (d), a jury trial in a
10 case removed to the business court shall be held in the county in
11 which the action was originally filed.
12 (d) A jury trial for a case in which a written contract
13 specifies a county as venue for suits shall be held in that county.
14 (e) The parties and the business court judge may agree to
15 hold the jury trial in any other county. A party may not be required
16 to agree to hold the jury trial in a different county.
17 (f) The drawing of jury panels, selection of jurors, and
18 other jury-related practice and procedure in the business court
19 shall be the same as for the district court in the county in which
20 the trial is held.
21 (g) Practice, procedure, rules of evidence, issuance of
22 process and writs, and all other matters pertaining to the conduct
23 of trials, hearings, and other business in the business court are
24 governed by the laws and rules prescribed for district courts,
25 unless otherwise provided by this chapter.
26 Sec. 25A.016. WRITTEN OPINIONS. The supreme court shall
27 adopt rules for the issuance of written opinions by the business

1 court.

2 Sec. 25A.017. COURT LOCATION; STAFFING. (a) In this
3 section, "remote proceeding" means a proceeding before the business
4 court in which one or more of the participants, including a judge,
5 party, attorney, witness, court reporter, or other individual
6 attends the proceeding remotely through the use of technology.

7 (b) The administrative presiding judge of the business
8 court shall manage administrative and personnel matters on behalf
9 of the court. The administrative presiding judge of the business
10 court shall appoint a clerk, whose office shall be located in Travis
11 County in facilities provided by this state. The clerk shall:

12 (1) accept all filings in the business court; and

13 (2) fulfill the legal and administrative functions of
14 a district clerk.

15 (c) Each business court judge shall maintain chambers in the
16 county the judge selects within the geographic boundaries of the
17 division to which the judge is appointed in facilities provided by
18 this state. For purposes of this section, the Office of Court
19 Administration of the Texas Judicial System may contract for the
20 use of facilities with a county.

21 (d) Subject to Section 25A.015, a business court judge may
22 hold court at any courtroom within the geographic boundaries of the
23 division to which the judge is appointed as the court determines
24 necessary or convenient for a particular civil action. To the
25 extent practicable, a county using existing courtrooms and
26 facilities shall accommodate the business court in the conduct of
27 the court's hearings and other proceedings.

1 (e) The business court may conduct a proceeding other than a
2 jury trial as a remote proceeding to facilitate the resolution of a
3 matter before the court. The business court may not require a party
4 or attorney to remotely attend a court proceeding in which oral
5 testimony is heard, absent the agreement of the parties.
6 (f) The business court shall conduct a remote proceeding
7 from a courtroom or the facilities provided to a business court
8 judge by this state.
9 (g) The business court shall provide reasonable notice to
10 the public that a proceeding will be conducted remotely and an
11 opportunity for the public to observe the remote proceeding.
12 (h) In a county in which a division of the business court
13 sits, the sheriff shall in person or by deputy attend the business
14 court as required by the court. The sheriff or deputy is entitled
15 to reimbursement from this state for the cost of attending the
16 business court.
17 (i) The business court may appoint personnel necessary for
18 the operation of the court, including:
19 (1) personnel to assist the clerk of the court;
20 (2) staff attorneys for the court;
21 (3) staff attorneys for each judge of the business
22 court;
23 (4) court coordinators; and
24 (5) administrative assistants.
25 (j) Subject to Subsection (k), the court officials shall
26 perform the duties and responsibilities of their offices and are
27 entitled to the compensation, fees, and allowances prescribed by

1 law for the offices.

2 (k) All personnel, including the business court clerk,
3 appointed under this section are employees of the Office of Court
4 Administration of the Texas Judicial System and are state employees
5 for all purposes, including accrual of leave time, insurance
6 benefits, retirement benefits, and travel regulations.

7 Sec. 25A.0171. ADMINISTRATIVE ATTACHMENT TO OFFICE OF COURT
8 ADMINISTRATION; REPORT. (a) The business court is
9 administratively attached to the Office of Court Administration of
10 the Texas Judicial System.

11 (b) The Office of Court Administration of the Texas Judicial
12 System shall provide administrative support to the business court
13 as necessary to enable the business court to carry out its duties
14 under this chapter.

15 (c) The Office of Court Administration of the Texas Judicial
16 System may employ personnel necessary to provide administrative
17 support to the business court under this chapter.

18 (d) Only the business court may exercise the duties of the
19 business court under this chapter. Except as otherwise provided by
20 this chapter, the Office of Court Administration of the Texas
21 Judicial System does not have any authority or responsibility
22 related to the duties of the business court under this chapter.

23 (e) Not later than December 1 of each year, the Office of
24 Court Administration of the Texas Judicial System shall submit to
25 the legislature a report on the number and types of cases heard by
26 the business court in the preceding year.

27 Sec. 25A.018. FEES. The supreme court shall set fees for

1 filings and actions in the business court in amounts sufficient to
2 cover the costs of administering this chapter, taking into account
3 fee waivers necessary for the interest of justice.
4 Sec. 25A.019. SEAL. The seal of the business court is the
5 same as that provided by law for a district court except that the
6 seal must contain the name "The Business Court of Texas."
7 Sec. 25A.020. RULES. (a) The supreme court shall adopt
8 rules of civil procedure as the court determines necessary,
9 including rules providing for:
10 (1) the timely and efficient removal and remand of
11 cases to and from the business court; and
12 (2) the assignment of cases to judges of the business
13 court.
14 (b) The business court may adopt rules of practice and
15 procedure consistent with the Texas Rules of Civil Procedure and
16 the Texas Rules of Evidence.
17 SECTION 2. Sections 659.012(a) and (e), Government Code,
18 are amended to read as follows:
19 (a) Notwithstanding Section 659.011 and subject to
20 Subsections (b) and (b-1):
21 (1) a judge of a district court or a division of the
22 business court is entitled to an annual base salary from the state
23 as set by the General Appropriations Act in an amount equal to at
24 least $140,000, except that the combined base salary of a district
25 judge or judge of a division of the business court from all state
26 and county sources, including compensation for any extrajudicial
27 services performed on behalf of the county, may not exceed the

1 amount that is $5,000 less than the maximum combined base salary
2 from all state and county sources for a justice of a court of
3 appeals other than a chief justice as determined under this
4 subsection;

5 (2) a justice of a court of appeals other than the
6 chief justice is entitled to an annual base salary from the state in
7 the amount equal to 110 percent of the state base salary of a
8 district judge as set by the General Appropriations Act, except
9 that the combined base salary of a justice of the court of appeals
10 other than the chief justice from all state and county sources,
11 including compensation for any extrajudicial services performed on
12 behalf of the county, may not exceed the amount that is $5,000 less
13 than the base salary for a justice of the supreme court as
14 determined under this subsection;

15 (3) a justice of the supreme court other than the chief
16 justice or a judge of the court of criminal appeals other than the
17 presiding judge is entitled to an annual base salary from the state
18 in the amount equal to 120 percent of the state base salary of a
19 district judge as set by the General Appropriations Act; and

20 (4) the chief justice or presiding judge of an
21 appellate court is entitled to an annual base salary from the state
22 in the amount equal to $2,500 more than the state base salary
23 provided for the other justices or judges of the court, except that
24 the combined base salary of the chief justice of a court of appeals
25 from all state and county sources may not exceed the amount equal to
26 $2,500 less than the base salary for a justice of the supreme court
27 as determined under this subsection.

1 (e) For the purpose of salary payments by the state, the
2 comptroller shall determine from sworn statements filed by the
3 justices of the courts of appeals, [and] district judges, and
4 business court judges that the required salary limitations provided
5 by Subsection (a) are maintained. If the state base salary for a
6 judge or justice prescribed by Subsection (a) combined with
7 additional compensation from a county would exceed the limitations
8 provided by Subsection (a), the comptroller shall reduce the salary
9 payment made by the state by the amount of the excess.
10 SECTION 3. Section 837.001(a), Government Code, is amended
11 to read as follows:
12 (a) Membership [Except as provided by Subsection (b),
13 membership] in the retirement system is limited to persons who have
14 never been eligible for membership in the Judicial Retirement
15 System of Texas or the Judicial Retirement System of Texas Plan One
16 and who at any time on or after the effective date of this Act are
17 judges, justices, or commissioners of:
18 (1) the supreme court;
19 (2) the court of criminal appeals;
20 (3) a court of appeals;
21 (4) the business court;
22 (5) a district court; or
23 (6) [(5)] a commission to a court specified in this
24 subsection.
25 SECTION 4. (a) The Texas Supreme Court has exclusive and
26 original jurisdiction over a challenge to the constitutionality of
27 this Act or any part of this Act and may issue injunctive or

1 declaratory relief in connection with the challenge.

2 (b) If the appointment of judges by the governor to the
3 divisions of the business court under Section 25A.009, Government
4 Code, as added by this Act, is held by the Texas Supreme Court as
5 unconstitutional, the business court shall be staffed by retired or
6 former judges or justices who are appointed to the court as provided
7 by Section 25A.014, Government Code, as added by this Act.

8 SECTION 5. Except as otherwise provided by this Act, the
9 business court is created September 1, 2024.

10 SECTION 6. (a) As soon as practicable after the effective
11 date of this Act, the governor shall appoint judges to the First,
12 Third, Fourth, Eighth, and Eleventh Business Court Divisions as
13 required by Section 25A.009, Government Code, as added by this Act.

14 (b) On or before September 1, 2026, but not before July 1,
15 2026, the governor shall appoint judges to the Second, Fifth,
16 Sixth, Seventh, Ninth, and Tenth Business Court Divisions as
17 required by Section 25A.009, Government Code, as added by this Act.

18 SECTION 7. (a) Notwithstanding Chapter 25A, Government
19 Code, as added by this Act, the business court is not created unless
20 the legislature makes a specific appropriation of money for that
21 purpose. For purposes of this subsection, a specific appropriation
22 is an appropriation identifying the business court or an Act of the
23 88th Legislature, Regular Session, 2023, relating to the creation
24 of a specialty trial court to hear certain cases or of the business
25 court.

26 (b) Notwithstanding Section 25A.007(a), Government Code, as
27 added by this Act, a court of appeals retains the jurisdiction the

1 court had on August 31, 2024, if the business court is not created
2 as a result of Subsection (a) of this section.
3 SECTION 8. The changes in law made by this Act apply to
4 civil actions commenced on or after September 1, 2024.
5 SECTION 9. This Act takes effect September 1, 2023.

______________________________ ______________________________

President of the Senate Speaker of the House

I certify that H.B. No. 19 was passed by the House on May 2, 2023, by the following vote: Yeas 90, Nays 51, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 19 on May 25, 2023, by the following vote: Yeas 86, Nays 53, 1 present, not voting.

____

Chief Clerk of the House

I certify that H.B. No. 19 was passed by the Senate, with amendments, on May 12, 2023, by the following vote: Yeas 24, Nays 6.

____

Secretary of the Senate

APPROVED: __________________

Date

____

Governor

Tab W

H.B. No. 19

AN ACT relating to the creation of a specialty trial court to hear certain cases; authorizing fees.

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

SECTION 1.

Subtitle A, Title 2, Government Code, is amended by adding Chapter 25A to read as follows:

CHAPTER 25A. BUSINESS COURT

Sec. 25A.001. DEFINITIONS.

In this chapter:

(1) "Controlling person" means a person who directly or indirectly controls a governing person, officer, or organization.

(2) "Derivative proceeding" means a civil action brought in the right of a domestic or foreign corporation, a domestic or foreign limited liability company, or a domestic or foreign limited partnership, to the extent provided by the Business Organizations Code.

(3) "Governing documents" means the instruments, documents, or agreements adopted under an organization's governing law to govern the organization's formation and internal affairs. The term includes:

(A) a certificate of formation, articles of incorporation, and articles of organization;
(B) bylaws;
(C) a partnership agreement;
(D) a company agreement or operating agreement;
(E) a shareholder agreement;
(F) a voting agreement or voting trust agreement; and
(G) an agreement among owners restricting the transfer of ownership interests.

(4) "Governing law" means the law governing the formation and internal affairs of an organization.

(5) "Governing person" means a person who is entitled, alone or as part of a group, to manage and direct an organization's affairs under the organization's governing documents and governing law. The term includes:

(A) a member of the board of directors of a corporation or other organization;
(B) a general partner of a general or limited partnership;
(C) a manager of a limited liability company that is managed by its managers;
(D) a member of a limited liability company that is managed by its members;
(E) a trust manager of a real estate investment trust; and
(F) a trustee of a business trust.

(6) "Governmental entity" means:

(A) this state; or
(B) a political subdivision of this state, including a municipality, a county, or any kind of district.

(7) "Internal affairs" means:

(A) the rights, powers, and duties of an organization's governing persons, officers, owners, and members; and
(B) matters relating to the organization's membership or ownership interests.

(8) "Managerial official" means a governing person or officer.

(9) "Officer" means a person elected, appointed, or designated as an officer of an organization by the organization's governing persons or governing documents.

(10) "Organization" means a foreign or domestic entity or association, regardless of whether the organization is for profit or nonprofit. The term includes:

(A) a corporation;
(B) a limited partnership;
(C) a general partnership;
(D) a limited liability partnership;
(E) a limited liability company;
(F) a business trust;
(G) a real estate investment trust;
(H) a joint venture;
(I) a joint stock company;
(J) a cooperative;
(K) a bank;
(L) a credit union;
(M) a savings and loan association;
(N) an insurance company; and
(O) a series of a limited liability company or of another entity.

(11) "Owner" means an owner of an organization. The term includes:

(A) a shareholder or stockholder of a corporation or other organization;
(B) a general or limited partner of a partnership or an assignee of a partnership interest in a partnership;
(C) a member of, or an assignee of a membership interest in, a limited liability company; and
(D) a member of a nonprofit organization.

(12) "Ownership interest" means an owner's interest in an organization, including an owner's economic, voting, and management rights.

(13) "Publicly traded company" means an entity whose voting equity securities are listed on a national securities exchange registered with the United States Securities and Exchange Commission under Section 6, Securities Exchange Act of 1934 (15 U.S.C. Section 78f) and any entity that is majority owned or controlled by such an entity.

(14) "Qualified transaction" means a transaction, other than a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution, under which a party:

(A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least $10 million; or
(B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least $10 million.

Sec. 25A.002. CREATION.

The business court is a statutory court created under Section 1, Article V, Texas Constitution.

Sec. 25A.003. BUSINESS COURT JUDICIAL DISTRICT; DIVISIONS.

(a) The judicial district of the business court is composed of all counties in this state.

(b) The business court is composed of divisions as provided by this section.

(c) The First Business Court Division is composed of the counties composing the First Administrative Judicial Region under Section 74.042(b).

(d) The Second Business Court Division is composed of the counties composing the Second Administrative Judicial Region under Section 74.042(c), subject to funding through legislative appropriations. The division is abolished September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(e) The Third Business Court Division is composed of the counties composing the Third Administrative Judicial Region under Section 74.042(d).

(f) The Fourth Business Court Division is composed of the counties composing the Fourth Administrative Judicial Region under Section 74.042(e).

(g) The Fifth Business Court Division is composed of the counties composing the Fifth Administrative Judicial Region under Section 74.042(f), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(h) The Sixth Business Court Division is composed of the counties composing the Sixth Administrative Judicial Region under Section 74.042(g), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(i) The Seventh Business Court Division is composed of the counties composing the Seventh Administrative Judicial Region under Section 74.042(h), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(j) The Eighth Business Court Division is composed of the counties composing the Eighth Administrative Judicial Region under Section 74.042(i).

(k) The Ninth Business Court Division is composed of the counties composing the Ninth Administrative Judicial Region under Section 74.042(j), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(l) The Tenth Business Court Division is composed of the counties composing the Tenth Administrative Judicial Region under Section 74.042(k), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(m) The Eleventh Business Court Division is composed of the counties composing the Eleventh Administrative Judicial Region under Section 74.042(l).

(n) This subsection and Subsections (d), (g), (h), (i), (k), and (l) expire September 1, 2026.

Sec. 25A.004. JURISDICTION AND POWERS.

(a) Subject to Subsections (b), (c), (d), (e), and (f), the business court has the powers provided to district courts by Chapter 24, including the power to:

(1) issue writs of injunction, mandamus, sequestration, attachment, garnishment, and supersedeas; and

(2) grant any relief that may be granted by a district court.

(b) Subject to Subsection (c), the business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) a derivative proceeding;

(2) an action regarding the governance, governing documents, or internal affairs of an organization;

(3) an action in which a claim under a state or federal securities or trade regulation law is asserted against:

(A) an organization;
(B) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as a controlling person or managerial official;
(C) an underwriter of securities issued by the organization; or
(D) the auditor of an organization;

(4) an action by an organization, or an owner of an organization, if the action:

(A) is brought against an owner, controlling person, or managerial official of the organization; and
(B) alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization;

(5) an action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith;

(6) an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and

(7) an action arising out of the Business Organizations Code.

(c) The business court has civil jurisdiction concurrent with district courts in an action described by Subsection (b) regardless of the amount in controversy if a party to the action is a publicly traded company.

(d) The business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $10 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) an action arising out of a qualified transaction;

(2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the business court has jurisdiction of the action, except an action that arises out of an insurance contract; and

(3) subject to Subsection (g), an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization other than a bank, credit union, or savings and loan association.

(e) The business court has civil jurisdiction concurrent with district courts in an action seeking injunctive relief or a declaratory judgment under Chapter 37, Civil Practice and Remedies Code, involving a dispute based on a claim within the court's jurisdiction under Subsection (b), (c), or (d).

(f) Except as provided by Subsection (h), the business court has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy. A claim within the business court's supplemental jurisdiction may proceed in the business court only on the agreement of all parties to the claim and a judge of the division of the court before which the action is pending. If the parties involved in a claim within the business court's supplemental jurisdiction do not agree on the claim proceeding in the business court, the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the business court.

(g) Unless the claim falls within the business court's supplemental jurisdiction, the business court does not have jurisdiction of:

(1) a civil action:

(A) brought by or against a governmental entity; or
(B) to foreclose on a lien on real or personal property;

(2) a claim arising out of:

(A) Subchapter E, Chapter 15, and Chapter 17, Business & Commerce Code;
(B) the Estates Code;
(C) the Family Code;

(D) the Insurance Code; or
(E) Chapter 53 and Title 9, Property Code;

(3) a claim arising out of the production or sale of a farm product, as that term is defined by Section 9.102, Business & Commerce Code;

(4) a claim related to a consumer transaction, as that term is defined by Section 601.001, Business & Commerce Code, to which a consumer in this state is a party, arising out of a violation of federal or state law; or

(5) a claim related to the duties and obligations under an insurance policy.

(h) The business court does not have jurisdiction of the following claims regardless of whether the claim is otherwise within the court's supplemental jurisdiction under Subsection (f):

(1) a claim arising under Chapter 74, Civil Practice and Remedies Code;

(2) a claim in which a party seeks recovery of monetary damages for bodily injury or death; or

(3) a claim of legal malpractice.

Sec. 25A.005. JUDICIAL AUTHORITY.

A business court judge has all powers, duties, immunities, and privileges of a district judge.

Sec. 25A.006. INITIAL FILING; REMOVAL AND REMAND.

(a) An action within the jurisdiction of the business court may be filed in the business court. The party filing the action must plead facts to establish venue in a county in a division of the business court, and the business court shall assign the action to that division. Venue may be established as provided by law or, if a written contract specifies a county as venue for the action, as provided by the contract.

(b) If the business court does not have jurisdiction of the action, the court shall, at the option of the party filing the action:

(1) transfer the action to a district court or county court at law in a county of proper venue; or

(2) dismiss the action without prejudice to the party's rights.

(c) If, after an action is assigned to a division of the business court, the court determines that the division's geographic territory does not include a county of proper venue for the action, the court shall:

(1) if an operating division of the court includes a county of proper venue, transfer the action to that division; or

(2) if there is not an operating division of the court that includes a county of proper venue, at the option of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.

(d) A party to an action filed in a district court or county court at law that is within the jurisdiction of the business court may remove the action to the business court. If the business court does not have jurisdiction of the action, the business court shall remand the action to the court in which the action was originally filed.

(e) A party to an action filed in a district court or county court at law in a county of proper venue that is not within an operating division of the business court or the judge of the court in which the action is filed may not remove or transfer the action to the business court.

(f) A party may file an agreed notice of removal at any time during the pendency of the action. If all parties to the action have not agreed to remove the action, the notice of removal must be filed:

(1) not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action; or

(2) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action, not later than the 30th day after the date the application is granted, denied, or denied as a matter of law.

(g) The notice of removal must be filed with the business court and the court in which the action was originally filed. On receipt of the notice, the clerk of the court in which the action was originally filed shall immediately transfer the action to the business court in accordance with rules adopted by the supreme court, and the business court clerk shall assign the action to the appropriate division of the business court.

(h) The filing of an action or a notice of removal in the business court is subject to Section 10.001, Civil Practice and Remedies Code.

(i) Removal of a case to the business court is not subject to the statutes or rules governing the due order of pleading.

(j) Removal of a case does not waive a defect in venue or constitute an appearance to determine personal jurisdiction.

(k) The judge of a court in which an action is filed may request the presiding judge for the court's administrative region to transfer the action to the business court if the action is within the business court's jurisdiction. The judge shall notify all parties of the transfer request and request a hearing on the transfer request. After a hearing on the request, the presiding judge may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice. The business court clerk shall assign an action transferred under this subsection to the appropriate division of the business court.

(l) The business court judge on establishment of jurisdiction and venue over an action shall by order declare the county in which any jury trial for the action will be held as determined under Section 25A.015.

Sec. 25A.007. APPEALS.

(a) Notwithstanding any other law and except as provided by Subsection (b) and in instances when the supreme court has concurrent or exclusive jurisdiction, the Fifteenth Court of Appeals has exclusive jurisdiction over an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court.

(b) If the Fifteenth Court of Appeals is not created, an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court shall be filed in the court of appeals with appellate jurisdiction of civil cases for the county declared in an order under Section 25A.006(l).

(c) The procedure governing an appeal or original proceeding from the business court is the same as the procedure for an appeal or original proceeding from a district court.

Sec. 25A.008. QUALIFICATIONS OF JUDGE.

(a) A business court judge must:

(1) be at least 35 years of age;

(2) be a United States citizen;

(3) have been a resident of a county within the division of the business court to which the judge is appointed for at least five years before appointment; and

(4) be a licensed attorney in this state who has 10 or more years of experience in:

(A) practicing complex civil business litigation;

(B) practicing business transaction law;

(C) serving as a judge of a court in this state with civil jurisdiction; or

(D) any combination of experience described by Paragraphs (A)-(C).

(b) A business court judge may not have had the judge's license to practice law revoked, suspended, or subject to a probated suspension.

Sec. 25A.009. APPOINTMENT OF JUDGES; TERM; PRESIDING JUDGE; EXCHANGE OF BENCHES.

(a) The governor, with the advice and consent of the senate, shall appoint:

(1) two judges to each of the First, Third, Fourth, Eighth, and Eleventh Divisions of the business court; and

(2) one judge to each of the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions of the business court.

(b) A business court judge shall serve for a term of two years, beginning on September 1 of every even-numbered year.

(c) A business court judge may be reappointed.

(d) Not later than the seventh day after the first day of a term, the business court judges by majority vote shall select a judge of the court to serve as administrative presiding judge for the duration of the term. If a vacancy occurs in the position of administrative presiding judge, the remaining business court judges shall select a judge of the court to serve as administrative presiding judge for the remainder of the unexpired term as soon as practicable.

(e) A business court judge shall take the constitutional oath of office required of appointed officers of this state and file the oath with the secretary of state.

(f) To promote the orderly and efficient administration of justice, the business court judges may exchange benches and sit and act for each other in any matter pending before the court.

Sec. 25A.010. VACANCY.

If a vacancy occurs in an office of a business court judge, the governor, with the advice and consent of the senate, shall appoint, in the same manner as the original appointment, another person to serve for the remainder of the unexpired term.

Sec. 25A.011. JUDGE'S SALARY.

The salary of a business court judge is the amount provided by Section 659.012 and shall be paid in equal monthly installments.

Sec. 25A.012. REMOVAL; DISQUALIFICATION AND RECUSAL.

(a) A business court judge may be removed from office in the same manner and for the same reasons as a district judge.

(b) A business court judge is disqualified and subject to mandatory recusal for the same reasons a district judge is subject to disqualification or recusal in a pending case. Disqualification or recusal of a business court judge shall be governed by the same procedure as disqualification or recusal of a district judge.

Sec. 25A.013. PRIVATE PRACTICE OF LAW.

A business court judge shall diligently discharge the duties of the office on a full-time basis and may not engage in the private practice of law.

Sec. 25A.014. VISITING JUDGE.

(a) A retired or former judge or justice who has the qualifications prescribed by Section 25A.008 may be assigned as a visiting judge of a division of the business court by the chief justice of the supreme court. A visiting judge of a division of the business court is subject to objection, disqualification, or recusal in the same manner as a retired or former judge or justice is subject to objection, disqualification, or recusal if appointed as a visiting district judge.

(b) Before accepting an assignment as a visiting judge of a division of the business court, a retired or former judge or justice shall take the constitutional oath of office required of appointed officers of this state and file the oath with the secretary of state.

Sec. 25A.015. JURY PRACTICE AND PROCEDURE; VENUE FOR JURY TRIAL.

(a) A party in an action pending in the business court has the right to a trial by jury when required by the constitution.

(b) Subject to Subsection (d), a jury trial in a case filed initially in the business court shall be held in any county in which the case could have been filed under Section 15.002, Civil Practice and Remedies Code, as chosen by the plaintiff.

(c) Subject to Subsections (b) and (d), a jury trial in a case removed to the business court shall be held in the county in which the action was originally filed.

(d) A jury trial for a case in which a written contract specifies a county as venue for suits shall be held in that county.

(e) The parties and the business court judge may agree to hold the jury trial in any other county. A party may not be required to agree to hold the jury trial in a different county.

(f) The drawing of jury panels, selection of jurors, and other jury-related practice and procedure in the business court shall be the same as for the district court in the county in which the trial is held.

(g) Practice, procedure, rules of evidence, issuance of process and writs, and all other matters pertaining to the conduct of trials, hearings, and other business in the business court are governed by the laws and rules prescribed for district courts, unless otherwise provided by this chapter.

Sec. 25A.016. WRITTEN OPINIONS.

The supreme court shall adopt rules for the issuance of written opinions by the business court.

Sec. 25A.017. COURT LOCATION; STAFFING.

(a) In this section, "remote proceeding" means a proceeding before the business court in which one or more of the participants, including a judge, party, attorney, witness, court reporter, or other individual attends the proceeding remotely through the use of technology.

(b) The administrative presiding judge of the business court shall manage administrative and personnel matters on behalf of the court. The administrative presiding judge of the business court shall appoint a clerk, whose office shall be located in Travis County in facilities provided by this state. The clerk shall:

(1) accept all filings in the business court; and

(2) fulfill the legal and administrative functions of a district clerk.

(c) Each business court judge shall maintain chambers in the county the judge selects within the geographic boundaries of the division to which the judge is appointed in facilities provided by this state. For purposes of this section, the Office of Court Administration of the Texas Judicial System may contract for the use of facilities with a county.

(d) Subject to Section 25A.015, a business court judge may hold court at any courtroom within the geographic boundaries of the division to which the judge is appointed as the court determines necessary or convenient for a particular civil action. To the extent practicable, a county using existing courtrooms and facilities shall accommodate the business court in the conduct of the court's hearings and other proceedings.

(e) The business court may conduct a proceeding other than a jury trial as a remote proceeding to facilitate the resolution of a matter before the court. The business court may not require a party or attorney to remotely attend a court proceeding in which oral testimony is heard, absent the agreement of the parties.

(f) The business court shall conduct a remote proceeding from a courtroom or the facilities provided to a business court judge by this state.

(g) The business court shall provide reasonable notice to the public that a proceeding will be conducted remotely and an opportunity for the public to observe the remote proceeding.

(h) In a county in which a division of the business court sits, the sheriff shall in person or by deputy attend the business court as required by the court. The sheriff or deputy is entitled to reimbursement from this state for the cost of attending the business court.

(i) The business court may appoint personnel necessary for the operation of the court, including:

(1) personnel to assist the clerk of the court;

(2) staff attorneys for the court;

(3) staff attorneys for each judge of the business court;

(4) court coordinators; and

(5) administrative assistants.

(j) Subject to Subsection (k), the court officials shall perform the duties and responsibilities of their offices and are entitled to the compensation, fees, and allowances prescribed by law for the offices.

(k) All personnel, including the business court clerk, appointed under this section are employees of the Office of Court Administration of the Texas Judicial System and are state employees for all purposes, including accrual of leave time, insurance benefits, retirement benefits, and travel regulations.

Sec. 25A.0171. ADMINISTRATIVE ATTACHMENT TO OFFICE OF COURT ADMINISTRATION; REPORT.

(a) The business court is administratively attached to the Office of Court Administration of the Texas Judicial System.

(b) The Office of Court Administration of the Texas Judicial System shall provide administrative support to the business court as necessary to enable the business court to carry out its duties under this chapter.

(c) The Office of Court Administration of the Texas Judicial System may employ personnel necessary to provide administrative support to the business court under this chapter.

(d) Only the business court may exercise the duties of the business court under this chapter. Except as otherwise provided by this chapter, the Office of Court Administration of the Texas Judicial System does not have any authority or responsibility related to the duties of the business court under this chapter.

(e) Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall submit to the legislature a report on the number and types of cases heard by the business court in the preceding year.

Sec. 25A.018. FEES.

The supreme court shall set fees for filings and actions in the business court in amounts sufficient to cover the costs of administering this chapter, taking into account fee waivers necessary for the interest of justice.

Sec. 25A.019. SEAL.

The seal of the business court is the same as that provided by law for a district court except that the seal must contain the name "The Business Court of Texas."

Sec. 25A.020. RULES.

(a) The supreme court shall adopt rules of civil procedure as the court determines necessary, including rules providing for:

(1) the timely and efficient removal and remand of cases to and from the business court; and

(2) the assignment of cases to judges of the business court.

(b) The business court may adopt rules of practice and procedure consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence.

SECTION 2.

Sections 659.012(a) and (e), Government Code, are amended to read as follows:

(a) Notwithstanding Section 659.011 and subject to Subsections (b) and (b-1):

(1) a judge of a district court or a division of the business court is entitled to an annual base salary from the

state as set by the General Appropriations Act in an amount equal to at least $140,000, except that the combined base salary of a district judge or judge of a division of the business court from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the maximum combined base salary from all state and county sources for a justice of a court of appeals other than a chief justice as determined under this subsection;

(2) a justice of a court of appeals other than the chief justice is entitled to an annual base salary from the state in the amount equal to 110 percent of the state base salary of a district judge as set by the General Appropriations Act, except that the combined base salary of a justice of the court of appeals other than the chief justice from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the base salary for a justice of the supreme court as determined under this subsection;

(3) a justice of the supreme court other than the chief justice or a judge of the court of criminal appeals other than the presiding judge is entitled to an annual base salary from the state in the amount equal to 120 percent of the state base salary of a district judge as set by the General Appropriations Act; and

(4) the chief justice or presiding judge of an appellate court is entitled to an annual base salary from the state in the amount equal to $2,500 more than the state base salary provided for the other justices or judges of the court, except that the combined base salary of the chief justice of a court of appeals from all state and county sources may not exceed the amount equal to $2,500 less than the base salary for a justice of the supreme court as determined under this subsection.

(e) For the purpose of salary payments by the state, the comptroller shall determine from sworn statements filed by the justices of the courts of appeals, district judges, and business court judges that the required salary limitations provided by Subsection (a) are maintained. If the state base salary for a judge or justice prescribed by Subsection (a) combined with additional compensation from a county would exceed the limitations provided by Subsection (a), the comptroller shall reduce the salary payment made by the state by the amount of the excess.

SECTION 3.

Section 837.001(a), Government Code, is amended to read as follows:

(a) Membership in the retirement system is limited to persons who have never been eligible for membership in the Judicial Retirement System of Texas or the Judicial Retirement System of Texas Plan One and who at any time on or after the effective date of this Act are judges, justices, or commissioners of:

(1) the supreme court;

(2) the court of criminal appeals;

(3) a court of appeals;

(4) the business court;

(5) a district court; or

(6) a commission to a court specified in this subsection.

SECTION 4.

(a) The Texas Supreme Court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge.

(b) If the appointment of judges by the governor to the divisions of the business court under Section 25A.009, Government Code, as added by this Act, is held by the Texas Supreme Court as unconstitutional, the business court shall be staffed by retired or former judges or justices who are appointed to the court as provided by Section 25A.014, Government Code, as added by this Act.

SECTION 5.

Except as otherwise provided by this Act, the business court is created September 1, 2024.

SECTION 6.

(a) As soon as practicable after the effective date of this Act, the governor shall appoint judges to the First, Third, Fourth, Eighth, and Eleventh Business Court Divisions as required by Section 25A.009, Government Code, as added by this Act.

(b) On or before September 1, 2026, but not before July 1, 2026, the governor shall appoint judges to the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Business Court Divisions as required by Section 25A.009, Government Code, as added by this Act.

SECTION 7.

(a) Notwithstanding Chapter 25A, Government Code, as added by this Act, the business court is not created unless the legislature makes a specific appropriation of money for that purpose. For purposes of this subsection, a specific appropriation is an appropriation identifying the business court or an Act of the 88th Legislature, Regular Session, 2023, relating to the creation of a specialty trial court to hear certain cases or of the business court.

(b) Notwithstanding Section 25A.007(a), Government Code, as added by this Act, a court of appeals retains the jurisdiction the court had on August 31, 2024, if the business court is not created as a result of Subsection (a) of this section.

SECTION 8.

The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024.

SECTION 9.

This Act takes effect September 1, 2023.

Tab X

1 AN ACT

2 relating to the creation of the Fifteenth Court of Appeals with
3 jurisdiction over certain civil cases, the compensation of the
4 justices of that court, and the jurisdiction of the courts of
5 appeals in this state.

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

7 ARTICLE 1. FIFTEENTH COURT OF APPEALS

8 SECTION 1.01. Section 22.201, Government Code, is amended
9 by amending Subsection (a) and adding Subsection (p) to read as
10 follows:

11 (a) The state is organized [~~divided~~] into 15 [~~14~~] courts of
12 appeals districts with a court of appeals in each district.

13 (p) The Fifteenth Court of Appeals District is composed of
14 all counties in this state.

15 SECTION 1.02. Subchapter C, Chapter 22, Government Code, is
16 amended by adding Section 22.2151 to read as follows:

17 Sec. 22.2151. FIFTEENTH COURT OF APPEALS. (a) The Court of
18 Appeals for the Fifteenth Court of Appeals District shall be held in
19 the City of Austin.

20 (b) The Fifteenth Court of Appeals may transact its business
21 in any county in the district as the court determines is necessary
22 and convenient.

23 SECTION 1.03. Subchapter C, Chapter 22, Government Code, is
24 amended by adding Section 22.2152 to read as follows:

1 Sec. 22.2152. REPORT ON FIFTEENTH COURT OF APPEALS. Not
2 later than December 1 of each year, the Office of Court
3 Administration of the Texas Judicial System shall submit to the
4 legislature a report on the number and types of cases heard by the
5 Court of Appeals for the Fifteenth Court of Appeals District in the
6 preceding state fiscal year.
7 SECTION 1.04. Section 22.216, Government Code, is amended
8 by adding Subsections (n-1) and (n-2) to read as follows:
9 (n-1) The Court of Appeals for the Fifteenth Court of
10 Appeals District consists of a chief justice and of four justices
11 holding places numbered consecutively beginning with Place 2.
12 (n-2) Notwithstanding Subsection (n-1), the Court of
13 Appeals for the Fifteenth Court of Appeals District consists of a
14 chief justice and of two justices holding places numbered
15 consecutively beginning with Place 2 for the first three years
16 following the court's creation. This subsection expires September
17 1, 2027.
18 SECTION 1.05. Section 22.220, Government Code, is amended
19 by amending Subsection (a) and adding Subsection (d) to read as
20 follows:
21 (a) Except as provided by Subsection (d), each [~~Each~~] court
22 of appeals has appellate jurisdiction of all civil cases within its
23 district of which the district courts or county courts have
24 jurisdiction when the amount in controversy or the judgment
25 rendered exceeds $250, exclusive of interest and costs.
26 (d) The Court of Appeals for the Fifteenth Court of Appeals
27 District has exclusive intermediate appellate jurisdiction over

1 the following matters arising out of or related to a civil case:
2 (1) matters brought by or against the state or a board,
3 commission, department, office, or other agency in the executive
4 branch of the state government, including a university system or
5 institution of higher education as defined by Section 61.003,
6 Education Code, or by or against an officer or employee of the state
7 or a board, commission, department, office, or other agency in the
8 executive branch of the state government arising out of that
9 officer's or employee's official conduct, other than:
10 (A) a proceeding brought under the Family Code
11 and any related motion or proceeding;
12 (B) a proceeding brought under Chapter 7B or
13 Article 17.292, Code of Criminal Procedure;
14 (C) a proceeding brought against a district
15 attorney, a criminal district attorney, or a county attorney with
16 criminal jurisdiction;
17 (D) a proceeding relating to a mental health
18 commitment;
19 (E) a proceeding relating to civil asset
20 forfeiture;
21 (F) a condemnation proceeding for the
22 acquisition of land or a proceeding related to eminent domain;
23 (G) a proceeding brought under Chapter 101, Civil
24 Practice and Remedies Code;
25 (H) a claim of personal injury or wrongful death;
26 (I) a proceeding brought under Chapter 125, Civil
27 Practice and Remedies Code, to enjoin a common nuisance;

(J) a proceeding brought under Chapter 55, Code of Criminal Procedure;

(K) a proceeding under Chapter 22A, Government Code;

(L) a proceeding brought under Subchapter E-1, Chapter 411, Government Code;

(M) a proceeding brought under Chapter 21, Labor Code;

(N) a removal action under Chapter 87, Local Government Code; or

(O) a proceeding brought under Chapter 841, Health and Safety Code;

(2) matters in which a party to the proceeding files a petition, motion, or other pleading challenging the constitutionality or validity of a state statute or rule and the attorney general is a party to the case; and

(3) any other matter as provided by law.

SECTION 1.06. Section 22.221, Government Code, is amended by amending Subsection (b) and adding Subsections (c) and (c-1) to read as follows:

(b) Subject to Subsection (c-1), each [~~Each~~] court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against [~~:~~

[~~(1)~~] a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district[~~;~~

[~~(2) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or~~

[~~(3) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge~~].

(c) Each court of appeals for a court of appeals district, other than the Court of Appeals for the Fifteenth Court of Appeals District, may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against:

(1) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or

(2) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge.

(c-1) The original jurisdiction of the Court of Appeals for the Fifteenth Court of Appeals District to issue writs is limited to writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d).

SECTION 1.07. Section 22.229(a), Government Code, is amended to read as follows:

(a) An appellate judicial system fund is established for each court of appeals, other than the Court of Appeals of the Fifteenth Court of Appeals District, to:

(1) assist the court of appeals in the processing of appeals filed with the court of appeals from the county courts,

1 statutory county courts, statutory probate courts, and district
2 courts in the counties the court of appeals serves; and
3 (2) defray costs and expenses incurred in the
4 operation of the court of appeals.
5 SECTION 1.08. Section 73.001, Government Code, is amended
6 to read as follows:
7 Sec. 73.001. AUTHORITY TO TRANSFER. (a) Except as provided
8 by Subsection (b), the [~~The~~] supreme court may order cases
9 transferred from one court of appeals to another at any time that,
10 in the opinion of the supreme court, there is good cause for the
11 transfer.
12 (b) The supreme court may not transfer any case or
13 proceeding properly filed in the Court of Appeals for the Fifteenth
14 Court of Appeals District to another court of appeals for the
15 purpose of equalizing the dockets of the courts of appeals.
16 (c) The supreme court shall adopt rules for:
17 (1) transferring an appeal inappropriately filed in
18 the Fifteenth Court of Appeals to a court of appeals with
19 jurisdiction over the appeal; and
20 (2) transferring to the Fifteenth Court of Appeals
21 from another court of appeals the appeals over which the Fifteenth
22 Court of Appeals has exclusive intermediate appellate jurisdiction
23 under Section 22.220(d).
24 SECTION 1.09. Section 659.012(a), Government Code, is
25 amended to read as follows:
26 (a) Notwithstanding Section 659.011 and subject to
27 Subsections (b) and (b-1):

1 (1) a judge of a district court is entitled to an
2 annual base salary from the state as set by the General
3 Appropriations Act in an amount equal to at least $140,000, except
4 that the combined base salary of a district judge from all state and
5 county sources, including compensation for any extrajudicial
6 services performed on behalf of the county, may not exceed the
7 amount that is $5,000 less than the maximum combined base salary
8 from all state and county sources for a justice of a court of
9 appeals other than a chief justice as determined under this
10 subsection;
11 (2) <u>except as provided by Subdivision (3),</u> a justice
12 of a court of appeals other than the chief justice is entitled to an
13 annual base salary from the state in the amount equal to 110 percent
14 of the state base salary of a district judge as set by the General
15 Appropriations Act, except that the combined base salary of a
16 justice of the court of appeals other than the chief justice from
17 all state and county sources, including compensation for any
18 extrajudicial services performed on behalf of the county, may not
19 exceed the amount that is $5,000 less than the base salary for a
20 justice of the supreme court as determined under this subsection;
21 (3) <u>a justice of the Court of Appeals for the Fifteenth</u>
22 <u>Court of Appeals District other than the chief justice is entitled</u>
23 <u>to an annual base salary from the state in the amount equal to</u>
24 <u>$5,000 less than 120 percent of the state base salary of a district</u>
25 <u>judge as set by the General Appropriations Act;</u>
26 <u>(4)</u> a justice of the supreme court other than the chief
27 justice or a judge of the court of criminal appeals other than the

1 presiding judge is entitled to an annual base salary from the state
2 in the amount equal to 120 percent of the state base salary of a
3 district judge as set by the General Appropriations Act; and
4 <u>(5)</u> [~~(4)~~] the chief justice or presiding judge of an
5 appellate court is entitled to an annual base salary from the state
6 in the amount equal to $2,500 more than the state base salary
7 provided for the other justices or judges of the court, except that
8 the combined base salary of the chief justice of a court of appeals
9 from all state and county sources may not exceed the amount equal to
10 $2,500 less than the base salary for a justice of the supreme court
11 as determined under this subsection.
12 SECTION 1.10. Section 2001.038(f), Government Code, is
13 amended to read as follows:
14 (f) A Travis County district court in which an action is
15 brought under this section, on its own motion or the motion of any
16 party, may request transfer of the action to the Court of Appeals
17 for the <u>Fifteenth</u> [~~Third~~] Court of Appeals District if the district
18 court finds that the public interest requires a prompt,
19 authoritative determination of the validity or applicability of the
20 rule in question and the case would ordinarily be appealed. After
21 filing of the district court's request with the court of appeals,
22 transfer of the action may be granted by the court of appeals if it
23 agrees with the findings of the district court concerning the
24 application of the statutory standards to the action. On entry of
25 an order by the court of appeals granting transfer, the action is
26 transferred to the court of appeals for decision, and the validity
27 or applicability of the rule in question is subject to judicial

1 review by the court of appeals. The administrative record and the
2 district court record shall be filed by the district clerk with the
3 clerk of the court of appeals. The court of appeals may direct the
4 district court to conduct any necessary evidentiary hearings in
5 connection with the action.

6 SECTION 1.11. Section 2001.176(c), Government Code, is
7 amended to read as follows:

8 (c) A Travis County district court in which an action is
9 brought under this section, on its own motion or on motion of any
10 party, may request transfer of the action to the Court of Appeals
11 for the Fifteenth [~~Third~~] Court of Appeals District if the district
12 court finds that the public interest requires a prompt,
13 authoritative determination of the legal issues in the case and the
14 case would ordinarily be appealed. After filing of the district
15 court's request with the court of appeals, transfer of the action
16 may be granted by the court of appeals if it agrees with the
17 findings of the district court concerning the application of the
18 statutory standards to the action. On entry of an order by the
19 court of appeals granting transfer, the action is transferred to
20 the court of appeals for decision, and the agency decision in the
21 contested case is subject to judicial review by the court of
22 appeals. The administrative record and the district court record
23 shall be filed by the district clerk with the clerk of the court of
24 appeals. The court of appeals may direct the district court to
25 conduct any necessary evidentiary hearings in connection with the
26 action.

27 SECTION 1.12. Section 2301.751(a), Occupations Code, is

amended to read as follows:

(a) A party to a proceeding affected by a final order, rule, or decision or other final action of the board with respect to a matter arising under this chapter or Chapter 503, Transportation Code, may seek judicial review of the action under the substantial evidence rule in:

(1) a district court in Travis County; or

(2) the court of appeals for the Fifteenth [~~Third~~] Court of Appeals District.

SECTION 1.13. Section 39.001(e), Utilities Code, is amended to read as follows:

(e) Judicial review of competition rules adopted by the commission shall be conducted under Chapter 2001, Government Code, except as otherwise provided by this chapter. Judicial review of the validity of competition rules shall be commenced in the Court of Appeals for the Fifteenth [~~Third~~] Court of Appeals District and shall be limited to the commission's rulemaking record. The rulemaking record consists of:

(1) the notice of the proposed rule;

(2) the comments of all interested persons;

(3) all studies, reports, memoranda, or other materials on which the commission relied in adopting the rule; and

(4) the order adopting the rule.

SECTION 1.14. (a) Except as otherwise provided by this Act, the Court of Appeals for the Fifteenth Court of Appeals District is created September 1, 2024.

(b) If the Court of Appeals for the Fifteenth Court of

1 Appeals District is created, the initial vacancies in the offices
2 of chief justice and justices of the court shall be filled by
3 appointment.
4 SECTION 1.15. (a) The changes in law made by this Act apply
5 to appeals perfected on or after September 1, 2024.
6 (b) On September 1, 2024, all cases pending in other courts
7 of appeal that were filed on or after September 1, 2023, and of
8 which the Court of Appeals for the Fifteenth Court of Appeals
9 District has exclusive intermediate appellate jurisdiction are
10 transferred to the Court of Appeals for the Fifteenth Court of
11 Appeals District.
12 (c) When a case is transferred as provided by Subsection (b)
13 of this section:
14 (1) all processes, writs, bonds, recognizances, or
15 other obligations issued from the other courts of appeal are
16 returnable to the Court of Appeals for the Fifteenth Court of
17 Appeals District as if originally issued by that court; and
18 (2) the obligees on all bonds and recognizances taken
19 in and for the other courts of appeal and all witnesses summoned to
20 appear in another court of appeals are required to appear before the
21 Court of Appeals for the Fifteenth Court of Appeals District as if
22 originally required to appear before the Court of Appeals for the
23 Fifteenth Court of Appeals District.
24 ARTICLE 2. CONFORMING AMENDMENTS
25 SECTION 2.01. Article 4.01, Code of Criminal Procedure, is
26 amended to read as follows:
27 Art. 4.01. WHAT COURTS HAVE CRIMINAL JURISDICTION. The

1 following courts have jurisdiction in criminal actions:
2 1. The Court of Criminal Appeals;
3 2. Courts of appeals, other than the Court of Appeals
4 for the Fifteenth Court of Appeals District;
5 3. The district courts;
6 4. The criminal district courts;
7 5. The magistrates appointed by the judges of the
8 district courts of Bexar County, Dallas County, Tarrant County, or
9 Travis County that give preference to criminal cases and the
10 magistrates appointed by the judges of the criminal district courts
11 of Dallas County or Tarrant County;
12 6. The county courts;
13 7. All county courts at law with criminal
14 jurisdiction;
15 8. County criminal courts;
16 9. Justice courts;
17 10. Municipal courts;
18 11. The magistrates appointed by the judges of the
19 district courts of Lubbock County;
20 12. The magistrates appointed by the El Paso Council
21 of Judges;
22 13. The magistrates appointed by the Collin County
23 Commissioners Court;
24 14. The magistrates appointed by the Brazoria County
25 Commissioners Court or the local administrative judge for Brazoria
26 County; and
27 15. The magistrates appointed by the judges of the

district courts of Tom Green County.

SECTION 2.02. Article 4.03, Code of Criminal Procedure, is amended to read as follows:

Art. 4.03. COURTS OF APPEALS. The Courts of Appeals, other than the Court of Appeals for the Fifteenth Court of Appeals District, shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed. This article [~~Article~~] shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed or affirmed by the county court, the county criminal court or county court at law does not exceed one hundred dollars, unless the sole issue is the constitutionality of the statute or ordinance on which the conviction is based.

SECTION 2.03. Article 44.25, Code of Criminal Procedure, is amended to read as follows:

Art. 44.25. CASES REMANDED. The courts of appeals, other than the Court of Appeals of the Fifteenth Court of Appeals District, or the Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts.

SECTION 2.04. Section 31.001, Government Code, is amended to read as follows:

Sec. 31.001. AUTHORITY FOR COUNTY PAYMENT OF COMPENSATION. The commissioners courts in the counties of each of the 15 [~~14~~] courts of appeals districts may pay additional compensation in an amount that does not exceed the limitations of Section 659.012 to

1 each of the justices of the courts of appeals, other than a justice
2 of the Court of Appeals of the Fifteenth Court of Appeals District,
3 residing within the court of appeals district that includes those
4 counties. The compensation is for all extrajudicial services
5 performed by the justices.

6 ARTICLE 3. SPECIFIC APPROPRIATION REQUIRED; CONSTITUTIONAL
7 CHALLENGE; EFFECTIVE DATE

8 SECTION 3.01. (a) Notwithstanding Section 22.201(a),
9 Government Code, as amended by this Act, and Sections 22.201(p) and
10 22.2151, Government Code, as added by this Act, the Court of Appeals
11 for the Fifteenth Court of Appeals District is not created unless
12 the legislature makes a specific appropriation of money for that
13 purpose. For purposes of this subsection, a specific appropriation
14 is an appropriation identifying the Court of Appeals for the
15 Fifteenth Court of Appeals District or an Act of the 88th
16 Legislature, Regular Session, 2023, relating to the creation of the
17 Court of Appeals for the Fifteenth Court of Appeals District.

18 (b) Notwithstanding Section 22.220(a), Government Code, as
19 amended by this Act, a court of appeals has the same jurisdiction
20 the court had on August 31, 2023, if the Court of Appeals for the
21 Fifteenth Court of Appeals District is not created as a result of
22 Subsection (a) of this section.

23 SECTION 3.02. The Texas Supreme Court has exclusive and
24 original jurisdiction over a challenge to the constitutionality of
25 this Act or any part of this Act and may issue injunctive or
26 declaratory relief in connection with the challenge.

27 SECTION 3.03. This Act takes effect September 1, 2023.

______________________________ President of the Senate

______________________________ Speaker of the House

I hereby certify that S.B. No. 1045 passed the Senate on March 30, 2023, by the following vote: Yeas 19, Nays 12; and that the Senate concurred in House amendments on May 21, 2023, by the following vote: Yeas 19, Nays 12.

______________________________ Secretary of the Senate

I hereby certify that S.B. No. 1045 passed the House, with amendments, on May 19, 2023, by the following vote: Yeas 91, Nays 47, two present not voting.

______________________________ Chief Clerk of the House

Approved:

______________________________ Date

______________________________ Governor

Tab Y

Texas Supreme Court
Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: TRE Subcommittee

CC: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: May 22, 2023

Re: TRE 509

The SCAC Evidence Subcommittee has reviewed AREC's recommendations for Rules 509 and 510 (Exhibit A). In addition, we have conferred with three members of AREC and have separately conferred with Professor Steven Goode. A copy of Professor Goode's response to AREC's proposal is attached as Exhibit B. Roger Hughes wrote a memo for our committee on the impact of the changes on administrative proceedings (Exhibit C).

509(e)(1), 509(e)(2), and 509(e)(5)

We agree with AREC that 509(e)(1)(b) and 501(e)(5) should be removed, the caption for 509(e)(2) be changed from "Consent" to "Authorization," and the text of 509(e)(2) should be revised as AREC suggests.

Professor Goode raised the issue of whether 509(e)(5)'s provision regarding disciplinary investigations of or proceedings against nurses should be left in place. AREC responded that nurses practice under a hospital's or physician's supervision so this provision should likewise be deleted. We agree with AREC.

509(f)

AREC recommended deleting the entirety of 509(f). We agree with deleting subparts 1 and 2. We have informed AREC that we believe there are some practical benefits to retaining—with some tweaks—subsections (3) and (4) but moving them up into for 509(e)(2). The three AREC members that we spoke with agreed with this change. They also agreed that many practitioners would benefit from providing the statutory references.

Thus, we recommend that 509(e)(2) include three slight revisions from AREC's recommendation. First, we think it should cover "health care information" rather than "medical information;" that change is reflected in the orange font below. Second, we think it would be

helpful to identify the two laws that most commonly apply to the question; this change is highlighted in green. Third, we recommend retaining former subparts (f)(3) and (f)(4), with the additional revision of the word consent to authorization; that change is highlighted in yellow. We believe it would be helpful to advise practitioners that an authorization may be revoked.

We also discussed with AREC Professor Goode's suggestion to delete all the references to consent/authorization. Under this proposal, Section (e)(2) and (f) would be deleted in their entirety. The AREC members with whom we spoke are not strongly opposed to this suggestion but slightly lean toward their original view that an authorization provision is helpful to practitioners who are in small firms, do not regularly handle personal injury litigation, or are new practitioners. They also believe that deleting the authorization provisions entirely could be misinterpret by some lawyers as meaning that an authorization is no longer available to obtain medical records from a physician. We were persuaded by this argument.

509(e)(6)

We agree, and so does Professor Goode, that 509(e)(6) should be revised to include a provision regarding civil commitment of sexually violent predators as follows:

> Involuntary Civil Commitment or Similar Proceeding. In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:
>
> (A) chapter 462 (Treatment of Persons with Chemical Dependencies);
> (B) title 7, subtitle C (Texas Mental Health Code);
> (C) title 7, subtitle D (Persons With an Intellectual Disability Act); or
> (D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

Conclusion

Here is how the Rule would read under out proposal.

(e) Exceptions in a Civil Case. This privilege does not apply:

(A) a proceeding the patient brings against a physician; or
~~**(B)** a license revocation proceeding in which the patient is a complaining witness.~~
(2) ***Consent.*** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).
(3) ***Action to Collect.*** In an action to collect a claim for medical services rendered to the patient.
(4) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.
(5) ~~***Disciplinary Investigation or Proceeding.*** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §~~

~~164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~
~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~
~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:
(A) chapter 462 (Treatment of Persons With Chemical Dependencies);
(B) title 7, subtitle C (Texas Mental Health Code); or
(C) title 7, subtitle D (Persons With an Intellectual Disability Act).
(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

(7) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

(f) ~~**Consent For Release of Privileged Information.**~~

~~Consent~~ *Authorization*. If a written authorization is executed that complies with applicable state or federal law governing the release or disclosure of otherwise privileged health care information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F. R. § 164.500, et seq., or the Texas Medical Records Privacy Act, Tex. Health & Safety Code § 181.001, et seq. ~~(3)~~ The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal. ~~(4)~~ Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

~~(1) Consent for the release of privileged information must be in writing and signed by:~~

~~(A) the patient;~~

~~(B) a parent or legal guardian if the patient is a minor;~~

~~(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

~~(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or~~

~~(G) a personal representative if the patient is deceased.~~

~~(2) The consent must specify:~~

~~(A) the information or medical records covered by the release;~~

~~(B) the reasons or purposes for the release; and~~

~~(C) the person to whom the information is to be released.~~

~~(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.~~

~~(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.~~

Tab Y1

EXHIBIT

A

MEMORANDUM

To: Texas State Bar Board of Directors

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

Re: AREC's recommendation to amend TRE 509

Date: December 5, 2022

Summary

At its final meeting for the 2020-2021 bar year, AREC voted to recommend 3 changes to TRE 509:

1. to remove references to administrative proceedings in 509(e)(1)(b) and 509(e)(5),
2. to remove (f)'s consent requirements, and
3. to add the sexually violent predator statutory exception to 509(e)(6)).

AREC decided not to recommend adding any redaction requirement to records under TRE 509, or to add a privilege exception if the patient's condition is relevant to the execution of a will.

Background and AREC's Work

AREC continues its years-long review of TRE 509 and 510 to update them and make them consistent with current statutory provisions regarding the confidentiality of personal health and mental health information.

Rules 509 and 510 are peculiar among the Texas Rules of Evidence because their roots lie largely in statutory privileges afforded to patients and their doctors, nurses, physicians' assistants, dentists, podiatrists, pharmacists, and several other types of healthcare providers. There is even a statute protecting communications between a veterinarian and a pet owner. These statutes and protections are tied to the provision of health care.

AREC has been tasked with reviewing current statutes to ensure that the Rules of Evidence do not conflict with, and accurately reflect the current scope of the law concerning, a patient's medical and mental health privileges.

As part of that work, preliminary review shows that three changes should be recommended without additional delay:

I. Removing references to administrative proceedings in 509(e)(1)(b) and 509(e)(5)

In 2015's restyling, the committee noted that the former rule's reference to administrative proceedings was deleted because the Texas Rules of Evidence only govern proceedings in Texas courts.

The TRE apply only to proceedings in Texas courts, unless a statute or constitutional provision requires otherwise. Tex. R. Evid. 101(b), (d). The TRE does not apply to certain criminal proceedings set out in Rule 101(e).

To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code § 2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases."

Based on this note, and the fact that a physician's duty to keep medical information confidential outside the courtroom derives from statutory and professional obligations, AREC has voted to remove language in Rule 509 that applies specifically to administrative proceedings.

TRE 509(e)(1)(B), (5) both exclusively relate to occupational licensing investigations and proceedings brought by the Texas Medical Board (TMB) against physicians. These are administrative proceedings that take place before TMB and at the State Office of Administrative Hearings (SOAH). There are a separate set of laws and rules relating to these proceedings, including the physician-patient privilege contained in the Texas Occupation Code Chapter 159, so removing references to administrative proceedings in the TRE will have no actual impact.

The current version of Rule 509 includes an exception for disciplinary investigations or proceedings against a physician or nurse under the Medical Practice Act. These are administrative proceedings that should be governed according to administrative rules and the applicable statutory privileges and confidentiality provisions, not the Texas Rules of Evidence.

AREC therefore voted to recommend the following change to Rule 509, to remove subsection 509(e)(1)(b) and 509(e)(5):

(e) Exceptions in a Civil Case. This privilege does not apply:
(1) Proceeding Against Physician. If the communication or record is relevant to a claim or defense in:
~~(A)~~ a proceeding the patient brings against a physician~~; or~~.
~~(B) a license revocation proceeding in which the patient is a complaining witness.~~

…

~~**(5) Disciplinary Investigation or Proceeding.** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code § 164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board~~

~~conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~
~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~
~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

These recommended changes are not meant to in any way limit any statutory or existing privileges, but to clarify that administrative proceedings are governed by statutory confidentiality and privilege protections. Nothing in this recommended change would prohibit an administrative proceeding from choosing to abide by TRE provisions.

II. Removing subsection (f)'s consent requirements and changing "consent" to "authorization."

Extensive federal and state laws govern the release of protected health information. The TRE, on the other hand, relate to the admission of certain evidence during proceedings before Texas courts, and do not govern whether a third-party health provider should, or can, release information to a third party. Because regulations such as the Health Insurance Portability and Accountability Act, or HIPAA, govern whether and when protected health information can be *released* to someone who is not the patient, there is no need for the Texas Rules of Evidence to duplicate, or possibly conflict with, such requirements.

For example, an "authorization" has a specific meaning in the HIPAA Privacy Rule., which is the document that must be signed by the patient or their representative. Authorizations must comply with the certain requirements before the release of protected health information to a third party can occur. The TMRPA,[1] the TMRPA, Texas Civil Practice & Remedies Code,[2] and Office of the Attorney General model[3] authorization forms use the term "authorization" in reference to the release of protected health information. The TRE, however, uses the term "consent," while substantively referring to what federal and Texas law deem an "authorization."

[1] Tex. Health & Safety Code § 181.154(d) (Texas Medical Records Privacy Act or TMRPA, adopting HIPAA's requirements for an authorization to release medical information); *see also* Tex. Health & Safety Code § 181.154(b) (a separate authorization is required for each disclosure and that "[a]n authorization for disclosure under this subsection may be made in written or electronic form or in oral form if it is documented in writing by the covered entity.")

[2] For medical liability claims brought against health care providers, a patient-litigant in Texas must provide complete a statutory "Authorization Form for Release of Protected Health Information." Tex. Civ. Prac. Rem. Code § 74.052(b).

[3] The OAG model authorization form states that:

> As indicated on the form, specific authorization is required for the release of information about certain sensitive conditions, including:
> - Mental health records (excluding "psychotherapy notes" as defined in HIPAA at 45 CFR 164.501).
> - Drug, alcohol, or substance abuse records.
> - Records or tests relating to HIV/AIDS.
> - Genetic (inherited) diseases or tests (except as may be prohibited by 45 C.F.R. § 164.502).

Therefore, to eliminate any duplication of, or conflict with, state and federal statutory protections regarding the release of protected health information, AREC has voted to amend TRE 509(f) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

…

(2) ~~Consent~~Authorization. If a written authorization is executed that complies with Texas or federal law governing the disclosure of medical information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~.

…

~~**(f) Consent For Release of Privileged Information.**~~

~~**(1)** Consent for the release of privileged information must be in writing and signed by:~~

~~**(A)** the patient;~~

~~**(B)** a parent or legal guardian if the patient is a minor;~~

~~**(C)** a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~**(D)** an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~**(E)** an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

~~**(F)** an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or~~

~~**(G)** a personal representative if the patient is deceased.~~

~~**(2)** The consent must specify:~~

~~**(A)** the information or medical records covered by the release;~~

~~**(B)** the reasons or purposes for the release; and~~

~~**(C)** the person to whom the information is to be released.~~

~~**(3)** The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.~~

~~**(4)** Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.~~

III. Adding the sexually violent predator statutory exception to TRE 509(e)(6)

The program for the civil commitment of sexually violent predators not exist when TRE 509(e)(6) was originally written. As a subsequently created program that meets the criteria listed in this rule, AREC has voted that TRE 509 should be amended to include this program.

Accordingly, AREC recommends the following change to TRE 509(e)(6):

Involuntary Civil Commitment or Similar Proceeding. In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); ~~or~~
(C) title 7, subtitle D (Persons With an Intellectual Disability Act); or
(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

Tab Y2

EXHIBIT

B

Misty N. Croshaw

From: Goode, Steven <SGoode@law.utexas.edu>
Sent: Tuesday, March 21, 2023 5:46 PM
To: Misty N. Croshaw
Subject: RE: SCAC - Referral of Rules Issues

[EXTERNAL SENDER]

Buddy,

It was good to chat with you today. You are a goldmine of information.

Here's my quick take on the AREC proposals.

Rule 509:

1. I absolutely agree with the AREC's premise that the TRE are not the place for rules regarding the applicability of privilege to administrative proceedings. As the AREC report aptly states, the TRE apply to court proceedings. The extent to which administrative agencies should apply them is a matter of administrative law, not the rules of evidence. And with perhaps one exception, I agree that deleting the exceptions currently listed in Rule 509(e)(1)(B) and (e) would have no effect on the law because the Texas Occ. Code sec. 159.003(a)(1)(B) and (5) respectively provide statutory exceptions for license revocation proceedings and disciplinary investigations of physicians. The one possible exception – where the AREC proposal might change the status quo – concerns disciplinary investigations or proceedings against a nurse. The cited Occ. Code provisions refer only to physicians; they don't cover nurses. I'm not aware of any other statutory exception regarding nurses, although there may be one of which I'm simply not aware. In any event, this is something that should be dealt with statutorily. The TRE should not be setting rules for administrative proceedings.
2. Rather than substitute for the Rule 509(e)(2) and (f) consent provisions the AREC proposed "authorization" language, my inclination would be to simply delete Rule 509(e)(2) and (f). Rules of privilege are designed to allow the privilege holder to resist being compelled to disclose and to prevent others from disclosing privileged information. A privilege holder, however, may voluntarily choose to disclose privileged information. As I understand it, the written authorization language in HIPAA and the Texas statutes cited in the AREC memo set forth for health providers the conditions under which they may release a patient's health information. That has nothing to do with privilege. To the contrary, as I understand it (and I may be wrong) HIPAA provides in 45 CFR 164.512(a) and (e)(1) that a health provider may disclose a patient's health information (without the patient's written authorization) in response to a court order or subpoena.

   In other words, if a patient asserts the physician-patient privilege and the court finds that the privilege doesn't apply – either because an exception applies or the patient has waived the privilege – the court may compel production. And a court can find under Rule 511 that a patient has waived the privilege in the absence of any written authorization of the type contemplated in the AREC proposed language. So, to my thinking, there's simply no need – and, in fact, no place – in Rule 509 for either the current Rule 509(e)(2) and (f) or the language proposed as a substitute for the current provision.

3. I agree with the addition of the sexually violent predator exception to Rule 509(e)(6).

Rule 510

I'm afraid I just don't understand the landscape of the peer assistance programs well enough to have much of an opinion about this. I'm not sure exactly what putting this in TRE 510 accomplishes beyond what's already in the statute. The statute provides for confidentiality and seems by its terms to apply to court proceedings as well as other situations. I suppose one could argue it would privilege confidential communications made between the patient and profession, which arguably are not covered by the statutory language. But I'm not sure that such communications are not covered implicitly by the statutory provision. The only other observation I have concerns the proposed comment to the AREC proposal. It states:

> Such programs [peer assistance programs under Chapter 467] include, but are not limited to, programs assisting lawyers
> (the Texas Lawyers' Assistance Program or TLAP), and professions listed in the Texas Occupations Code such as nurses, doctors, veterinarians, and chemical dependency counselors.

But Health & S. Code section 467.002 says, "This chapter does not apply to a peer assistance program for licensed physicians or pharmacists or for any other profession that is authorized under other law to establish a peer assistance program." That seems at variance with the reference to doctors in the AREC comment. But again, I really am not familiar with the world of peer assistance programs and their statutory bases.

I hope this is helpful.

Regards,
Steve

From: Misty N. Croshaw <mcroshaw@obt.com>
Sent: Tuesday, March 21, 2023 2:34 PM
To: Goode, Steven <SGoode@law.utexas.edu>
Subject: SCAC - Referral of Rules Issues

Steve,

Thank you for talking to me about this and agreeing to review this and giving me your comments. Your opinion means so very much to me and I appreciate your help.

Thank you very much,
Buddy Low

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ord of the in camera proceeding. The record of the in camera proceeding must not otherwise be revealed without the public entity's consent.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

Source: Proposed FRE 510 (1972) and Unif. R. Evid. 509 (1974).

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; O'Connor's **Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 508.

ANNOTATIONS

In re Bates, 555 S.W.2d 420, 430 (Tex.1977). When the "role of the informer was very minor and occurred quite early in the [bribery] investigation; and absent other evidence concerning the relevance of the identity of the informer; the disclosure [of the informer's identity] is not required."

Warford v. Childers, 642 S.W.2d 63, 66-67 (Tex.App.—Amarillo 1982, no writ). The rule-blocking disclosure "is a recognition of the fact that most informants relay rumor, gossip and street talk of no evidentiary value and the exceptions [to the rule] are designed for the rare case where the informant can give eyewitness testimony about the alleged crime or arrest."

TRE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) Definitions. In this rule:

(1) A "patient" is a person who consults or is seen by a physician for medical care.

(2) A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(b) Limited Privilege in a Criminal Case. There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1) to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

(c) General Rule in a Civil Case. In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) Who May Claim in a Civil Case. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(e) Exceptions in a Civil Case. This privilege does not apply:

(1) ***Proceeding Against Physician.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Consent.*** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) ***Action to Collect.*** In an action to collect a claim for medical services rendered to the patient.

(4) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) ***Disciplinary Investigation or Proceeding.*** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §164.001 et seq., or a registered nurse under Tex. Occ. Code §301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A) the patient's records would be subject to disclosure under paragraph (e)(1); or

(B) the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commit-

ment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability Act).

(7) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

(f) Consent for Release of Privileged Information.

(1) Consent for the release of privileged information must be in writing and signed by:

(A) the patient;

(B) a parent or legal guardian if the patient is a minor;

(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

(A) the information or medical records covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015. Amended by order of Supreme Court June 14, 2016, eff. June 14, 2016.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by Tex.Rev.Civ.Stat.Ann. art. 4495b, §5.08. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in **R.K. v. Ramirez**, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (c) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Comment to 2015 Restyling: The physician-patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in **Tex. Rev. Civ. Stat. art. 4495b.** That statute provided that the privilege applied even if a patient had received a physician's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

The former rule's reference to "confidentiality or" and "administrative proceedings" in subdivision (e) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. Tex. Occ. Code §159.004 sets forth exceptions to a physician's duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See Rule 101(b). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code §2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; **O'Connor's Texas Rules**, "Medical Records," ch. 6-J, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 509; **O'Connor's Texas Forms**, FORM 6E:1.

ANNOTATIONS

R.K. v. Ramirez, 887 S.W.2d 836, 842 (Tex.1994). "[T]he patient-litigant exception to [TRE 509 and 510] privileges applies when a party's condition relates in a significant way to a party's claim or defense. *At 843 n.7:* Whether a condition is a part of a claim or defense should be determined on the face of the pleadings, without reference to the evidence that is allegedly privileged. *At 843:* [T]he exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance."

Groves v. Gabriel, 874 S.W.2d 660, 661 (Tex.1994). "[A] trial court's order compelling release of medical records should be restrictively drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit. The global release in this case does not meet the **Mutter** standard." *See also* **In re Collins**, 286 S.W.3d 911, 916 (Tex.2009).

Mutter v. Wood, 744 S.W.2d 600, 600 (Tex.1988). "There are ... eight exceptions to the [physician-patient] privilege. *At 601:* In this case, the privilege was waived completely as to the defendant doctors and partially as to the treating doctors. To the extent, however, that the treating doctors had records or communications which were not relevant to the underlying suit, they remained privileged...."

In re Toyota Motor Corp., 191 S.W.3d 498, 502 (Tex.App.—Waco 2006, orig. proceeding). "A claim for mental anguish or emotional distress will not, standing alone, make a plaintiff's mental or emotional condition a part of the plaintiff's claim. [T]he allegation in [P's] petition that he suffered 'emotional shock' is not a sufficient basis to make his mental or emotional condition an issue on which the jury will be required to make a factual determination. [¶] Therefore, [P's] communications ... are protected by the physician-patient privilege."

In re Arriola, 159 S.W.3d 670, 675-76 (Tex.App.—Corpus Christi 2004, orig. proceeding). "[Ds] contend the abuse-and-neglect exceptions [to TRE 509 and 510] apply only to proceedings brought by appropriate law enforcement agencies. [¶] However, the abuse-and-neglect exceptions ... contain no such limitation. [R]ules 509 and 510 state that the exceptions apply in administrative proceedings and civil proceedings in court. [¶] [Ds] contend numerous state statutes and administrative rules protect the records and medical information from disclosure.... [¶] However, each of the confidentiality and privilege provisions [Ds cite] contains an exception to nondisclosure where release of the information is required by law or ordered by the court. *At 677:* Here, the rules of evidence are the 'law' that requires release of the information."

In re Whiteley, 79 S.W.3d 729, 732-34 (Tex.App.—Corpus Christi 2002, orig. proceeding). D-doctor in medical-malpractice case triggered the TRE 509(e)(4) exception to physician-patient privilege when he testified in deposition that he successfully performed the same surgical procedure on nonparty patients; thus, nonparty patients' medical records became discoverable by P.

James v. Kloos, 75 S.W.3d 153, 160 (Tex.App.—Fort Worth 2002, no pet.). "[A] party can be prejudiced when his doctor meets with opposing counsel, but ... such prejudice may not be severe enough to disallow the doctor's testimony. [P]rejudice due to an improper meeting does not necessarily mean prejudice at trial, and, therefore, does not mean that an improper verdict necessarily results when a doctor is allowed to testify after such a meeting. [T]here must be a showing that the ruling probably caused the rendition of an improper judgment." *See also* **Durst v. Hill Country Mem'l Hosp.**, 70 S.W.3d 233, 237 (Tex.App.—San Antonio 2001, no pet.).

TRE 510. MENTAL HEALTH INFORMATION PRIVILEGE IN CIVIL CASES

(a) Definitions. In this rule:

(1) A "professional" is a person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) who the patient reasonably believes to be a professional under this rule.

(2) A "patient" is a person who:

(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A "patient's representative" is:

(A) any person who has the patient's written consent;

(B) the parent of a minor patient;

(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D) the personal representative of a deceased patient.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) Who May Claim. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The professional may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) *Proceeding Against Professional.* If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) *Written Waiver.* If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) *Action to Collect.* In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) *Communication Made in Court-Ordered Examination.* To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) *Party Relies on Patient's Condition.* If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) *Abuse or Neglect of "Institution" Resident.* In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015. Amended by Supreme Court order of June 14, 2016, eff. June 14, 2016.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. This rule governs disclosures of patient-professional communications only in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by Tex.Health & Safety Code Ann. §§611.001 to 611.008. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (d)(5), as construed in R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (d) does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Comment to 2015 Restyling: The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at Tex. Health & Safety Code §611.001 et seq.) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

Tex. Health & Safety Code ch. 611 addresses confidentiality rules for communications between a patient and a mental-health professional and for the professional's treatment records. Many of these provisions apply in contexts other than court proceedings. Reconciling the provisions of Rule 510 with the parts of chapter 611 that address a mental-health-information privilege applicable to court proceedings is beyond the scope of the restyling project.

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; **O'Connor's Texas Rules**, "Medical Records," ch. 6-J, §1 et seq.; **Brown & Rondon, Texas Rules of Evidence Handbook**, Rule 510; **O'Connor's Texas Forms**, FORM 5E:1.

ANNOTATIONS

R.K. v. Ramirez, 887 S.W.2d 836, 843 (Tex.1994). "As a general rule, a mental condition will be a 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself."

Groves v. Gabriel, 874 S.W.2d 660, 661 (Tex.1994). "Because [P] alleges severe emotional damages, including 'post-traumatic stress disorder,' [she] waived the privilege as to any medical records relevant to her claim for emotional damages." *See also* **Ginsberg v. Fifth Ct. of Appeals**, 686 S.W.2d 105, 107 (Tex.1985).

In re Arriola, 159 S.W.3d 670, 675-76 (Tex.App.—Corpus Christi 2004, orig. proceeding). See annotation under TRE 509.

TRE 511. WAIVER BY VOLUNTARY DISCLOSURE

(a) General Rule.

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while

Tab Y3

EXHIBIT C

To: SCAC Evidence Subcommittee
Fm: Roger W. Hughes
Date: May 8, 2023
Re: Effect of Proposed Changes to TRE 509 on Administrative Disciplinary Proceedings against Physicians and Nurse

1. I think the exceptions currently listed in Rule 509(e)(1)(B) and Rule 509(e)(5) are unnecessary and the proposed changes will have no adverse effect on current practices in administrative proceedings. First, they are probably holdover from the attempt to adopt former art. 4495(b) as a rule of evidence.

Second, the licensing proceedings are treated as "contested cases" under the Administrative Procedure Act (APA) held before an administrative law judge (ALJ) assigned by the State Office of Administrative Hearings (SOAH). For contested cases, the APA adopts the rules of evidence from district court and other privileges recognized by law. Appeals for the disciplinary proceedings go to the Travis County District Court which applies the "substantive evidence" rule of decision.

In short, Rule 509 and the statutory patient-physician communication privilege already apply in the administrative disciplinary proceedings. The proposed changes will not affect evidentiary practice before the licensing agency in contested case hearings or appeals into the district court.

2. TEX. R. EVID. 509(e)(1)(B) provides the privilege does not apply in a license revocation hearing against a physician in which the patient is the complaining witness. TEX. R. EVID. 509(e)(5) provides the privilege does not apply to a disciplinary proceeding against (i) a doctor under TEX. OCC. CODE §164.001, or (ii) a registered nurse under TEX. OCC. CODE §301.451. Note: this applies only to proceedings against medical doctors and registered nurses. There are a number of licensed healthcare providers (e.g., LPNs, physicians' assistants, medical technicians, chiropractors, etc.) that are not within the exception. I think the existing exceptions 509(e)(1)(B) and 509(e)(5) are vestiges of an earlier time.

3. TEX. GOV'T CODE §2001.081 provides the rules of evidence in district court apply to "contested cases" held under the APA, unless the evidence (a) is necessary to determine facts not "reasonably susceptible of proof" under the rules of evidence, and (b) not precluded by statute. Section 2001.083, states in contested cases, the agency will give effect to the rules of privilege "recognized by law." Section 2001.091 states that in contested cases the agency, subject to the "limitations of the kind provided for discovery under the Texas Rules of Civil Procedure," may order a party to produce relevant material that "is not privileged." TEX. OCC. CODE §159.002 provides a privilege for physician-

patient privileges. However, Section 159.003 provides exceptions for an administrative proceeding (1) in which the patient is the complaining witness for a license revocation and the disclosure is relevant, or (2) for discipline and the Medical Board protects the patient's identity.

Arguably the proposed changes will clarify that under section 2001.081 TRE 509 will apply to contested cases. The current TRE 509(e) says it does not apply to disciplinary proceedings against physicians/nurses, but section 2001.081 says the rules of evidence apply. This will reduce confusion about whether TRE 509 applies to disciplinary proceedings or not.

4. TEX. OCC. CODE §164.001 allows the Medical Board to refuse to issue/renew a medical license, revoke/suspend a license, or reprimand a license holder. Proceedings are treated as contested cases and held before an administrative law judge, who makes findings of fact and conclusions of law; however, sanctions are decided by the Board. TEX. OCC. CODE §164.007. Both sides may appeal to a Travis County District court. TEX. OCC. CODE §§164.0072, -.009. The appeal is decided under the 'substantive evidence' standard.

Similarly, a licensed nurse is entitled to "contested case" hearing by an ALJ before the Board of Nursing can refuse to issue or renew a license, or can revoke or suspend a license. TEX. OCC. CODE §301.454. The Board's decision is appealed to the Travis County district court and decided under the substantive evidence standard. TEX. GOV'T CODE §2001.176.

Tab Z

Texas Supreme Court
Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: TRE Subcommittee

CC: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: June 5, 2023

Re: TRE 510

In response to Chip Babcock's February 27, 2023 referral letter, the SCAC Evidence Subcommittee has reviewed recommendations from the State Bar of Texas Administration of Rules of Evidence Committee ("AREC") that would add what they call a "peer-assistance" privilege to Texas Rule of Evidence 510. Our subcommittee supports the proposed changes to the rule's text.

<u>The stated rationale for AREC's proposal</u>

AREC's proposal was animated by concern that lawyers may be deterred from seeking assistance through the Texas Lawyers' Assistance Program ("TLAP") because Rule 510 does not include an express privilege protecting their communications with TLAP staff. Although our subcommittee ultimately voted in support of AREC's proposed changes, we were not convinced by their stated concern with regard with existing Rule 510. Statutory law in Texas governs the extent to which communications by lawyers, judges, and law students with TLAP are confidential. Chapter 467 of the Health and Safety Code is the general statute governing peer assistance programs in Texas and is the only one applicable to TLAP. A copy of Chapter 467 is attached to this memo for easy reference. Because Chapter 467 provides only limited assurances of confidentiality, the proposed changes to Rule 510 will not fully ensure the confidentiality of their communications.

Moreover, it is of particular significance that Chapter 467's exceptions to confidentiality include allowing disclosure of TLAP communications in professional disciplinary hearings. We assume that for most lawyers and judges the possibility that a communication with TLAP could be used by the State Bar's disciplinary body in a hearing to suspend or revoke their law license (or, for law students, that they won't be admitted to the bar) is a far greater deterrent against talking with

TLAP as compared with the far more remote possibility that their TLAP communications might be used in court proceedings against them. It is difficult to imagine circumstances in which a TLAP communication would be of sufficient probative value in a case (*e.g.*, a malpractice case or a family law dispute) to justify its admission under Rule 403. Indeed, in this connection, it is notable that as far as we have been able to determine, no court has ever ordered TLAP to disclose its communications who those who have sought its assistance.

Our subcommittee's recommendation

Although we were not convinced by AREC's reasons for amending Rule 510, our subcommittee ultimately voted in favor AREC's proposal. Our reasoning was straightforward: after much deliberation, we could foresee no harm to adding a peer-assistance privilege to Rule 510 while we acknowledge the possibility, even if we deem that possibility remote, that adding this privilege could offer some added encouragement to some to seek TLAP's help.

Additional notes

AREC's proposal to amend Rule 510 is not limited to communications with TLAP. Instead, their language would extend the new privilege to other professionals who seek help through their peer assistance programs. Our subcommittee agrees that if the Court does add a peer assistance privilege to Rule 510 it should not be limited to TLAP communications. We note, however, that there are several statutes that specifically address communications between peer assistance programs and licensed Texas professionals in particular fields. (AREC's memo lists these other statutes so we will not repeat them again here.) Consequently, any changes to Rule 510 that the Court makes must be consistent with those other statutory schemes. In this regard, our subcommittee does not support the exact language of a comment that AREC proposes to go along with its textual changes to Rule 510. That proposed comment reads:

> This rule is a privilege rule only. Statutory protections exist to provide for the confidentiality of mental health and chemical dependency information that is in the possession of an approved peer assistance program under Chapter 467 of the Texas Health and Safety Code. Such programs include, but are not limited to, programs assisting lawyers (the Texas Lawyers' Assistance Program or TLAP), and professions listed in the Texas Occupations Code such as nurses, doctors, veterinarians, and chemical dependency counselors.

However, Chapter 467.002 specifically exempts professions whose peer assistance programs are governed by other statutory law: "This chapter does not apply to a peer assistance program for licensed physicians or pharmacists or for any other profession that is authorized under other law to establish a peer assistance program." If the Court is inclined to include a comment (though it is not clear to our subcommittee that a comment is either needed or useful), one simple solution may be to have the proposed comment refer not just to Chapter 467 but to any statutory grant of confidentiality, perhaps along these lines:

> This rule is a privilege rule only. Statutory protections exist to provide for the confidentiality of mental health and chemical dependency information that is in the possession of statutorily approved peer assistance programs. Such programs

include, but are not limited to, programs assisting lawyers (the Texas Lawyers' Assistance Program or TLAP), and professions listed in the Texas Occupations Code such as nurses, doctors, veterinarians, and chemical dependency counselors. *See generally* TEX. HEALTH & SAFETY CODE ANN., §467.

Tab Z1

The Supreme Court of Texas

CHIEF JUSTICE
NATHAN L. HECHT

JUSTICES
DEBRA H. LEHRMANN
JEFFREY S. BOYD
JOHN P. DEVINE
JAMES D. BLACKLOCK
J. BRETT BUSBY
JANE N. BLAND
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CLERK
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NINA HESS HSU

EXECUTIVE ASSISTANT
NADINE SCHNEIDER

DIRECTOR OF PUBLIC AFFAIRS
AMY STARNES

February 27, 2023

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 509. In the attached memorandum, the State Bar of Texas Administration of Rules of Evidence Committee ("AREC") proposes amending Texas Rule of Evidence 509 to reflect more accurately the current scope of statutory medical privileges. The Committee should review and make recommendations.

Texas Rule of Evidence 510. In the attached memorandum, AREC proposes amending Texas Rule of Evidence 510 to add a peer-assistance privilege. 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

MEMORANDUM

To: Texas State Bar Board of Directors

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

Re: AREC's recommendation to amend TRE 509

Date: December 5, 2022

Summary

At its final meeting for the 2020-2021 bar year, AREC voted to recommend 3 changes to TRE 509:

1. to remove references to administrative proceedings in 509(e)(1)(b) and 509(e)(5),
2. to remove (f)'s consent requirements, and
3. to add the sexually violent predator statutory exception to 509(e)(6)).

AREC decided not to recommend adding any redaction requirement to records under TRE 509, or to add a privilege exception if the patient's condition is relevant to the execution of a will.

Background and AREC's Work

AREC continues its years-long review of TRE 509 and 510 to update them and make them consistent with current statutory provisions regarding the confidentiality of personal health and mental health information.

Rules 509 and 510 are peculiar among the Texas Rules of Evidence because their roots lie largely in statutory privileges afforded to patients and their doctors, nurses, physicians' assistants, dentists, podiatrists, pharmacists, and several other types of healthcare providers. There is even a statute protecting communications between a veterinarian and a pet owner. These statutes and protections are tied to the provision of health care.

AREC has been tasked with reviewing current statutes to ensure that the Rules of Evidence do not conflict with, and accurately reflect the current scope of the law concerning, a patient's medical and mental health privileges.

As part of that work, preliminary review shows that three changes should be recommended without additional delay:

I. Removing references to administrative proceedings in 509(e)(1)(b) and 509(e)(5)

In 2015's restyling, the committee noted that the former rule's reference to administrative proceedings was deleted because the Texas Rules of Evidence only govern proceedings in Texas courts.

The TRE apply only to proceedings in Texas courts, unless a statute or constitutional provision requires otherwise. Tex. R. Evid. 101(b), (d). The TRE does not apply to certain criminal proceedings set out in Rule 101(e).

To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code § 2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases."

Based on this note, and the fact that a physician's duty to keep medical information confidential outside the courtroom derives from statutory and professional obligations, AREC has voted to remove language in Rule 509 that applies specifically to administrative proceedings.

TRE 509(e)(1)(B), (5) both exclusively relate to occupational licensing investigations and proceedings brought by the Texas Medical Board (TMB) against physicians. These are administrative proceedings that take place before TMB and at the State Office of Administrative Hearings (SOAH). There are a separate set of laws and rules relating to these proceedings, including the physician-patient privilege contained in the Texas Occupation Code Chapter 159, so removing references to administrative proceedings in the TRE will have no actual impact.

The current version of Rule 509 includes an exception for disciplinary investigations or proceedings against a physician or nurse under the Medical Practice Act. These are administrative proceedings that should be governed according to administrative rules and the applicable statutory privileges and confidentiality provisions, not the Texas Rules of Evidence.

AREC therefore voted to recommend the following change to Rule 509, to remove subsection 509(e)(1)(b) and 509(e)(5):

> (e) Exceptions in a Civil Case. This privilege does not apply:
> (1) Proceeding Against Physician. If the communication or record is relevant to a claim or defense in:
> ~~(A) ~~a proceeding the patient brings against a physician~~; or~~.
> ~~(B) a license revocation proceeding in which the patient is a complaining witness.~~
>
> …
>
> ~~**(5) Disciplinary Investigation or Proceeding.** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code § 164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board~~

~~conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~
~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~
~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

These recommended changes are not meant to in any way limit any statutory or existing privileges, but to clarify that administrative proceedings are governed by statutory confidentiality and privilege protections. Nothing in this recommended change would prohibit an administrative proceeding from choosing to abide by TRE provisions.

II. Removing subsection (f)'s consent requirements and changing "consent" to "authorization."

Extensive federal and state laws govern the release of protected health information. The TRE, on the other hand, relate to the admission of certain evidence during proceedings before Texas courts, and do not govern whether a third-party health provider should, or can, release information to a third party. Because regulations such as the Health Insurance Portability and Accountability Act, or HIPAA, govern whether and when protected health information can be *released* to someone who is not the patient, there is no need for the Texas Rules of Evidence to duplicate, or possibly conflict with, such requirements.

For example, an "authorization" has a specific meaning in the HIPAA Privacy Rule., which is the document that must be signed by the patient or their representative. Authorizations must comply with the certain requirements before the release of protected health information to a third party can occur. The TMRPA,[1] the TMRPA, Texas Civil Practice & Remedies Code,[2] and Office of the Attorney General model[3] authorization forms use the term "authorization" in reference to the release of protected health information. The TRE, however, uses the term "consent," while substantively referring to what federal and Texas law deem an "authorization."

[1] Tex. Health & Safety Code § 181.154(d) (Texas Medical Records Privacy Act or TMRPA, adopting HIPAA's requirements for an authorization to release medical information); *see also* Tex. Health & Safety Code § 181.154(b) (a separate authorization is required for each disclosure and that "[a]n authorization for disclosure under this subsection may be made in written or electronic form or in oral form if it is documented in writing by the covered entity.")

[2] For medical liability claims brought against health care providers, a patient-litigant in Texas must provide complete a statutory "Authorization Form for Release of Protected Health Information." Tex. Civ. Prac. Rem. Code § 74.052(b).

[3] The OAG model authorization form states that:

> As indicated on the form, specific authorization is required for the release of information about certain sensitive conditions, including:
> - Mental health records (excluding "psychotherapy notes" as defined in HIPAA at 45 CFR 164.501).
> - Drug, alcohol, or substance abuse records.
> - Records or tests relating to HIV/AIDS.
> - Genetic (inherited) diseases or tests (except as may be prohibited by 45 C.F.R. § 164.502).

Therefore, to eliminate any duplication of, or conflict with, state and federal statutory protections regarding the release of protected health information, AREC has voted to amend TRE 509(f) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

…

(2) ~~**Consent**~~**Authorization.** If a written authorization is executed that complies with Texas or federal law governing the disclosure of medical information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~.

…

~~**(f) Consent For Release of Privileged Information.**~~

~~**(1)** Consent for the release of privileged information must be in writing and signed by:~~

~~**(A)** the patient;~~

~~**(B)** a parent or legal guardian if the patient is a minor;~~

~~**(C)** a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~**(D)** an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~**(E)** an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

~~**(F)** an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or~~

~~**(G)** a personal representative if the patient is deceased.~~

~~**(2)** The consent must specify:~~

~~**(A)** the information or medical records covered by the release;~~

~~**(B)** the reasons or purposes for the release; and~~

~~**(C)** the person to whom the information is to be released.~~

~~**(3)** The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.~~

~~**(4)** Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.~~

III. Adding the sexually violent predator statutory exception to TRE 509(e)(6)

The program for the civil commitment of sexually violent predators not exist when TRE 509(e)(6) was originally written. As a subsequently created program that meets the criteria listed in this rule, AREC has voted that TRE 509 should be amended to include this program.

Accordingly, AREC recommends the following change to TRE 509(e)(6):

Involuntary Civil Commitment or Similar Proceeding. In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); ~~or~~
(C) title 7, subtitle D (Persons With an Intellectual Disability Act); or
(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

MEMORANDUM

To: Texas State Bar Board of Directors

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

Re: AREC's recommendation to amend TRE 510 to add a peer-assistance privilege

Date: December 5, 2022

Summary

At its final meeting for the 2020-2021 bar year, AREC voted to modify Texas Rule of Evidence or "TRE" 510 to add a "peer assistance program" privilege.

Background and AREC's Work

It was recommended by Andrew Tolchin, and supported by others in the Bar, including Chris Ritter and prior State Bar President Sylvia Borunda Firth, that AREC review whether an evidentiary privilege could be added to ensure the privacy of communications for lawyers seeking assistance through the Texas Lawyers' Assistance Program, or "TLAP."

AREC already had a Subcommittee formed to review whether Rules 509 and 510 should be amended to comport with current statutory physician-patient and mental health privileges. By way of brief background, while most privileges in the TRE are based in the common law, Rules 509 and 510 were adopted to reflect statutory privileges. As the statues have changed through the years, AREC has been tasked to review these rules to ensure they comport with current statutory privileges.

AREC, through its subcommittee, researched this issue and requested a presentation from TLAP personnel regarding the practical implications of the requested privilege. On September 10, 2021, TLAP gave a presentation to the full AREC committee to discuss its work and the potential implications of a peer assistance privilege under the TRE.

It is clear that Texas has a strong public policy in preventing and treating chemical dependency. As established in the Texas Health and Safety Code,

> Chemical dependency is a preventable and treatable illness and public health problem affecting the general welfare and the economy of this state. The legislature recognizes the need for proper and sufficient facilities, programs, and procedures for prevention, intervention, treatment, and rehabilitation. It is the policy of this state that a person with a chemical dependency shall be offered a continuum of services that will enable the person to lead a normal life as a productive member of society.

Tex. Health & Safety Code § 461A.001. The Executive Commissioner of the Health and Human Services Commission has the authority to "establish minimum criteria that peer assistance programs must meet to be governed by and entitled to the benefits of a law that authorizes licensing and disciplinary authorities to establish or approve peer assistance programs for impaired professionals." *Id.* §461A.051(2).

Chapter 467 of the Health and Safety Code governs certain approved peer assistance programs in Texas. They must be established or approved by a licensing or disciplinary authority. Under Section 467.007, information, reports or records that an approved peer assistance program receives under Chapter 467 is confidential, and may not be disclosed without written approval of the impaired professional or other interested person in many circumstances. Disclosure is allowed at disciplinary hearings before a licensing or disciplinary authority, or to health care personnel to whom the impaired professional has been referred or to meet a health care emergency.

Several statutes address whether communications among licensed Texas professionals seeking help through a peer assistance program (as defined by statute) will be treated as confidential, or receive other protections from disclosure. For example,

- Tex. Occ. Code § 504.057 establishes a peer assistance program for chemical dependency counselors
- Tex. Health & Safety Code § 773.013 provides authority to establish a peer assistance program for emergency medical services or EMS personnel
- Tex. Occ. Code § 254.0065 provides that records and information about a dentist's participation in a peer assistance program are confidential
- Tex. Occ. Code § 301.4106 provides that a peer assistance program be established for nurses, and Chapters 301 and 303 of that code offer confidentiality protections to nurses
- Tex. Occ. Code § 564.052 authorizes a peer assistance program for pharmacists and pharmacy students
- Tex. Occ. Code §§ 602, 603, 604 and 801, 603, 604, and 801 mention peer assistance programs for medical physicists, perfusionists, respiratory care practitioners, and veterinarians.

TLAP is a peer assistance program.

The subcommittee discussed the request to add a privilege to TRE 510 for only TLAP communications. While such a privilege would solidify protections for impaired professionals' communications with the TLAP peer assistance program, it would not do so for other impaired professionals who seek help through their peer assistance programs. The Subcommittee recommended that any recognition of an impaired professional privilege apply to all such programs, and not just to TLAP.

In addition, the TRE applies only to proceedings in Texas courts, with limited exceptions noted in TRE 101 (d)-(f). A TRE-recognized privilege would not apply beyond such proceedings, unless the proceedings are otherwise governed under the TRE.

Additionally, a TRE privilege would not interfere with or otherwise invalidate any statutory confidentiality provisions or privileges. *See* ______________.

Therefore, on June 10, 2022, AREC voted to recommend that TRE 510 be amended to add a peer assistance privilege.

AREC'S Recommendation

We recommend Texas Rule of Evidence 510, governing the Mental Health Information Privilege in Civil Cases, be amended as follows:

(a) Definitions. In this rule:
(1) A "professional" is a person:
(A) authorized to practice medicine in any state or nation;
(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;
(C) involved in the treatment or examination of drug abusers;
(D) acting as an employee, member, or agent of an approved peer assistance program under Chapter 467 of the Texas Health and Safety Code; or
(E) who the patient reasonably believes to be a professional under this rule.
(2) A "patient" is a person who:
(A) consults or is interviewed by a professional for diagnosis, evaluation, referral, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or
(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.
…
(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:
(A) present to further the patient's interest in the diagnosis, examination, evaluation, referral, or treatment;
(B) reasonably necessary to transmit the communication; or
(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

We additionally recommend that a comment to this amendment be added, as follows:

This rule is a privilege rule only. Statutory protections exist to provide for the confidentiality of mental health and chemical dependency information that is in the possession of an approved peer assistance program under Chapter 467 of the Texas Health and Safety Code. Such programs include, but are not limited to, programs assisting lawyers (the Texas Lawyers' Assistance Program or TLAP), and professions listed in the Texas Occupations Code such as nurses, doctors, veterinarians, and chemical dependency counselors.

Tab Z2

HEALTH AND SAFETY CODE

TITLE 6. FOOD, DRUGS, ALCOHOL, AND HAZARDOUS SUBSTANCES

SUBTITLE B. ALCOHOL AND SUBSTANCE ABUSE PROGRAMS

CHAPTER 467. PEER ASSISTANCE PROGRAMS

Sec. 467.001. DEFINITIONS. In this chapter:

(1) "Approved peer assistance program" means a program that is designed to help an impaired professional and that is:

(A) established by a licensing or disciplinary authority; or

(B) approved by a licensing or disciplinary authority as meeting the criteria established by the executive commissioner and any additional criteria established by that licensing or disciplinary authority.

(2) "Department" means the Department of State Health Services.

(2-a) "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.

(3) "Impaired professional" means an individual whose ability to perform a professional service is impaired by chemical dependency on drugs or alcohol or by mental illness.

(4) "Licensing or disciplinary authority" means a state agency or board that licenses or has disciplinary authority over professionals.

(5) "Professional" means an individual who:

(A) may incorporate under The Texas Professional Corporation Law as described by Section 1.008(m), Business Organizations Code; or

(B) is licensed, registered, certified, or otherwise authorized by the state to practice as a licensed vocational nurse, social worker, chemical dependency counselor, occupational therapist, speech-language pathologist, audiologist, licensed dietitian, or dental or dental hygiene school faculty member.

(6) "Professional association" means a national or statewide association of professionals, including any committee of a professional association and any nonprofit organization

controlled by or operated in support of a professional association.

(7) "Student" means an individual enrolled in an educational program or course of study leading to initial licensure as a professional as such program or course of study is defined by the appropriate licensing or disciplinary authority.

(8) "Impaired student" means a student whose ability to perform the services of the profession for which the student is preparing for licensure would be, or would reasonably be expected to be, impaired by chemical dependency on drugs or alcohol or by mental illness.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1995, 74th Leg., ch. 570, Sec. 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 17, Sec. 27, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 892, Sec. 26, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1373 (S.B. 155), Sec. 21, eff. September 1, 2007.

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.1223, eff. April 2, 2015.

Sec. 467.002. OTHER PEER ASSISTANCE PROGRAMS. This chapter does not apply to a peer assistance program for licensed physicians or pharmacists or for any other profession that is authorized under other law to establish a peer assistance program.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989.

Sec. 467.003. PROGRAMS. (a) A professional association or licensing or disciplinary authority may establish a peer assistance program to identify and assist impaired professionals in accordance with the minimum criteria established by the executive commissioner and any additional criteria established by the appropriate licensing or disciplinary authority.

(b) A peer assistance program established by a professional association is not governed by or entitled to the benefits of this chapter unless the association submits evidence to the appropriate licensing or disciplinary authority showing that the association's program meets the minimum criteria established by the executive

commissioner and any additional criteria established by that authority.

(c) If a licensing or disciplinary authority receives evidence showing that a peer assistance program established by a professional association meets the minimum criteria established by the executive commissioner and any additional criteria established by that authority, the authority shall approve the program.

(d) A licensing or disciplinary authority may revoke its approval of a program established by a professional association under this chapter if the authority determines that:

(1) the program does not comply with the criteria established by the executive commissioner or by that authority; and

(2) the professional association does not bring the program into compliance within a reasonable time, as determined by that authority.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1373 (S.B. 155), Sec. 22, eff. September 1, 2007.

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.1224, eff. April 2, 2015.

Sec. 467.0035. PROVISION OF SERVICES TO STUDENTS. (a) An approved peer assistance program may provide services to impaired students. A program that elects to provide services to impaired students is not required to provide the same services to those students that it provides to impaired professionals.

(b) An approved peer assistance program that provides services to students shall comply with any criteria for those services that are adopted by the appropriate licensing or disciplinary authority.

Added by Acts 1995, 74th Leg., ch. 570, Sec. 2, eff. Sept. 1, 1995.

Sec. 467.004. FUNDING. (a) Except as provided by Section 467.0041(b) of this code and Section 504.058, Occupations Code, a licensing or disciplinary authority may add a surcharge of not more than $10 to its license or license renewal fee to fund an approved

peer assistance program. The authority must adopt the surcharge in accordance with the procedure that the authority uses to initiate and adopt an increase in its license or license renewal fee.

(b) A licensing or disciplinary authority may accept, transfer, and expend funds made available by the federal or state government or by another public or private source to fund an approved peer assistance program.

(c) A licensing or disciplinary authority may contract with, provide grants to, or make other arrangements with an agency, professional association, institution, or individual to implement this chapter.

(d) Money collected under this section may be used only to implement this chapter and may not be used to pay for the actual treatment and rehabilitation costs required by an impaired professional.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1991, 72nd Leg., ch. 14, Sec. 194, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 493, Sec. 1, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1314, Sec. 24, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 564 (H.B. 3145), Sec. 1, eff. June 17, 2011.

Sec. 467.0041. FUNDING FOR STATE BOARD OF DENTAL EXAMINERS. (a) Except as provided by this section, the State Board of Dental Examiners is subject to Section 467.004.

(b) The board may add a surcharge of not more than $10 to its license or license renewal fee to fund an approved peer assistance program.

(c) The board may collect a fee of not more than $50 each month from a participant in an approved peer assistance program.

(d) Subject to the General Appropriations Act, the board may use the fees and surcharges collected under this section and fines collected in the enforcement of Subtitle D, Title 3, Occupations Code, to fund an approved program and to pay the administrative costs incurred by the board that are related to the program.

Added by Acts 1991, 72nd Leg., ch. 14, Sec. 195, eff. Sept. 1, 1991.

Amended by Acts 1995, 74th Leg., ch. 2, Sec. 19, eff. Feb. 6, 1995; Acts 1997, 75th Leg., ch. 493, Sec. 2, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1314, Sec. 25, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch; 1423, Sec. 10.07, eff. Sept. 1, 1997.
Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.1225, eff. April 2, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.1226, eff. April 2, 2015.

Sec. 467.005. REPORTS. (a) A person who knows or suspects that a professional is impaired by chemical dependency on alcohol or drugs or by mental illness may report the professional's name and any relevant information to an approved peer assistance program.

(b) A person who is required by law to report an impaired professional to a licensing or disciplinary authority satisfies that requirement if the person reports the professional to an approved peer assistance program. The program shall notify the person making the report and the appropriate licensing or disciplinary authority if the person fails to participate in the program as required by the appropriate licensing or disciplinary authority.

(c) An approved peer assistance program may report in writing to the appropriate licensing or disciplinary authority the name of a professional who the program knows or suspects is impaired and any relevant information concerning that professional.

(d) A licensing or disciplinary authority that receives a report made under Subsection (c) shall treat the report in the same manner as it treats an initial allegation of misconduct against a professional.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1997, 75th Leg., ch. 414, Sec. 1, eff. Sept. 1, 1997.

Sec. 467.006. ASSISTANCE TO IMPAIRED PROFESSIONALS. (a) A licensing or disciplinary authority that receives an initial complaint concerning an impaired professional may:

(1) refer the professional to an approved peer

assistance program; or

(2) require the professional to participate in or successfully complete a course of treatment or rehabilitation.

(b) A licensing or disciplinary authority that receives a second or subsequent complaint or a report from a peer assistance program concerning an impaired professional may take the action permitted by Subsection (a) in addition to any other action the authority is otherwise authorized to take in disposing of the complaint.

(c) An approved peer assistance program that receives a report or referral under Subsection (a) or (b) or a report under Section 467.005(a) may intervene to assist the impaired professional to obtain and successfully complete a course of treatment and rehabilitation.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989.

Sec. 467.007. CONFIDENTIALITY. (a) Any information, report, or record that an approved peer assistance program or a licensing or disciplinary authority receives, gathers, or maintains under this chapter is confidential. Except as prescribed by Subsection (b) or by Section 467.005(c), a person may not disclose that information, report, or record without written approval of the impaired professional or other interested person. An order entered by a licensing or disciplinary authority may be confidential only if the licensee subject to the order agrees to the order and there is no previous or pending action, complaint, or investigation concerning the licensee involving malpractice, injury, or harm to any member of the public. It is the intent of the legislature to encourage impaired professionals to seek treatment for their impairments.

(b) Information that is confidential under Subsection (a) may be disclosed:

(1) at a disciplinary hearing before a licensing or disciplinary authority in which the authority considers taking disciplinary action against an impaired professional whom the authority has referred to a peer assistance program under Section 467.006(a) or (b);

(2) at an appeal from a disciplinary action or order imposed by a licensing or disciplinary authority;

(3) to qualified personnel for bona fide research or educational purposes only after information that would identify a person is removed;

(4) to health care personnel to whom an approved peer assistance program or a licensing or disciplinary authority has referred the impaired professional; or

(5) to other health care personnel to the extent necessary to meet a health care emergency.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1991, 72nd Leg., ch. 245, Sec. 1, eff. Sept. 1, 1991.

Sec. 467.0075. CONSENT TO DISCLOSURE. An impaired professional who is reported to a peer assistance program by a third party shall, as a condition of participation in the program, give consent to the program that at a minimum authorizes the program to disclose the impaired professional's failure to successfully complete the program to the appropriate licensing or disciplinary authority.

Added by Acts 1997, 75th Leg., ch. 414, Sec. 2, eff. Sept. 1, 1997.

Sec. 467.008. CIVIL IMMUNITY. (a) A person who in good faith reports information or takes action in connection with a peer assistance program is immune from civil liability for reporting the information or taking the action.

(b) The civil immunity provided by this section shall be liberally construed to accomplish the purposes of this chapter.

(c) The persons entitled to immunity under this section include:

(1) an approved peer assistance program;

(2) the professional association or licensing or disciplinary authority operating the peer assistance program;

(3) a member, employee, or agent of the program, association, or authority;

(4) a person who reports or provides information concerning an impaired professional;

(5) a professional who supervises or monitors the course of treatment or rehabilitation of an impaired professional; and

(6) a person who employs an impaired professional in connection with the professional's rehabilitation, unless the person:

(A) knows or should have known that the professional is incapable of performing the job functions involved; or

(B) fails to take reasonable precautions to monitor the professional's job performance.

(d) A professional association, licensing or disciplinary authority, program, or person acting under this chapter is presumed to have acted in good faith. A person alleging a lack of good faith has the burden of proof on that issue.

(e) The immunity provided by this section is in addition to other immunity provided by law.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989.