SOUTHERN METHODIST UNIVERSITY

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

MEMORANDUM

To: Appellate Rules Subcommittee Members
cc: Justice Nathan L. Hecht and Lisa Hobbs
Re: August meeting
Date: July 11, 2005

Enclosed please consider the following matters that should be reviewed by the subcommittee before the August meeting:

1. *Civil Cases - [Accelerated] Appeal As of Right.* A revised draft of suggested changes to TRAP 28.1 is attached together with a proposed comment. This draft is based on the discussions conducted and the votes taken at the May meeting. As you recall, on May 7, the Committee voted to adopt Alternative A of proposed Rule 28.1(a) and directed me to revise Rule 28.1(b). The Committee also directed me to prepare a Comment identifying the statutes to which proposed Rule 28.1 will be applicable. If this proposal is finally adopted, it will not be necessary to amend Rule 26.1

2. *Civil Cases - [Accelerated] Appeal By Permission.* The attached draft also contains proposed Rule 28.2, which was seminared and approved provisionally by the Committee in August, 2004. I have made no changes in the draft since incorporating Committee input after the August 2004 meeting. In this connection, please note that the version of H.B. No. 1294 passed by the Legislature in 2005 made changes in Civil Practice and Remedies Code Section 51.014(d)-(f). Specifically, the changes were amendments to subsections (d) and (e) extending the coverage of the permissive appeal statute to county level courts and the repeal of subsection (f). The repeal of subsection (f) eliminates the former statutory requirement that the "application [must be] made to the court of appeals that has appellate jurisdiction . . . not later than the 10th day after the date an interlocutory order under subsection (d) is entered." See former Section 51.014(f). As a result the Committee may want to consider making a change in proposed TRAP 28.2(a)(2). If this proposal is finally adopted, it will be necessary to amend Rule 12.1 (docketing the case) to include a reference to "the petition for permission to

School of Law
PO Box 750116 Dallas TX 75275-0116
214-768-2626 Fax 214-768-4330 wdorsane@mail.smu.edu

appeal," in the opening sentence before the words "the petition for review". In addition, Appellate Rule 29.5 should also be amended to conform to the 2003 amendments to Civil Practice and Remedies Code 51.014(b). This proposed amendment follows:

> **Rule 29.5 Further Proceedings in Trial Court.** While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of an appeal. If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:
>
> (a) is inconsistent with any appellate court temporary order; or
>
> (b) interferes or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

3. *Proposed Rule Concerning Transfer of Court of Appeal Cases.* For further discussion purposes, please also find a revised draft of a proposed Administrative Rule concerning the transfer of court of appeals' cases and particularly the subdivision dealing with Precedent in Transferred Cases. As discussed at the last meeting, this proposal could be injected into the Appellate Rules rather than in the Administrative Rules. For now, the principal question is what the rule should say, not where it should be codified. This draft is based on the discussion held and the votes taken at the May 6, 2005 meeting.

4. *Certificate of Conference on Motions for Rehearing.* I have also prepared the following proposal for the revision of TRAP 10.1 (a)(5) (certificates of conference on motions) and a companion revision of TRAP 49 consistent with the Committee's vote approving Chief Justice Sherry Radack's recommendation that "a certificate of conference on a motion for rehearing is unnecessary and unproductive." See Radack letter to Hecht dated 6/2/04.

Proposed Amendment to TRAP 10.1(a)(5).

> **10.1 Contents of Motions; Response**
>
> (a) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

(5) in civil cases, *other than a motion and further motion for rehearing filed under Rule 49*, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.

Proposed Amendment to TRAP 49.

49.11. ***Certificate of Conference Not Required.*** A certificate of conference is not required for motions for rehearing, further motions for rehearing or for en banc reconsideration or review of a panel's decision.

5. *Proposed Change to TRAP 8.1.* The Court Rules Committee of the State Bar of Texas has proposed alternative changes in TRAP 8.1 due to the adoption of electronic filing of petitions in Bankruptcy Courts. A copy of the suggested changes contained in a memorandum from Lisa Powell to Carl Hamilton and dated 2/17/05 is also attached.

6. *Amendments to TRAP's 52 and 53.* It has been suggested that Rules 53.2 (d)(8) and 52.3 (d)(5)(D) be amended to eliminate the requirement that petitioner (in a petition for review) and a relator (in an original proceeding) inform the Court whether the court of appeals opinion was unpublished and requiring the petitioner or relator to inform the Court whether the court of appeals designated its opinion as a memorandum opinion.

7. *Consolidation of Cross-Appeals Noticed to Different Courts of Appeals.* A proposal for consolidation of cross appeals noticed to different courts of appeals, prepared by Mike Hatchell, is also attached to this memorandum for your consideration.

Please review each of the draft proposals and suggestions and provide me with your comments and suggestions, preferably by email at wdorsane@mail.smu.edu. If a conference call is necessary, I will arrange for one to be held after July 26, 2005. I will be out of the country until then.

8/18/05 Revisions

Revised Draft of Proposed Appellate Rule 28
Based on Minutes of May 7, 2005 Meeting

Rule 28. Accelerated Appeals in Civil Cases

28.1 Civil Cases - Appeal As of Right

(a) **Types of Accelerated Appeals.** Appeals from interlocutory orders (when allowed as of right by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited and appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are accelerated appeals.

(b) Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial, any other post trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

(c) **Appeals of Interlocutory Orders.** The trial court need not, but may – within 30 days after the order is signed – file findings of fact and conclusions of law.

(d) **Quo Warranto Appeals.** The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329b (a) – (b) until 50 days after the trial court's final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.

(e) **Record and Briefs.** In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn an uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35 and 38.

28.2 Civil Cases – Appeal By Permission

(a) Petition for permission to appeal.

(1) To request permission to appeal an interlocutory order pursuant to Section 51.014(d)-(f) of the Civil Practice and Remedies Code, a party to the trial court proceeding must file a petition for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.

(2) The petition must be filed not later than the 10th day after the date a trial court signs a written order granting permission to appeal. The appellate court may extend the time to file the petition if, within 15 days after the deadline for filing the petition, the petitioner:

(A) files the petition in the appellate court, and

(B) files in the appellate court a motion complying with Rule 10.5(b)

(b) Contents of petition; service; response or cross-petition

(1) The petition must:

(A) identify the trial court, and trial judge, and state the case's trial court number and style;

(B) list the names of all parties to the trial court proceeding and the names, addresses and telefax numbers of all trial and appellate counsel;

(C) identify the trial court's order granting permission to appeal by stating the title and date of the order and attaching a copy of the order to the petition;

(D) state that all parties agree to the trial court's order granting permission to appeal;

(E) identify the written order sought to be appealed by stating the title and date of the order

and attaching a copy of the order to the petition;

(F) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

(2) The petition must be served on all parties to the trial court proceeding.

(3) If any party timely files a petition, any other party may file a response or a cross-petition not later than 7 days after the initial petition is served. Any response or cross-petition must be served on all parties to the trial court proceeding.

(c) **Form of papers; number of copies:**

All papers must conform to Rule 9. Except by the appellate court's permission, a petition, response, or cross-petition may not exceed 10 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition. An original and 3 copies must be filed unless the appellate court requires a different number by local rule or by order in a particular case.

(d) **Submission of petition; appellate court's order.** Unless the court of appeals orders otherwise, the petition and response or cross-petition will be submitted to the appellate court without oral argument. A copy of the appellate court's order granting or denying permission to appeal, dismissing the petition, or otherwise directing the parties to take further action, must be served on all parties to the trial court proceedings. No motion

for rehearing may be filed.

(e) **Grant of petition; prosecution of appeal**

(1) Within 10 days after the signing of the appellate court's order granting permission to appeal, in order to perfect an appeal under these rules, any party to the trial court proceeding may file a notice of accelerated appeal with the trial court clerk and the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32. The provisions of Rule 26.3 apply to such a notice.

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as any other accelerated appeal.

[Alternative (e)]

(e) **Grant of petition; prosecution of appeal**

(1) Within 10 days after the signing of the order granting permission to appeal, any party to the trial court proceeding must:

(A) file a notice of accelerated appeal with the trial court clerk to perfect the appeal,

(B) file with the clerk of the court of appeals a copy of the notice of accelerated appeal and a docketing statement in accordance with Rule 32, and

(C) pay all required fees

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as my other accelerated appeal.

COMMENT: Subdivision 28.1 is amended to provide a uniform appellate timetable for all accelerated appeals, regardless of my statutory deadlines. Many statutes provide for accelerated or expedited appellate timetables, including, among others, appeals of final judgments in a suit in which termination of the parent-child relationship is in issue as provided in Family Code Section 109.002 and appeals of "final orders" as provided in subchapter E of the Chapter 3 of the Texas Family Code. Rule 28 is made expressly applicable to all such appeals. Subsection 28.2 is amended to provide a procedural mechanism for seeking permission to appeal an interlocutory order that is not appealable as of right in accordance with Civil Practice and Remedies Code § 51.014 (d)-(f), as amended in 2005.

Revised Draft of Proposed Administrative Rule Concerning Transferred Cases Based on Minutes of May 6, 2005 Meeting

Rule ___. Transfer of Court of Appeal Cases

__.1 Authority to Transfer. The Supreme Court may order cases transferred from one court of appeals to another at any time that, in the opinion of the Supreme Court, there is good cause for the transfer.

__.2 Jurisdiction When Transferred. The court of appeals to which a case is transferred has jurisdiction of the case without regard to the district in which the case originally was tried and to which it is returnable on appeal.

__.3 Place of Decision. The court of appeals to which a case is transferred shall deliver, enter and render the opinions, orders and decisions in a transferred case at the place where the court to which the case is transferred regularly sits as provided by law.

__.4 Oral Argument.

(a) Except as provided by Subsections (b) and (e), the justices of the court of appeals to which a case is transferred shall hear oral argument, after due notice to the parties or their attorneys, at the place from which the case is originally transferred.

(b) If requested by all parties or their attorneys, the oral argument in a transferred case may be heard in the regular place of the court to which the case is transferred.

(c) If a case is transferred to a court that regularly sits not more than 35 miles from the place the court from which the case was transferred regularly sits, the court, at the discretion of its chief justice and after notice to the parties or their counsel, may hear oral arguments at the place it regularly sits. For purposes of this subsection, the place where a court of appeals regularly sits is that specified in Subchapter C, Chapter 22, and the mileage between the places is that determined by the comptroller under Chapter 660.

(d) The actual and necessary traveling and living expenses of the justices in hearing an oral argument at the place from which the case is transferred shall be paid by the state from funds appropriated for that purpose.

(e) At the discretion of its chief justice, a court to which a case is transferred may hear oral argument through the use of teleconferencing technology as provided by Section 22.302. The court and the parties or their attorneys may participate in oral argument from any location through the use of teleconferencing technology. The actual and necessary expenses of the court in hearing an oral argument through the use of teleconferencing technology shall be paid by the state from funds appropriated for the transfer of case, as specified in Subsection (d).

__.5 Precedent in Transferred Cases

Alternative One

In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with [the clear precedent] of the transferor court under principles of stare decisis. [The court's opinion must also state whether the outcome would or would not have been different had the transferee court applied its own precedent or view of the law or another court of appeals' precedent.]

The Supreme Court may take the following action on a petition for review that alleges error because precedent of the transferor court was not applied to resolve the case:

(a) grant the petition for review and decide the issues itself,

(b) set aside the judgment of the court of appeals without reference to the merits and, in the interest of justice, transfer the case to the transferor court for decision on the merits, or

(c) deny or refuse the petition.

Alternative Two

In cases transferred by the Supreme Court from one court of appeals to another court of appeals, the court of appeals must consider and give due regard to the decisions of the transferor court under principles of stare decisis but may decide the case in accordance with the court of appeals' own precedent or view of Texas law. [The court may when it issues its opinion, and must on motion for rehearing, state whether the outcome will have been different had the court of appeals decided the case in accordance with the precedent of the court from which the case is transferred.]

The Supreme Court may take the following action on a petition for review that alleges error because precedent of the transferor court was applied to resolve the case:

(a) grant the petition for review and decide the issues itself,

(b) grant the petition for review, resolve the actual or apparent conflict of decisions and, if necessary, remand the case to the court of appeals for further action.

(c) deny or refuse the petition.

H.B. No. 1294

AN ACT

relating to interlocutory appeals.

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

SECTION 1. Section 51.014, Civil Practice and Remedies Code, is amended by amending Subsections (d) and (e) to read as follows:

(d) A district court, county court at law, or county court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the trial [~~district~~] court unless the parties agree and the trial court [~~the district court~~], the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

SECTION 2. Section 51.014(f), Civil Practice and Remedies Code, is repealed.

SECTION 3. (a) Except as provided by this section, the change in law made by this Act applies to an action filed before, on, or after the effective date of this Act.

(b) The change in law made by this Act does not apply to an interlocutory order issued under Section 51.014, Civil Practice and Remedies Code, before the effective date of this Act. An interlocutory order issued under that section before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2005.

President of the Senate

Speaker of the House

I certify that H.B. No. 1294 was passed by the House on May 13, 2005, by the following vote: Yeas 83, Nays 56, 3 present, not voting; and that the House concurred in Senate amendments to H.B. No. 1294 on May 27, 2005, by the following vote: Yeas 111, Nays 30, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1294 was passed by the Senate, with amendments, on May 25, 2005, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

79R4266 SGA-F

By: Rose H.B. No. 1294

S.B. 494

A BILL TO BE ENTITLED

AN ACT

relating to permissive interlocutory appeals in civil actions.

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

SECTION 1. Sections 51.014(d), (e), and (f), Civil Practice and Remedies Code, are amended to read as follows:

(d) On a party's motion or on a trial court's own initiative, the trial [~~A district~~] court in a civil action may, by [~~issue a~~] written order, permit an appeal from an [~~for~~] interlocutory order that is [~~appeal in a civil action~~] not otherwise appealable [~~under this section~~] if:

(1) [~~the parties agree that~~] 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[~~, and~~

[~~(3) the parties agree to the order~~].

(e) An appeal under Subsection (d) does not stay proceedings in the trial [~~district~~] court unless the parties agree to a stay or [~~and~~] the trial or appellate [~~district~~] court[~~, the court of appeals, or a judge of the court of appeals~~] orders a stay of the proceedings pending appeal.

(f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 10th day after the date the trial court signs the order permitting the appeal, files in [~~If application is made to~~] the court of appeals having [~~that has~~] appellate jurisdiction over the action an application for permission to appeal explaining why an appeal is warranted under Subsection (d) [~~not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order~~]. If the court of appeals accepts the appeal, the appealing party must pursue the appeal in accordance with the procedures set forth in the Texas Rules of Appellate Procedure for an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time for filing the notice of appeal.

SECTION 2. The change in law made by this Act applies only to a civil action pending or commenced on or after the effective date of this Act.

SECTION 3. This Act takes effect September 1, 2005.

This did not pass. WVP III 7/12/05

Court of Appeals
First District of Texas
1307 San Jacinto Street, 10th Floor
Houston, Texas 77002-7006

Phone: 713-655-2700
Fax: 713-752-2304
www.1sticoa.courts.state.tx.us

June 2, 2004

The Hon. Nathan Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711-2248

Dear Justice Hecht:

This letter is written to request your consideration of (1) a resolution for the different requirements found in the current rules of civil and appellate procedure regarding certificates of service and (2) deleting the requirement for a certificate of conference on motions for rehearing filed in the appellate courts. Both suggested changes would benefit the practioners and the appellate courts.

First, the current version of Texas Rule of Appellate Procedure 9.5(d) requires a certificate of service to state: (1) the date of service; (2) the method of service–hand delivery, mail, commercial delivery service, or fax, or combination of these methods; (3) the name of each person served; (4) the address of each person served; and (5) if the person served is a party's attorney, the name of the party represented by that attorney. Texas Rule of Civil Procedure 21a only requires a statement that the requirements of the rule have been met. If the two rules had the same requirements, we believe that fewer non-conforming documents would be presented to the appellate courts.

Secondly, we would respectfully request that the Supreme Court revisit Texas Rule of Appellate Procedure 10.1(a)(5) (certificates of conference on motions). In our experience, requiring a certificate of conference on a motion for rehearing is unnecessary and unproductive.

I am available to discuss these suggestions with you and can be reached at 832-814-2011.

Sincerely,

Sherry Radack

Sherry Radack
Chief Justice

Discussion draft, as modified and approved by Committee 3/25/05

MEMORANDUM

To: Carl Hamilton
From: Lisa Powell
Re: Suggested change to TRAP 8.1
Date: February 17, 2005

Texas Rule of Appellate Procedure 8 governs notice to a Texas appellate court of the bankruptcy filing by a party. Rule 8.1(e) currently requires that such notice contain "an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed." TEX. R. APP. P. 8.1(e).

All U.S. Bankruptcy Courts in Texas now allow electronic filing. *See generally* Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts. § 1.A (eff. Dec. 1, 2004). Some districts, such as the Southern District of Texas, now require electronic filing except in exceptional circumstances. Administrative Procedures for Electronic Filing § a, in TEXAS RULES OF COURT (FEDERAL) (West 2004). Thus, in many cases there is no paper filed and no "file stamp" as such. A bankruptcy petition filed electronically in the Southern District of Texas can be obtained via the official government web site; alternately, and with long explanations to the U.S. District Clerk's office as to why you now want such a thing, you can even get a certified copy of the petition from the clerk's office. However, such petition will not contain a file stamp or other evidence of date filed. Thus it is impossible to comply literally with Rule 8.1(e) as it is currently written.

Electronically filed petitions do cause the federal court electronic filing system to generate a separate document, called a Notice of Bankruptcy Case Filing (example attached), which does show the date of filing. The notice is available on PACER. That document, or a copy of the docket sheet, should suffice to show date of filing. I therefore would suggest that Rule 8.1(e) be revised to allow other evidence of filing. Some alternate proposals are:

> (e) [~~an authenticated~~] ~~a certified or verified~~ a copy of the page or pages of the bankruptcy petition, ~~Notice of Bankruptcy Case Filing, or other document filed with or~~ generated by the bankruptcy court showing when the petition was filed.
>
> (e) evidence of the date of filing.

or a document

(Both proposals eliminate the term "authenticated"; I'm not sure what that means).

Rule _____, Tex. R. App. P.

Cross appeals to be consolidated: If cross appeals by two or more parties are noticed to different courts of appeals that have concurrent jurisdiction of the appeals, the cross appeals must be consolidated.

Procedures for Consolidation: When an appealing party has knowledge that cross appeals from a judgment or order have been noticed to different courts of appeals, that party shall promptly contact lead counsel for all other appealing parties and attempt to agree on consolidation of the appeals in one court of appeals.

If no agreement can be reached, the parties shall so advise the clerk of both courts in writing and request that the appeals be consolidated.

The clerks of the respective courts of appeals shall notify the Chief Justice of the Supreme Court of Texas of the cross appeals, and the Chief Justice shall refer the matter to the Clerk of that court for consolidation by lot according to the following procedure.

For each pair of courts of appeals that have concurrent jurisdiction of appeals from the same county, the Clerk shall maintain an appropriate receptacle with the name of each court of appeals on an equal number of slips, but no less than ten for each court.

Upon receipt of a request for consolidation, the Clerk shall blindly draw one slip from the proper receptacle and advise the Chief Justice of the name of the court of appeals drawn. The Chief Justice shall order the cross appeals consolidated in that court of appeals.

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF APPELLATE PROCEDURE

I. Exact wording of existing Rule:

8.1. Notice of Bankruptcy

Any party may file a notice that a party is in bankruptcy. The notice must contain:

(a) the bankrupt party's name;

(b) the court in which the bankruptcy proceeding is pending;

(c) the bankruptcy proceeding's style and case number;

(d) the date when the bankruptcy petition was filed; and

(e) an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed.

II. Proposed New Rule:

8.1. Notice of Bankruptcy

Any party may file a notice that a party is in bankruptcy. The notice must contain:

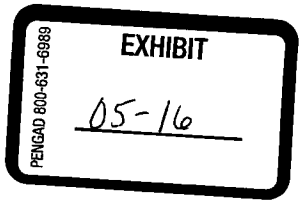
(a) the bankrupt party's name;

(b) the court in which the bankruptcy proceeding is pending;

(c) the bankruptcy proceeding's style and case number;

(d) the date when the bankruptcy petition was filed; and

(e) ~~an authenticated~~ a copy of the page or pages of the bankruptcy petition or a document prepared by the bankruptcy court ~~that show~~ showing when the petition was filed.



III. Reason for Proposed New Rule:

Texas Rule of Appellate Procedure 8 governs notice to a Texas Appellate Court of the bankruptcy filing by a party. Rule 8.1(e) currently requires that such notice contain "an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed." 8.1(e). P. 8.1(e). TEX. R. APP. P. 8.1(e).

All U.S. Bankruptcy Courts in Texas now allow electronic filing. Some districts, such as the Southern District of Texas, now require electronic filing except in exceptional circumstances. Administrative Procedures for Electronic Filing § a, in TEXAS RULES OF COURT (FEDERAL) (West 2004). Thus, in many cases there is no paper filed and no "file stamp" as such. A bankruptcy petition filed electronically in the Southern District of Texas can be obtained via the official government web site; alternately, and with long explanations to the U.S. District Clerk's office as to why you now want such a thing, you can even get a certified copy of the petition from the clerk's office. However, such petition will not contain a file stamp or other evidence of date filed. Thus it is impossible to comply literally with Rule 8.1(e) as it is currently written. Some courts of appeals have refused to file the notice without the authenticated copy.

Electronically filed petitions do cause the federal court electronic filing system to generate a separate document, called a Notice of Bankruptcy Case Filing (example attached), which does show the date of filing. The notice is available on PACER. That document, or a copy of the docket sheet, should suffice to show date of filing.

Lisa Hobbs

From: Lisa Hobbs
Sent: Thursday, August 25, 2005 11:04 AM
To: Nathan Hecht
Subject: Quick thoughts on MDL/SB15

I ran into a Beaumont lawyer last night at dinner who says it is an absolute jungle out there in the asbestos world; no one wants to lose a trial setting that is before December 1, the statutory date when any case not set gets to go to MDL. (But, as you can imagine, a lot of those cases aren't really ready to be tried.)

As far as our rules, this severance issue will be the toughest issue, procedurally. I drafted the subcommittee's version that provided for severance to occur in the trial court (as opposed to the pretrial court). I thought it would be unfair to require a plaintiff to go through the expense/delay of MDL if the plaintiff meets the statutory requirements. But I was concerned, like Judge Christopher, about delay in the trial court. To alleviate this concern, I tried to make the severance as ministerial as possible by putting a duty on the TC to rule "without delay" if the motion contains an appropriate verified statement.

3M wrote to oppose this approach and comments on costs: if one case involving 1000 Ps is transferred and then severed appropriately, the D will pay $165 in transfer fees; if the same case is severed and then transferred, the D (or so he claims) will pay $165,000 in transfer fees. I guess I envisioned that the case would be split in two -- Cause X of Ps who meet medical standards and Cause Y of Ps who didn't file a complying report -- not in 1000 individual claims.

***

But that does raise the question of how we will implement the requirement in 90.009: "Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial." This provision applies "to an action commenced on or after the effective date of this Act *OR* pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, has not commenced on or before the effective date of this Act" (Emphasis mine, of course)

***

Judge Gray suggested, for the sake of our severance discussion, an alternative approach: Deem claims severed on the same day the claims are deemed transferred if a defendant includes in its notice of transfer an appropriate verified statement. This removes one hoop for the defendant and requires no less proof than my approach. If the defendant is wrong, Christopher and Davidson can fix it and remand.

***

The toughest issue, politically, is whether to place deadlines on the Ds that SB15 doesn't mandate. Ds are crying that, even if only 10-25% of Ps file reports, that is 3000-8000 reports. But how many asbestos/silica defense attorneys are there in Texas now???

If all these cases are getting tried before 12/1, how are TCs handling these gatekeeper provisions?

Subcommittee on Rules of Judicial Administration

REPORT ON PROPOSED REVISIONS TO RJA 13

—in response to SB15 (relating to civil claims involving asbestos and silica)—

The Subcommittee on the Rules of Judicial Administration has considered revisions to Rule of Judicial Administration 13 proposed by Tracy Christopher, Judge of the 295th District Court, and Mark Davidson, Judge of the 11th District Court, in response to the recent addition of Chapter 90 to Texas Civil Practices and Remedies Code pertaining to civil claims involving asbestos and silica. *See* Senate Bill 15, attached; *see also* "Christopher/Davidson Proposal" (with cover letter), attached.

Judge Christopher and Judge Davidson recommend amending current Rule 13—which, by its express terms, covers only cases filed *on or after* September 1, 2003—to account for the provisions in the new statute that allow all asbestos and silica cases filed *before* that date (an estimated 30,000 cases) to be transferred to MDL silica and asbestos pretrial judges unless certain criteria are met. Judge Christopher and Judge Davidson also recommend establishing time limitations for a defendant to file a notice of transfer to the pretrial court for report compliance review and for a plaintiff to move to remand to the trial court.

This report contains the subcommittee's concerns and recommendations on that proposal.

- Judge Christopher and Judge Davidson proposed the following provision on attorney fees: "The party who prevails in the hearing on the motion to remand must be entitled to reasonable attorneys' fees." The subcommittee recommends against including this provision given the probable difficulty, for both sides, in determining what constitutes a compliant report under the new statute. Awarding attorney fees may also be difficult when one defendant files a notice on behalf of all defendants in the case.

- Judge Christopher and Judge Davidson proposed imposing a deadline of December 30, 2005, to file a notice of transfer for failure to file a report, and a deadline of January 31, 2006, to file a notice of conditional transfer. The subcommittee recommends extending both deadlines by ~30 days. Requiring a defendant to file notices within 30 days during the holiday season seems unduly burdensome given the lack of statutory deadlines. Further, the recommended timetable on conditional transfers gives defendants the same time to review the plaintiff's report (90 days) as the plaintiff originally had to prepare and serve the report.

- Judge Christopher and Judge Davidson's proposal contemplated severing claims of various plaintiffs in cases involving multiple claimants—some of whom can file complying reports and others of whom cannot—but did not provide a specific procedure for obtaining severance. This issue is tough. The subcommittee could not tell whether Judge Christopher and Judge Davidson anticipated the case would be severed at the trial court level, as their "costs" section implies, R13._(g) ("However the cost of severance in the trial court of multiple claimant cases must be borne by the claimants."), or at the pretrial court level, as their notice provision implies, R13._(a) (requiring a defendant to indicate in its notice whether severance is necessary). With the rationale that it would be unfair to require a plaintiff to go through the expense of the MDL rigamarole (a technical, legal term) if the plaintiff meets the statutory medical requirements, this draft requires a defendant to seek severance before filing the notice. The subcommittee, however, recognizes the impact the severance provisions may have on a defendant trying to comply with the timetables created under these rules. To alleviate concerns about the timing, this draft places a duty on the trial court to rule "without delay" if the motion contains a "verified statement that the defendant was not served with a report as required under sections 90.003 and 90.004 in the cases to be severed or that the defendant reasonably believes that the reports served in the cases to be severed do not comply with

sections 90.003 and 90.004." The idea is to make the severance as ministerial as possible in hopes of keeping the fight about report compliance in one forum – the pretrial court.

- The draft also adds a provision that would "deem" a case transferred upon filing a notice of transfer or a notice of conditional transfer. The Christopher/Davidson draft seems to imply that a case is deemed transferred upon filing a notice of transfer but leaves a case in procedural limbo once a conditional notice is filed. The subcommittee wondered whether the new rules should just treat conditional transfers similar to tag-along transfers under current R13.5(e). Doing so makes the remand section more intellectually honest – i.e., how does a pretrial court remand a case that had never been transferred? It also made the remand section easier to draft, as the subcommittee ran into the problem that the Christopher/Davidson draft did not contemplate a procedure where a claimant could respond to a notice of transfer for failure to serve a report with evidence that the claimant did, in fact, serve a report (i.e., the defendant just got his paperwork wrong). Assuming, for the sake of drafting, that the committee would favor this approach, this draft also changes the fees section.

With those recommendations and concerns stated, the subcommittee presents the following draft to the full committee for consideration.

Amend existing provisions of Rule 13.1 as follows:

13.1 Authority and Applicability.

(a) *Authority*. This rule is promulgated under sections 74.161-.164 of the Texas Government Code and sections 90.001-.012 of the Texas Civil Practices and Remedies Code.

(b) *Applicability*. This rule applies to civil actions that involve one or more common questions of fact and that were filed in a constitutional county court, county court at law, probate court, or district court on or after September 1, 2003. Except as provided in subsection (c), cCases filed before that date are governed by Rule 11 of these rules.

(c) *Applicability to Asbestos and Silica Claims.* Sections 13.2 and 13.6-[new section number] of this rule apply to civil actions that seek personal injury damages for asbestos-related injuries or silica-related injuries, as defined in Chapter 90 of the Texas Civil Practices and Remedies Code, filed before September 1, 2003, to the extent authorized by that chapter.

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Add provisions to Rule 13 as follows:

13.____ Transfer of Civil Actions Involving Asbestos and Silica Filed Before September 1, 2003.

(a) *Transfer When No Report Served.* If a claimant, as defined in section 90.001, fails to serve a report as directed under section 90.003 or 90.004 on or before November 30, 2005, the claimant's case may be transferred to the existing MDL asbestos or silica pretrial court as allowed under section 90.010. The notice of transfer must:

(1) be filed in the trial court and in the pretrial court by January 31, 2006, and be titled Notice of Transfer for Failure to File a(n) Asbestos/Silica Report;

(2) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number;

(3) state the names of the claimants who did not file the report;
(4) attach to the notice filed in the pretrial court a copy of the plaintiffs' live petition.

(b) *Conditional Transfers for Report Compliance Review.* If a claimant serves a report pursuant to section 90.003 or 90.004, but a defendant reasonably believes that the report does not comply with the statutory requirements, a defendant may file a Notice of Conditional Transfer with the pretrial court to determine whether the report complies with the statutes. The notice must:

(1) be filed in the trial court and in the pretrial court by February 28, 2006, and be titled Notice of Conditional Transfer For Asbestos/Silica Report Compliance Review;

(2) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number;

(3) state the names of the claimants whose report is alleged to be non-compliant;

(4) attach to the notice filed in the pretrial court a copy of the plaintiffs' live petition; and

(5) attach to the notice filed in the pretrial court a copy of the report alleged to be non-compliant.

(c) *Motion for Severance in Trial Court.* Before filing a notice under subsections (a) or (b), a defendant must move to sever the claims of plaintiffs who have filed reports complying with sections 90.003 or 90.004 from the claims of plaintiffs who have not filed such reports. The motion must be filed in the trial court and must contain a verified statement that the defendant was not served with a report as required under sections 90.003 and 90.004 in the cases to be severed or that the defendant reasonably believes that the reports served in the cases to be severed do not comply with sections 90.003 and 90.004. The trial court must grant the motion, if so verified, by written order and without delay. The written order must assign a new cause number to the claims that are being transferred.

(d) *Deemed Transferred Upon Filing Notice.* A case is deemed transferred to the pretrial court when a notice of transfer—in the form described in subsections (a) or (b)—is filed in both the trial court and the pretrial court.

(e) *Remand to the Trial Court.* Within 60 days from the date a case is transferred under subsection (d), a claimant may move to remand a case to the trial court on the ground that the claimant served a report complying with sections 90.003 and 90.004. If the pretrial court finds that the claimant served a report complying with sections 90.003 or 90.004, the pretrial court must remand that claimant's claim(s) to the trial court.

(f) *No Further Action in Trial Court.* After notice is filed pursuant to subsections (a) or (b) in the trial court, the trial court must take no further action in the transferred case until the pretrial court remands the case to the trial court.

(g) *Transfer of Files.* There is no automatic transfer of the case file for notices filed pursuant to this section. The pretrial court may issue appropriate orders for transferring files.

(h) *Filing Fees and Costs.* The party filing a notice under subsections (a) or (b) must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs.

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There were several questions raised during the subcommittee meeting about the substance of the proposal in addition to the concerns about severance and "deemed transfers" mentioned above. The subcommittee determined, however, that these questions were better raised before the full advisory committee. For example:

1. Should the Court impose deadlines on the parties that the Legislature chose not to impose? Proponents of the deadlines note that prompt resolution of the legal issues that will arise under this new statute further the underlying goals of the statute and benefit plaintiffs and defendants alike. (And, as a practical matter, the MDL judges would likely impose these or similar deadlines on the parties through standing orders if the Court chose not to act.) Opponents of the deadlines maintain that, if the Legislature wanted to impose deadlines, they would have included them; adoption of these deadlines exceeds the scope of the Legislature's rule-making directive to the Court. *See* Sec. 90.012 ("The supreme court may promulgate amendments to the Texas Rules of Civil Procedure regarding the joinder of claimants in asbestos-related actions or silica-related actions if the rules are consistent with Section 90.009.").

2. What is the consequence if a defendant does not file a notice of transfer within the deadlines under this rule? Perhaps the rule needs a provision, similar to RJA 13.3(b) and/or (c), that allows a judge (the trial court, a presiding judge or a judge on the MDL panel) to transfer cases to MDL if the defendant does not?

3. Should the rules include a "good cause after consultation" exception to subsection (f), which prohibits a trial court from taking any further action in a case transferred to the pretrial court, similar to current RJA 13.5(b)?

4. Could the rule be drafted so that claims are deemed severed on the same day the claims are deemed transferred if a defendant includes in its notice of transfer a verified statement that the defendant was not served with a report as required under sections 90.003 and 90.004 in the cases to be severed or that the defendant reasonably believes that the reports served in the cases to be severed do not comply with sections 90.003 and 90.004? This removes one hoop for the defendant and requires no less proof than the subcommittee's rule, as currently drafted.

5. Should the rules specify that a case that is severed for the purpose of transfer and that is later remanded be re-assigned the cause number the case had before it was severed for transfer?

6. Should the rules apply to cases filed AFTER September 1, 2003, to the extent they are not already in the MDL (and were filed before September 1, 2005)?

Christopher/Davidson Proposal

TRACY CHRISTOPHER
JUDGE, 295TH DISTRICT COURT
301 FANNIN
HOUSTON, TEXAS 77002
(713) 755-5541

July 25, 2005

Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box. 12248
Austin, TX 78711

Re: Proposed Changes to Rule 13 of the Rules of Judicial Administration

Dear Justice Hecht:

With the passage of SB 15 on asbestos and silica litigation, Judge Davidson and I respectfully request that we may need some changes to Rule 13. We believe that these changes need to be in place before Nov. 30, 2005.

SB 15 provides for the transfer of all asbestos and silica cases filed before 9/1/03 to the MDL silica and asbestos judges unless certain criteria are met. Rule 13 by its express terms only covers cases filed on or after 9/1/03. Therefore we request a change to Rule 13.1 to add a paragraph on the pre 9/1/03 asbestos and silica cases.

We would also like a clarification as to whether our current appointments would cover the pre 9/1/03 cases. I do not know whether this needs to be in the Rule itself or whether a new order from the MDL panel is needed. Our current orders cover tag-along cases but those are all post 9/1/03 tag-alongs.

There are approximately 4300 silica plaintiffs and 28,000 asbestos plaintiffs whose cases were filed pre 9/1/03 and are pending. They must either be tried, be suffering from mesothelioma or other malignant cancer or have a medical report filed by the 11/30/05 deadline. SB 15 provides for a medical report compliance review on the pre 9/1/03 cases. Even if a plaintiff files a medical report timely (by 11/30/05) a defendant can still file a notice of transfer, and transfer the case to the MDL pretrial court to determine if the report meets the statutory criteria. If the report meets the criteria, the case is remanded. If the report does not meet the criteria, the case stays in the MDL. We anticipate a large number of cases transferred to us for a medical report compliance review shortly after the 11/30/05 deadline.

The statute does not provide any time limits for when the defendant must file the notice of transfer, nor does it provide any time limits for the plaintiff to file a motion to remand on these medical report compliance

cases. Given the large number of reports that we anticipate will be filed, we respectfully suggest 60 days for both would be reasonable. This would give both sides more time to make certain that they are making good decisions. We also believe that a provision for attorney fees for the winning party might also be reasonable.

Given the 11/30/05 deadline, we would like to have the deadlines established and a provision for attorney fees in place before then so that all parties may know the proper procedures to follow. Therefore we request a new paragraph to deal with these issues.

Sincerely,

Tracy Christopher

Mark Davidson

Proposed Amendments to Rule 13
Rules of Judicial Administration

Additions to Rule 13 in bold

13.1 (a) *Authority.* This rule is promulgated under sections 74.161-.164 of the Texas Government Code **and sections 90.001-.012 of the Texas Civil Practices and Remedies Code.**

13.1(c) *Applicability to Asbestos and Silica Claims.* This rule applies to civil actions involving asbestos and silica filed before September 1, 2003 to the extent authorized by sections 90.001-.012 of the Texas Civil Practices and Remedies Code.

13.____ Transfer of civil actions involving asbestos and silica filed before September 1, 2003 pursuant to sections 90.001-.012 of the Texas Civil Practices and Remedies Code.

(a) *Transfer when no report served.* If a claimant, as defined in section 90.001, fails to file a report pursuant to section 90.003 or 90.004 on or before November 30, 2005, (and the other exceptions in section 90.010 do not apply) the claimant's case may be transferred to the existing MDL asbestos or silica pretrial court through a notice of transfer. The notice must:
  (1) Be filed by December 30, 2005 in the trial court and in the pretrial court and state that it is a Notice of Transfer for Failure to File a(n) Asbestos/Silica Report.
  (2) List all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number.
  (3) State the names of the claimants who did not file the report and whether severance is necessary.
  (4) Attach a copy of the plaintiffs' latest petition in the pretrial court filing.

(b) *Conditional transfers for report compliance review.* If a claimant serves a report pursuant to section 90.003 or 90.004, but a defendant reasonably believes that the report fails to comply with the requirements for such reports, a defendant may file a Notice of Conditional Transfer with the pretrial court to determine whether the report complied with the statutes. The notice must:
  (1) Be filed by January 31, 2006 in the master case number of the pretrial court and in the trial court and state that it is a Notice of Conditional Transfer For Asbestos/Silica Report Compliance Review.
  (2) List all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number.
  (3) State the names of the claimants whose report is alleged to be non-compliant.
  (4) Attach a copy of the plaintiffs' latest petition in the pretrial court filing.
  (5) Attach a copy of the report alleged to be non-compliant in the pretrial court filing.

(c) *Remand to the trial court.* The claimant may file a motion to remand to the trial court within 60 days from the date of conditional transfer. If the pretrial court finds that the claimant's report did comply with the requirements of 90.003 or 90.004, the pretrial court shall remand the claimant's action to the trial court and this rule will no longer apply to that claimant's action. If the pretrial court finds that the claimant's report did not comply with the requirements of 90.003 or 90.004, then the court shall order transfer of the claimant's action to the MDL. The party who prevails in the hearing on the motion to remand shall be entitled to reasonable attorneys' fees. If no timely

motion to remand is filed, the pretrial court shall order transfer of the claimant's action to the MDL.

(d) *No further action in Trial Court.* After notice of transfer is filed pursuant to (a) or (b) in the trial court, the trial court must take no further action as to those claimants' actions, until the pretrial court orders a remand.

(e) *Transfer of files.* There is no automatic transfer of the case file for notices filed pursuant to this section. The pretrial court may issue orders as to the extent of the transfer of the files from the trial court clerk.

Alternative

(f) *Transfer of files* When a Notice of Transfer for Failure to File a(n) Asbestos/Silica Report is filed, the trial court clerk shall transmit the case file to the pretrial court clerk. If there are multiple claimants in one case, and only some of the claimants failed to file a report, those claimants who failed to file a report shall be severed into a new case file for transfer to the pretrial court. The new case file shall consist of the Notice of Transfer with the plaintiffs' latest petition attached only. When a Notice of Conditional Transfer For Asbestos/Silica Report Compliance Review is filed, the trial court clerk shall not transmit the file to the pretrial court clerk until ordered to do so by the pretrial court.

(g) *Filing Fees and Costs.* The party moving for transfer for Failure to File a(n) Asbestos/Silica report must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs. However the cost of severance in the trial court of multiple claimant cases shall be borne by the claimants. There shall be no filing fees associated with the Conditional Transfer For Asbestos/Silica Report Compliance Review. If the pretrial court orders the transfer of claimant's case to the MDL, then the party moving for transfer must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs.

Chapter 90, Civil Practices & Remedies Code

Sec. 90.001	Definitions
Sec. 90.002	Physician who interprets Pulmonary Function Tests must meet certain standards.
Sec. 90.003	Asbestos claimant must serve a report containing specific information.
Sec. 90.004	Silica claimant must serve a report containing specific information.
Sec. 90.005	Physician cannot rely on certain reports as the basis of his report. If he does, report invalid.
Sec. 90.006	In new cases, report must be served 30 days after answer or other appearance. In pending cases, if within 90 days of trial, no report required. If over 90 days from trial, report must be served either 60 days before trial or 180 days from eff. date of chapter, whichever is earlier.
Sec. 90.007	In new cases, if no report or defective report, D may file motion to dismiss within 30 days. (If defective report, must state reasons.) P has 15 days (from service) to file response. P may amend or supplement report during this time. If report still defective, D is not required to re-file motion to dismiss. "Except as provided by 90.010(d) or (e)", if motion meritorious, court shall grant, by written order, relief and dismiss w/o prejudice. Filing of motion to dismiss stays all further proceedings in case. On motion and for good cause, court may shorten or extend time tables.
Sec. 90.008	Before filing report, P may voluntarily dismiss (w/o prejudice) case.
Sec. 90.009	Claims relating to more than one exposed person may not be joined unless all parties agree.
Sec. 90.010	MDL rules apply to all pending cases filed before 9/1/03 unless: • imminent trial (90 days, no continuances) • P serves report within 90 days • P has cancer If P doesn't serve report w/in 90 days, D may file notice of transfer to the MDL pretrial court. If PTC determines report served does comply, the PTC shall remand to TC. If PTC determines report defective, PTC retains jurisdiction until: (1) P serves complying report; or (2) P files (f)(1) report; and Court makes (f)(2) findings. In new cases, PTC shall dismiss a case if no report unless P files (f)(1) report ("comparable disease report") and Court makes specific (f)(2) findings (credible report, actual physical impairment) in a detailed, written order after evidentiary hearing. These findings are not later admissible at trial.

	Only in "exceptional and limited circumstances" should comparable disease reports suffice. PTC shall expedite actions involving living cancer Ps (preferably w/in 60 months of transfer). MDL Pretrial Judges must file report to gov, lt. gov, and speaker on 9/1/2010.
Sec. 90.011	Chapter not intended to affect bankruptcy cases.
Sec. 90.012	"The supreme court may promulgate amendments to the Texas Rules of Civil Procedure regarding the joinder of claimants in asbestos-related actions or silica-related actions if the rules are consistent with Section 90.009."

Other Civil Practices & Remedies Code Provisions

Sec. 16.003 (amended)	Sec. 16.0031 excepted from general 2-yr SOL.
Sec. 16.0031 (added)	Asbestos/silica COA accrues on earlier of two dates: date of death; or date of asbestos/silica report
Sec. 51.014 (11)	Permits interlocutory appeal of a denial of a motion to dismiss for lack of asbestos/silica report or inadequate asbestos/silica report. [Gov't Code 22.225(d) also amended to allow interlocutory appeal to come to SCT and to set asbestos/silica cancer cases on priority docket.]

Effective Date Provisions

This Act takes effect September 1, 2005.

Sec. 90.009 and 16.0031, Civil Practice and Remedies Code apply to an action commenced on or after the effective date of this Act or pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, has not commenced on or before the effective date of this Act. An action commenced before the effective date of this Act in which trial has commenced on or before the effective date of this Act or in which there has been a final, unappealable disposition by order, judgment; voluntary dismissal, or otherwise is governed by the law applicable to the action immediately before the effective date of this Act, and that law is continued in effect for that purpose.

Section 16.0031 shall not operate to revive any claims that are barred by application of the law in effect immediately before the effective date of this Act.

Other Provisions

There is a direct appeal to the supreme court on constitutionality challenges. The direct appeal is an accelerated appeal.

AN ACT

relating to civil claims involving exposure to asbestos and silica.

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

SECTION 1. FINDINGS; PURPOSE. (a) The Legislature of the State of Texas makes findings as stated in this section.

(b) Asbestos is a mineral that was used extensively in industrial applications, especially between the 1940s and the 1970s. It is estimated that as many as 27 million American workers were exposed to asbestos between 1940 and 1979. Exposure to asbestos, particularly through inhalation of asbestos fibers, has allegedly been linked to certain malignant and nonmalignant diseases, including mesothelioma and asbestosis. These diseases have latency periods of up to 40 years.

(c) Over the last three decades, hundreds of thousands of lawsuits alleging asbestos-related disease have been filed throughout the United States. In the early 1990s, between 15,000 and 20,000 new lawsuits alleging asbestos-related disease were filed each year. By the late 1990s, the number of new lawsuits alleging asbestos-related disease filed each year was more than double the number of yearly filings seen in the early 1990s. By one estimate, the number of asbestos lawsuits pending in state and federal courts in the United States doubled in the 1990s, from approximately 100,000 to more than 200,000 claims.

(d) In 1991, the Judicial Conference Ad Hoc Committee on

Asbestos Litigation, appointed by United States Supreme Court Chief Justice William Rehnquist, found that "the [asbestos litigation] situation has reached critical dimensions and is getting worse." In 1997, the United States Supreme Court acknowledged that the country was in the midst of an "asbestos-litigation crisis." *AmChem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

(e) Texas has not been spared this crisis. In the period from 1988 to 2000, more lawsuits alleging asbestos-related disease were filed in Texas than in any other state. Thousands of asbestos lawsuits are pending in Texas courts today.

(f) This asbestos litigation crisis is due, in part, to screening of persons with possible occupational exposure to asbestos and to the existence of statutes of limitations that begin to run based merely on knowledge of a possible asbestos-related disease or symptom. The screening process identifies individuals with radiographically detectable markings on their lungs that are consistent with asbestos-related disease regardless of whether the individuals have any physical impairment. The identified individuals then file lawsuits, in part to avoid the running of limitations triggered by the discovery that they may have an asbestos-related injury. Many of the identified individuals (at least one estimate puts the figure as high as 90 percent of identified individuals) are not experiencing any symptoms of asbestos-related disease and are not suffering from any asbestos-related illness affecting their daily functions.

(g) The crush of asbestos litigation has been costly to employers, employees, litigants, and the court system. In 2003,

the American Bar Association Commission on Asbestos Litigation noted that in 1982, the nation's single largest supplier of asbestos-containing insulation products, the Johns-Manville Corporation, "declared bankruptcy due to the burden of the asbestos litigation." Since then, more than 70 other companies have declared bankruptcy due to the burden of asbestos litigation. It is estimated that between 60,000 and 128,000 American workers already have lost their jobs as a result of asbestos-related bankruptcies and that eventually 423,000 jobs will be lost due to asbestos-related bankruptcies. Each worker who loses a job due to an asbestos-related bankruptcy loses between $25,000 and $50,000 in wages over the worker's career. These workers also have seen the value of their 401(k) retirement plans drop by 25 percent or more due to these bankruptcies.

(h) Additionally, it is estimated that asbestos litigation has already cost over $54 billion, with well over half of this expense going to attorney's fees and other litigation costs. The crowded dockets that result from the crush of asbestos cases filed by persons who are not functionally or physically impaired by any asbestos-related illness severely hampers the ability of seriously ill claimants to seek redress in the courts. Those claimants who have had their day in court often find that the value of their recovery is seriously reduced when the company against whom the judgment was rendered files bankruptcy due to the weight of asbestos litigation brought by unimpaired claimants.

(i) Silica is a naturally occurring mineral and is the second most common constituent of the earth's crust. Crystalline

silica in the form of quartz is present in sand, gravel, soil, and rocks.

(j) Silica sand is the primary raw material for the production of glass, including container glass (bottles and jars), flat glass (windows), and other forms of glass. Silica sand is used to make foundry molds and cores. Industrial minerals that contain silica are the essential raw materials for the manufacture of ceramics, which include industrial ceramics, sanitary ware (bathrooms), and tableware (plates and cups). Crushed stone and sand and gravel (aggregates), most of which contain crystalline silica, are the primary raw materials in concrete and asphalt; these materials are used in the construction of roads, sidewalks, building foundations, and many other things. Sandstone and granite, both of which contain silica, are used as building materials.

(k) The primary adverse health effect associated with silica is silicosis. Silicosis is a lung disease characterized by fibrosis, or scarring, and is caused by prolonged overexposure to respirable silica through inhalation. Additionally, silica inhaled from occupational sources was classified as a lung carcinogen in 1996.

(l) Silicosis has been recognized as an occupational disease for over 100 years. By the 1930s, the federal government had launched a silica-awareness campaign, which led to greater protection for workers exposed to silica dust. By the early 1970s, the United States Occupational Safety and Health Administration had begun to regulate occupational exposure to respirable silica. In

1999, the United States Centers for Disease Control and Prevention/National Institute for Occupational Safety and Health called the reduction in occupational lung diseases, including silicosis, one of the ten great public health achievements of the 20th century. The United States Centers for Disease Control and Prevention/National Institute for Occupational Safety and Health data disclose a substantial decrease in silicosis since 1968 (the first year the data were collected). As a result, the number of silica lawsuits filed each year was relatively predictable through 2001. This trend has changed. The number of new lawsuits alleging silica-related disease being filed each year has risen precipitously in recent years. For example, one of America's largest suppliers of industrial sand had more than 15,000 new claims filed in the first six months of 2003, which is three times the number of claims it had in all of 2002 and more than 10 times the number of claims it had in all of 2001.

(m) Silica claims, like asbestos claims, often arise when an individual is identified as having markings on the individual's lungs that are possibly consistent with silica exposure, but the individual has no functional or physical impairment from any silica-related disease. The identified individuals, like those alleging asbestos-related injury, file lawsuits under the theory that they must do so to avoid having their claims barred by limitations even though they have no current impairment and may never have impairment. It is, therefore, necessary to address silica-related litigation.

(n) It is the purpose of this Act to protect the right of

people with impairing asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos or silica but have no functional or physical impairment from asbestos-related or silica-related disease. To that end, this Act:

(1) adopts medically accepted standards for differentiating between individuals with nonmalignant asbestos-related or silica-related disease causing functional impairment and individuals with no functional impairment;

(2) provides a method to obtain the dismissal of lawsuits in which the exposed person has no functional impairment, while at the same time protecting a person's right to bring suit on discovering an impairing asbestos-related or silica-related injury; and

(3) creates an extended period before limitations begin to run in which to bring claims for injuries caused by the inhalation or ingestion of asbestos or by the inhalation of silica to preserve the right of those who have been exposed to asbestos or silica but are not yet impaired to bring a claim later in the event that they develop an impairing asbestos-related or silica-related disease or injury.

SECTION 2. Title 4, Civil Practice and Remedies Code, is amended by adding Chapter 90 to read as follows:

CHAPTER 90. CLAIMS INVOLVING ASBESTOS AND SILICA

Sec. 90.001. DEFINITIONS. In this chapter:

(1) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(2) "Asbestos-related injury" means personal injury or death allegedly caused, in whole or in part, by inhalation or ingestion of asbestos.

(3) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(4) "Certified B-reader" means a person who has successfully completed the x-ray interpretation course sponsored by the National Institute for Occupational Safety and Health (NIOSH) and passed the B-reader certification examination for x-ray interpretation and whose NIOSH certification is current at the time of any readings required by this chapter.

(5) "Chest x-ray" means chest films that are taken in accordance with all applicable state and federal regulatory standards and in the posterior-anterior view.

(6) "Claimant" means an exposed person and any person who is seeking recovery of damages for or arising from the injury or death of an exposed person.

(7) "Defendant" means a person against whom a claim arising from an asbestos-related injury or a silica-related injury is made.

(8) "Exposed person" means a person who is alleged to

have suffered an asbestos-related injury or a silica-related injury.

(9) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(10) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.

(11) "ILO system of classification" means the radiological rating system of the International Labor Office in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (2000), as amended.

(12) "MDL pretrial court" means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under Rule 13, Texas Rules of Judicial Administration.

(13) "MDL rules" means the rules adopted by the supreme court under Subchapter H, Chapter 74, Government Code.

(14) "Mesothelioma" means a rare form of cancer allegedly caused in some instances by exposure to asbestos in which the cancer invades cells in the membrane lining:

(A) the lungs and chest cavity (the pleural region);

(B) the abdominal cavity (the peritoneal region); or

(C) the heart (the pericardial region).

(15) "Nonmalignant asbestos-related injury" means an

asbestos-related injury other than mesothelioma or other cancer.

(16) "Nonmalignant silica-related injury" means a silica-related injury other than cancer.

(17) "Physician board certified in internal medicine" means a physician who is certified by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(18) "Physician board certified in occupational medicine" means a physician who is certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine or the American Osteopathic Board of Preventive Medicine.

(19) "Physician board certified in oncology" means a physician who is certified in the subspecialty of medical oncology by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(20) "Physician board certified in pathology" means a physician who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology or the American Osteopathic Board of Internal Medicine and whose professional practice:

(A) is principally in the field of pathology; and

(B) involves regular evaluation of pathology materials obtained from surgical or postmortem specimens.

(21) "Physician board certified in pulmonary medicine" means a physician who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(22) "Plethysmography" means the test for determining

lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume change.

(23) "Pulmonary function testing" means spirometry, lung volume, and diffusion capacity testing performed in accordance with Section 90.002 using equipment, methods of calibration, and techniques that meet:

(A) the criteria incorporated in the *American Medical Association Guides to the Evaluation of Permanent Impairment* and reported in 20 C.F.R. Part 404, Subpart P, Appendix 1, Part (A), Sections 3.00(E) and (F)(2003); and

(B) the interpretative standards in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies," as published in 144 *American Review of Respiratory Disease* 1202-1218 (1991).

(24) "Report" means a report required by Section 90.003, 90.004, or 90.010(f)(1).

(25) "Respirable," with respect to silica, means particles that are less than 10 microns in diameter.

(26) "Serve" means to serve notice on a party in compliance with Rule 21a, Texas Rules of Civil Procedure.

(27) "Silica" means a respirable form of crystalline silicon dioxide, including alpha quartz, cristobalite, and tridymite.

(28) "Silica-related injury" means personal injury or death allegedly caused, in whole or in part, by inhalation of

silica.

(29) "Silicosis" means interstitial fibrosis of the lungs caused by inhalation of silica, including:

(A) acute silicosis, which may occur after exposure to very high levels of silica within a period of months to five years after the initial exposure;

(B) accelerated silicosis; and

(C) chronic silicosis.

Sec. 90.002. PULMONARY FUNCTION TESTING. Pulmonary function testing required by this chapter must be interpreted by a physician:

(1) who is licensed in this state or another state of the United States;

(2) who is board certified in pulmonary medicine, internal medicine, or occupational medicine; and

(3) whose license and certification were not on inactive status at the time the testing was interpreted.

Sec. 90.003. REPORTS REQUIRED FOR CLAIMS INVOLVING ASBESTOS-RELATED INJURY. (a) A claimant asserting an asbestos-related injury must serve on each defendant the following information:

(1) a report by a physician who is board certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology and whose license and certification were not on inactive status at the time the report was made stating that:

(A) the exposed person has been diagnosed with malignant mesothelioma or other malignant asbestos-related cancer;

and

(B) to a reasonable degree of medical probability, exposure to asbestos was a cause of the diagnosed mesothelioma or other cancer in the exposed person; or

(2) a report by a physician who is board certified in pulmonary medicine, internal medicine, or occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(A) verifies that the physician or a medical professional employed by and under the direct supervision and control of the physician:

(i) performed a physical examination of the exposed person, or if the exposed person is deceased, reviewed available records relating to the exposed person's medical condition;

(ii) took a detailed occupational and exposure history from the exposed person or, if the exposed person is deceased, from a person knowledgeable about the alleged exposure or exposures that form the basis of the action; and

(iii) took a detailed medical and smoking history that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(B) sets out the details of the exposed person's occupational, exposure, medical, and smoking history and verifies that at least 10 years have elapsed between the exposed person's first exposure to asbestos and the date of diagnosis;

(C) verifies that the exposed person has:

(i) a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing:

(a) bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/1 or higher, for an action filed on or after May 1, 2005;

(b) bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/0 or higher, for an action filed before May 1, 2005; or

(c) bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

(ii) pathological asbestosis graded 1(B) or higher under the criteria published in "Asbestos-Associated Diseases," 106 *Archives of Pathology and Laboratory Medicine* 11, Appendix 3 (October 8, 1982);

(D) verifies that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing:

(i) forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; or

(ii) total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal or below 80 percent of predicted;

(E) verifies that the physician has concluded

that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure revealed by the exposed person's occupational, exposure, medical, and smoking history; and

(F) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

(b) The detailed occupational and exposure history required by Subsection (a)(2)(A)(ii) must describe:

(1) the exposed person's principal employments and state whether the exposed person was exposed to airborne contaminants, including asbestos fibers and other dusts that can cause pulmonary impairment; and

(2) the nature, duration, and frequency of the exposed person's exposure to airborne contaminants, including asbestos fibers and other dusts that can cause pulmonary impairment.

(c) If a claimant's pulmonary function test results do not meet the requirements of Subsection (a)(2)(D)(i) or (ii), the claimant may serve on each defendant a report by a physician who is board certified in pulmonary medicine, internal medicine, or occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(1) verifies that the physician has a physician-patient relationship with the exposed person;

(2) verifies that the exposed person has a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) with a profusion grading of 2/1 or higher;

(3) verifies that the exposed person has restrictive impairment from asbestosis and includes the specific pulmonary function test findings on which the physician relies to establish that the exposed person has restrictive impairment;

(4) verifies that the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure revealed by the exposed person's occupational, exposure, medical, and smoking history; and

(5) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

(d) If a claimant's radiologic findings do not meet the requirements of Subsection (a)(2)(C)(i), the claimant may serve on each defendant a report by a physician who is board certified in

pulmonary medicine, internal medicine, or occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(1) verifies that the physician has a physician-patient relationship with the exposed person;

(2) verifies that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing:

(A) either:

(i) forced vital capacity below the lower limit of normal or below 80 percent of predicted and total lung capacity, by plethysmography, below the lower limit of normal or below 80 percent of predicted; or

(ii) forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; and

(B) diffusing capacity of carbon monoxide below the lower limit of normal or below 80 percent of predicted;

(3) verifies that the exposed person has a computed tomography scan or high-resolution computed tomography scan showing either bilateral pleural disease or bilateral parenchymal disease consistent with asbestos exposure;

(4) verifies that the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure as revealed by the exposed person's occupational, exposure, medical,

and smoking history; and

(5) is accompanied by copies of all computed tomography scans, ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

Sec. 90.004. REPORTS REQUIRED FOR CLAIMS INVOLVING SILICA-RELATED INJURY. (a) A claimant asserting a silica-related injury must serve on each defendant a report by a physician who is board certified in pulmonary medicine, internal medicine, oncology, pathology, or, with respect to a claim for silicosis, occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(1) verifies that the physician or a medical professional employed by and under the direct supervision and control of the physician:

(A) performed a physical examination of the exposed person, or if the exposed person is deceased, reviewed available records relating to the exposed person's medical condition;

(B) took a detailed occupational and exposure history from the exposed person or, if the exposed person is deceased, from a person knowledgeable about the alleged exposure or exposures that form the basis of the action; and

(C) took a detailed medical and smoking history that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(2) sets out the details of the exposed person's occupational, exposure, medical, and smoking history;

(3) verifies that the exposed person has one or more of the following:

(A) a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing:

(i) bilateral predominantly nodular opacities (p, q, or r) occurring primarily in the upper lung fields, with a profusion grading of 1/1 or higher, for an action filed on or after May 1, 2005; or

(ii) bilateral predominantly nodular opacities (p, q, or r) occurring primarily in the upper lung fields, with a profusion grading of 1/0 or higher, for an action filed before May 1, 2005;

(B) pathological demonstration of classic silicotic nodules exceeding one centimeter in diameter as published in "Diseases Associated with Exposure to Silica and Nonfibrous Silicate Minerals," 112 *Archives of Pathology and Laboratory Medicine* 7 (July 1988);

(C) progressive massive fibrosis radiologically established by large opacities greater than one centimeter in diameter; or

(D) acute silicosis; and

(4) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

(b) If the claimant is asserting a claim for silicosis, the report required by Subsection (a) must also verify that:

(1) there has been a sufficient latency period for the applicable type of silicosis;

(2) the exposed person has at least Class 2 or higher impairment due to silicosis, according to the *American Medical Association Guides to the Evaluation of Permanent Impairment* and reported in 20 C.F.R. Part 404, Subpart P, Appendix 1, Part (A), Sections 3.00(E) and (F)(2003); and

(3) the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than silica exposure revealed by the exposed person's occupational, exposure, medical, and smoking history.

(c) If the claimant is asserting a claim for silica-related lung cancer, the report required by Subsection (a) must also:

(1) include a diagnosis that the exposed person has primary lung cancer and that inhalation of silica was a substantial contributing factor to that cancer; and

(2) verify that at least 15 years have elapsed from the

date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer.

(d) If the claimant is asserting a claim for any disease other than silicosis and lung cancer alleged to be related to exposure to silica, the report required by Subsection (a) must also verify that the physician has diagnosed the exposed person with a disease other than silicosis or silica-related lung cancer and has concluded that the exposed person's disease is not more probably the result of causes other than silica exposure.

(e) The detailed occupational and exposure history required by Subsection (a)(1)(B) must describe:

(1) the exposed person's principal employments and state whether the exposed person was exposed to airborne contaminants, including silica and other dusts that can cause pulmonary impairment; and

(2) the nature, duration, and frequency of the exposed person's exposure to airborne contaminants, including silica and other dusts that can cause pulmonary impairment.

Sec. 90.005. PROHIBITED BASIS FOR DIAGNOSIS. (a) For purposes of this chapter, a physician may not, as the basis for a diagnosis, rely on the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the exposed person's medical condition that was conducted in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which the examination, test, or screening was conducted.

(b) If a physician relies on any information in violation of

Subsection (a), the physician's opinion or report does not comply with the requirements of this chapter.

Sec. 90.006. SERVING REPORTS. (a) In an action filed on or after the date this chapter becomes law, a report prescribed by Section 90.003 or 90.004 must be served on each defendant not later than the 30th day after the date that defendant answers or otherwise enters an appearance in the action.

(b) In an action pending on the date this chapter becomes law and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, commences on or before the 90th day after the date this chapter becomes law, a claimant is not required to serve a report on any defendant unless a mistrial, new trial, or retrial is subsequently granted or ordered.

(c) In an action pending on the date this chapter becomes law and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, commences after the 90th day after the date this chapter becomes law, a report must be served on each defendant on or before the earlier of the following dates:

(1) the 60th day before trial commences; or

(2) the 180th day after the date this chapter becomes law.

Sec. 90.007. MOTION TO DISMISS. (a) In an action filed on or after the date this chapter becomes law, if a claimant fails to timely serve a report on a defendant, or serves on the defendant a report that does not comply with the requirements of Section 90.003 or 90.004, the defendant may file a motion to dismiss the claimant's asbestos-related claims or silica-related claims. The motion must

be filed on or before the 30th day after the date the report is served on the defendant. If a claimant fails to serve a report on the defendant, the motion must be filed on or before the 30th day after the date the report was required to be served on the defendant under Section 90.006. If the basis of the motion is that the claimant has served on the defendant a report that does not comply with Section 90.003 or 90.004, the motion must include the reasons why the report does not comply with that section.

(b) A claimant may file a response to a motion to dismiss on or before the 15th day after the date the motion to dismiss is served. A report required by Section 90.003 or 90.004 may be filed, amended, or supplemented within the time required for responding to a motion to dismiss. The service of an amended or supplemental report does not require the filing of an additional motion to dismiss if the reasons stated in the original motion to dismiss are sufficient to require dismissal under this chapter.

(c) Except as provided by Section 90.010(d) or (e), if the court is of the opinion that a motion to dismiss is meritorious, the court shall, by written order, grant the motion and dismiss all of the claimant's asbestos-related claims or silica-related claims, as appropriate, against the defendant. A dismissal under this section is without prejudice to the claimant's right, if any, to assert claims for an asbestos-related injury or a silica-related injury in a subsequent action.

(d) On the filing of a motion to dismiss under this section, all further proceedings in the action are stayed until the motion is heard and determined by the court.

(e) On the motion of a party showing good cause, the court may shorten or extend the time limits provided in this section for filing or serving motions, responses, or reports.

Sec. 90.008. VOLUNTARY DISMISSAL. Before serving a report required by Section 90.003 or 90.004, a claimant seeking damages arising from an asbestos-related injury or silica-related injury may voluntarily dismiss the claimant's action. If a claimant files a voluntary dismissal under this section, the claimant's voluntary dismissal is without prejudice to the claimant's right to file a subsequent action seeking damages arising from an asbestos-related injury or a silica-related injury.

Sec. 90.009. JOINDER OF CLAIMANTS. Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial.

Sec. 90.010. MULTIDISTRICT LITIGATION PROCEEDINGS. (a) The MDL rules apply to any action pending on the date this chapter becomes law in which the claimant alleges personal injury or death from exposure to asbestos or silica unless:

(1) the action was filed before September 1, 2003, and trial has commenced or is set to commence on or before the 90th day after the date this chapter becomes law, except that the MDL rules shall apply to the action if the trial does not commence on or before the 90th day after the date this chapter becomes law;

(2) the action was filed before September 1, 2003, and the claimant serves a report that complies with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law; or

(3) the action was filed before September 1, 2003, and the exposed person has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer, or malignant silica-related cancer.

(b) If the claimant fails to serve a report complying with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law under Subsection (a)(2), the defendant may file a notice of transfer to the MDL pretrial court. If the MDL pretrial court determines that the claimant served a report that complies with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law, the MDL pretrial court shall remand the action to the court in which the action was filed. If the MDL pretrial court determines that the report was not served on or before the 90th day after the date this chapter becomes law or that the report served does not comply with Section 90.003 or 90.004, the MDL pretrial court shall retain jurisdiction over the action pursuant to the MDL rules.

(c) In an action transferred to an MDL pretrial court in which the exposed person is living and has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer, malignant silica-related cancer, or acute silicosis, the MDL pretrial court shall expedite the action in a manner calculated to provide the exposed person with a trial or other disposition in the shortest period that is fair to all parties and consistent with the principles of due process. The MDL pretrial court should, as far as reasonably possible, ensure that such action is brought to trial or final disposition within six months from the date the action is

transferred to the MDL pretrial court, provided that all discovery and case management requirements of the MDL pretrial court have been satisfied.

(d) In an action pending on the date this chapter becomes law that is transferred to or pending in an MDL pretrial court and in which the claimant does not serve a report that complies with Section 90.003 or 90.004, the MDL pretrial court shall not dismiss the action pursuant to this chapter but shall retain jurisdiction over the action under the MDL rules. The MDL pretrial court shall not remand such action for trial unless:

(1) the claimant serves a report complying with Section 90.003 or 90.004; or

(2)(A) the claimant does not serve a report that complies with Section 90.003 or 90.004;

(B) the claimant serves a report complying with Subsection (f)(1); and

(C) the court, on motion and hearing, makes the findings required by Subsection (f)(2).

(e) In an action filed on or after the date this chapter becomes law that is transferred to an MDL pretrial court and in which the claimant does not serve on a defendant a report that complies with Section 90.003 or 90.004, the MDL pretrial court shall, on motion by a defendant, dismiss the action under Section 90.007 unless:

(1) the claimant serves a report that complies with Subsection (f)(1); and

(2) the court, on motion and hearing, makes the

findings required by Subsection (f)(2).

(f) In an action in which the claimant seeks remand for trial under Subsection (d)(2) or denial of a motion to dismiss under Subsection (e):

(1) the claimant shall serve on each defendant a report that:

(A) complies with the requirements of Sections 90.003(a)(2)(A), (B), (E), and (F) and 90.003(b) or Sections 90.004(a)(1), (2), and (4) and 90.004(e); and

(B) verifies that:

(i) the physician making the report has a physician-patient relationship with the exposed person;

(ii) pulmonary function testing has been performed on the exposed person and the physician making the report has interpreted the pulmonary function testing;

(iii) the physician making the report has concluded, to a reasonable degree of medical probability, that the exposed person has radiographic, pathologic, or computed tomography evidence establishing bilateral pleural disease or bilateral parenchymal disease caused by exposure to asbestos or silica; and

(iv) the physician has concluded that the exposed person has asbestos-related or silica-related physical impairment comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003 or 90.004; and

(2) the MDL pretrial court shall determine whether:

(A) the report and medical opinions offered by the claimant are reliable and credible;

(B) due to unique or extraordinary physical or medical characteristics of the exposed person, the medical criteria set forth in Sections 90.003 and 90.004 do not adequately assess the exposed person's physical impairment caused by exposure to asbestos or silica; and

(C) the claimant has produced sufficient credible evidence for a finder of fact to reasonably find that the exposed person is physically impaired as the result of exposure to asbestos or silica to a degree comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003 or 90.004.

(g) A court's determination under Subsection (f) shall be made after conducting an evidentiary hearing at which the claimant and any defendant to the action may offer supporting or controverting evidence. The parties shall be permitted a reasonable opportunity to conduct discovery before the evidentiary hearing.

(h) The court shall state its findings under Subsection (f)(2) in writing and shall address in its findings:

(1) the unique or extraordinary physical or medical characteristics of the exposed person that justify the application of this section; and

(2) the reasons the criteria set forth in Sections 90.003 and 90.004 do not adequately assess the exposed person's physical impairment caused by exposure to asbestos or silica.

(i) Any findings made by a court under Subsection (f) are not admissible for any purpose at a trial on the merits.

(j) Subsections (d)(2) and (e)-(i) apply only in exceptional and limited circumstances in which the exposed person does not satisfy the medical criteria of Section 90.003 or 90.004 but can demonstrate meaningful asbestos-related or silica-related physical impairment that satisfies the requirements of Subsection (f). Subsections (d)(2) and (e)-(i) have limited application and shall not be used to negate the requirements of this chapter.

(k) On or before September 1, 2010, each MDL pretrial court having jurisdiction over cases to which this chapter applies shall deliver a report to the governor, lieutenant governor, and the speaker of the house of representatives stating:

(1) the number of cases on the court's multidistrict litigation docket as of August 1, 2010;

(2) the number of cases on the court's multidistrict litigation docket as of August 1, 2010, that do not meet the criteria of Section 90.003 or 90.004, to the extent known;

(3) the court's evaluation of the effectiveness of the medical criteria established by Sections 90.003 and 90.004;

(4) the court's recommendation, if any, as to how medical criteria should be applied to the cases on the court's multidistrict litigation docket as of August 1, 2010; and

(5) any other information regarding the administration of cases in the MDL pretrial courts that the court deems appropriate.

Sec. 90.011. BANKRUPTCY. Nothing in this chapter is

intended to affect the rights of any party in a bankruptcy proceeding or affect the ability of any person to satisfy the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. Section 1101 et seq.).

Sec. 90.012. SUPREME COURT RULEMAKING. The supreme court may promulgate amendments to the Texas Rules of Civil Procedure regarding the joinder of claimants in asbestos-related actions or silica-related actions if the rules are consistent with Section 90.009.

SECTION 3. Subsection (a), Section 16.003, Civil Practice and Remedies Code, is amended to read as follows:

(a) Except as provided by Sections 16.010, 16.0031, and 16.0045, a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

SECTION 4. Subchapter A, Chapter 16, Civil Practice and Remedies Code, is amended by adding Section 16.0031 to read as follows:

Sec. 16.0031. ASBESTOS-RELATED OR SILICA-RELATED INJURIES. (a) In an action for personal injury or death resulting from an asbestos-related injury, as defined by Section 90.001, the cause of action accrues for purposes of Section 16.003 on the earlier of the following dates:

(1) the date of the exposed person's death; or

(2) the date that the claimant serves on a defendant a report complying with Section 90.003 or 90.010(f).

(b) In an action for personal injury or death resulting from a silica-related injury, as defined by Section 90.001, the cause of action accrues for purposes of Section 16.003 on the earlier of the following dates:

(1) the date of the exposed person's death; or

(2) the date that the claimant serves on a defendant a report complying with Section 90.004 or 90.010(f).

SECTION 5. Subsection (a), Section 51.014, Civil Practice and Remedies Code, is amended to read as follows:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of

the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351; [~~or~~]

(10) grants relief sought by a motion under Section 74.351(l)<u>; or</u>

<u>(11) denies a motion to dismiss filed under Section 90.007</u>.

SECTION 6. Subsection (d), Section 22.225, Government Code, is amended to read as follows:

(d) A petition for review is allowed to the supreme court for an appeal from an interlocutory order described by Section 51.014(a)(3)<u>,</u> [~~or~~] (6)<u>, or (11),</u> Civil Practice and Remedies Code.

SECTION 7. Subsection (a), Section 23.101, Government Code, is amended to read as follows:

(a) The trial courts of this state shall regularly and frequently set hearings and trials of pending matters, giving preference to hearings and trials of the following:

(1) temporary injunctions;

(2) criminal actions, with the following actions given preference over other criminal actions:

(A) criminal actions against defendants who are detained in jail pending trial;

(B) criminal actions involving a charge that a person committed an act of family violence, as defined by Section 71.004, Family Code; and

(C) an offense under:

(i) Section 21.11, Penal Code;

(ii) Chapter 22, Penal Code, if the victim of the alleged offense is younger than 17 years of age;

(iii) Section 25.02, Penal Code, if the victim of the alleged offense is younger than 17 years of age; or

(iv) Section 25.06, Penal Code;

(3) election contests and suits under the Election Code;

(4) orders for the protection of the family under Subtitle B, Title 4, Family Code;

(5) appeals of final rulings and decisions of the Texas Workers' Compensation Commission and claims under the Federal Employers' Liability Act and the Jones Act; [~~and~~]

(6) appeals of final orders of the commissioner of the General Land Office under Section 51.3021, Natural Resources Code; and

(7) actions in which the claimant has been diagnosed with malignant mesothelioma, other malignant asbestos-related

cancer, malignant silica-related cancer, or acute silicosis.

SECTION 8. Subchapter E, Chapter 21, Insurance Code, is amended by adding Article 21.53X to read as follows:

Art. 21.53X. PROHIBITED PRACTICES RELATED TO EXPOSURE TO ASBESTOS OR SILICA. (a) In this article, "health benefit plan" means a plan that provides benefits for medical, surgical, or other treatment expenses incurred as a result of a health condition, a mental health condition, an accident, sickness, or substance abuse, including an individual, group, blanket, or franchise insurance policy or insurance agreement, a group hospital service contract, or an individual or group evidence of coverage or similar coverage document. The term includes:

(1) a small employer health benefit plan or a health benefit plan written to provide coverage with a cooperative under Chapter 26 of this code;

(2) a standard health benefit plan offered under Article 3.80 of this code or Section 9N, Texas Health Maintenance Organization Act (Article 20A.09N, Vernon's Texas Insurance Code); and

(3) a health benefit plan offered under Chapter 1551, 1575, 1579, or 1601 of this code.

(b) This article applies to any entity that offers a health benefit plan or an annuity or life insurance policy or contract in this state, including:

(1) a stock or mutual life, health, or accident insurance company;

(2) a group hospital service corporation operating

under Chapter 842 of this code;

(3) a fraternal benefit society operating under Chapter 885 of this code;

(4) a stipulated premium insurance company operating under Chapter 884 of this code;

(5) a Lloyd's plan operating under Chapter 941 of this code;

(6) an exchange operating under Chapter 942 of this code;

(7) a health maintenance organization operating under Chapter 843 of this code;

(8) a multiple employer welfare arrangement that holds a certificate of authority under Chapter 846 of this code;

(9) an approved nonprofit health corporation that holds a certificate of authority under Chapter 844 of this code;

(10) a statewide mutual assessment company operating under Chapter 881 of this code;

(11) a local mutual aid association operating under Chapter 886 of this code; and

(12) a local mutual burial association operating under Chapter 888 of this code.

(c) An entity that offers a health benefit plan or an annuity or life insurance policy or contract may not use the fact that a person has been exposed to asbestos fibers or silica or has filed a claim governed by Chapter 90, Civil Practice and Remedies Code, to reject, deny, limit, cancel, refuse to renew, increase the premiums for, or otherwise adversely affect the person's

eligibility for or coverage under the policy or contract.

SECTION 9. (a) Sections 90.009 and 16.0031, Civil Practice and Remedies Code, as added by this Act, apply to an action commenced on or after the effective date of this Act or pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, has not commenced on or before the effective date of this Act. An action commenced before the effective date of this Act in which trial has commenced on or before the effective date of this Act or in which there has been a final, unappealable disposition by order, judgment, voluntary dismissal, or otherwise is governed by the law applicable to the action immediately before the effective date of this Act, and that law is continued in effect for that purpose. Section 16.0031, Civil Practice and Remedies Code, as added by this Act, shall not operate to revive any claims that are barred by application of the law in effect immediately before the effective date of this Act.

(b) Article 21.53X, Insurance Code, as added by this Act, applies only to a health benefit plan or an annuity or life insurance policy or contract delivered, issued for delivery, or renewed on or after the effective date of this Act. A health benefit plan or an annuity or life insurance policy or contract delivered, issued for delivery, or renewed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 10. There is a direct appeal to the supreme court

from an order, however characterized, of a trial court granting or denying a temporary or otherwise interlocutory injunction or a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of this Act. The direct appeal is an accelerated appeal.

SECTION 11. Section 90.007, Civil Practice and Remedies Code, as added by this Act, allowing the dismissal of claims for failing to serve reports complying with the requirements of Sections 90.003 and 90.004, Civil Practice and Remedies Code, Subsection (d), Section 90.010, Civil Practice and Remedies Code, as added by this Act, setting standards for certain cases to be remanded for trial from MDL pretrial courts, and Section 16.0031, Civil Practice and Remedies Code, as added by this Act, relating to the limitations period for asbestos-related and silica-related causes of action, are not severable, and none of those sections would have been enacted without the others. If any of those provisions are held invalid, all of those provisions are invalid. If any other provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act, and to this end the provisions of this Act, other than Section 90.007, Subsection (d), Section 90.010, and Section 16.0031, Civil Practice and Remedies Code, as added by this Act, are declared severable.

SECTION 12. This Act takes effect September 1, 2005.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 15 passed the Senate on April 27, 2005, by the following vote: Yeas 30, Nays 0; and that the Senate concurred in House amendment on May 16, 2005, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 15 passed the House, with amendment, on May 11, 2005, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor

TRACY CHRISTOPHER
JUDGE, 295TH DISTRICT COURT
301 FANNIN
HOUSTON, TEXAS 77002
(713) 755-5541

August 25, 2005

Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box. 12248
Austin, TX 78711

Re: Subcommittee Report on Proposed Revisions to RJA 13

Dear Justice Hecht:

Judge Davidson and I have a few comments on the Subcommittee Report of 8/19/05 on the Proposed Revisions to RJA 13 and the questions the report poses. We would also like to thank the subcommittee and the court for moving so quickly on this issue.

First, our draft was unclear on the severance issue. This is a very difficult and potentially expensive issue. But we do not believe that requesting and obtaining a severance from the trial court before filing the notices is a workable solution. (Subsection c) The trial court may not act swiftly enough to allow the defendant to file the transfer notices timely. The provision is also unclear as to whether each claimant must have a separate suit set up. What documents (at $1.00 per page) need to be included into the severed case? This could dramatically increase the cost of this litigation. The payment of the costs of this severance is hotly contested between the plaintiffs' bar and the defense bar.

We think it would be better to allow the pretrial court the option to deal with any necessary severances (and costs) in connection with the transference of the files (Subsection g) and the remand of the case back to the trial court (Subsection e).

Second, we do want to include a time limit for filing the transfers and remand motions but have no objection to extending it per the draft. (Question 1) Judge Davidson already imposes a time limit for transfers on existing cases by docket control order. We might want to include an exception "for good cause shown" for late filing of these

transfers to answer any objections. We are trying to avoid last minute transfers on the eve of trial.

We had not really considered Question 2 but would have no objection to allowing other judges to transfer the cases. However the statute uses the term defendant in connection with these transfers.

Third, we would like to add to Subsection f that the pretrial court may allow the trial court to continue to take some actions by written order. Judge Davidson has allowed the Dallas judges to continue to rule on substituted service motions until the case is completely in his court. We think that would be better than a "good cause after consultation" exception. (Question 3)

We think the remainder of the changes and additions made by the subcommittee are excellent.

Thank you for considering our comments.

Tracy Christopher

Mark Davidson

THOMPSON COE
Attorneys and Counselors
Thompson, Coe, Cousins & Irons, L.L.P.
One Riverway
Suite 1600
Houston, Texas 77056
(713) 403-8210 | Fax: (713) 403-8299

Kevin F. Risley
Direct Dial: (713) 403-8295
krisley@thompsoncoe.com
Board Certified in Civil Appellate Law
Texas Board of Legal Specialization

Austin
Dallas
Houston
Saint Paul

August 23, 2005

The Honorable Tracy Christopher
Judge, 295th District Court
301 Fannin
Houston, Texas 77002

Re: Proposed Changes to Rule 13 of the Rules of Judicial Administration

Dear Judge Christopher:

On behalf of 3M Company, I would like to express our appreciation for being able to provide comments on the proposed changes to Rule 13 of the Rules of Judicial Administration that you and Judge Davidson have submitted. We believe that the addition of cases filed before September 1, 2003 to the silica and asbestos MDL proceedings will present some significant case management issues that did not exist prior to the enactment of S.B. 15.

We have had a chance to review both the letter you and Judge Davidson sent to Justice Hecht dated July 25, 2005, and the Report of the Subcommittee on Rules of Judicial Administration ("Subcommittee") dated August 19, 2005. 3M agrees that Rule 13 should be amended to make appropriate provisions for the additional cases eligible for transfer to the MDL, and offer the following comments.

We agree with the Subcommittee that the proposed deadlines for filing a notice of transfer of December 30, 2005 for cases in which no medical report is filed and January 31, 2006 or cases in which a defendant wants to challenge the compliance of a medical report are unreasonably short. We believe that the deadlines should be extended until March 31 and April 30, 2006, respectively, due to the large number of individual claims that will have to be evaluated. As your letter indicates, the best estimate of cases that will become eligible for transfer after November 30, 2005, is probably in excess of 32,000 separate plaintiffs. It is an unrealistic burden to expect a party to review that number of cases to determine whether a medical report has been filed in either the thirty days you have proposed or the sixty days the Subcommittee has recommended. It will obviously take a longer time to review the medical reports that have been filed to determine whether those reports comply with the requirements of the new statute. Even if only 10% of the claimants file medical reports, that still leaves more

than 3000 medical reports that will have to be reviewed. If the number of plaintiffs who file reports goes to 25%, that will mean more than 8,000 medical reports to review. In light of the novelty of the statutory requirements and the detail required in the reports, it will place an extreme burden to try to do a meaningful review of such a large number of reports in only two or three months.

We also agree with the Subcommittee's recommendation that a mandatory "loser pays" rule should not be applied to contested notices of transfer or motions to remand. The reasons for the subcommittee's recommendation – the probable difficulty in determining what constitutes a compliant report and the situation in which one party files a notice on behalf of other parties – are very serious concerns. In addition, at several of the silica MDL hearings the Court has indicated that it will presume that parties act in good faith. A mandatory sanction provision is inconsistent with the presumption of good faith.

As between the alternative provisions for transfer of files, we would prefer proposed paragraph (f), which requires that a limited portion of a case file be transferred, rather than paragraph (3), which would not require an automatic transfer of the file, because we believe that will allow for a more orderly transition of cases between courts.

Finally, on the issue of whether severance of multiple-plaintiff cases, we believe that severance after transfer to the MDL will be more efficient for several reasons. First, requiring severance before transfer will delay the transfer. It will also result in a larger number of files being shipped, which increases the risk that one or more files will be lost or misplaced. In terms of paper flow, therefore, the less fragmentation of a case before it is sent to an MDL, the better chance all necessary papers will arrive securely.

Second, there is the matter of cost. The severance cost will be substantially the same, whether severance occurs before or after transfer. The difference in transfer cost will very greatly, however, depending on when severance occurs. One example is the Cotton case, an asbestos case pending in Jefferson County which has over 1000 plaintiffs. If the case is severed before transfer, the transferring party will have to pay the transfer filing fee, which has been identified at $165 a case. This will result in a total of $165,000 in transfer fees. If the case is not severed until after transfer, the total transfer fee will be $165. Because of the large number of cases involving multiple plaintiffs that are currently on file, requiring severance before transfer of the cases to the MDL will increase the transaction costs by several hundreds of thousands of dollars.

In order to simplify the process and minimize the cost, 3M suggests that in a multiple-plaintiff case in which the entire case is noticed for transfer to an MDL proceeding, either because no plaintiff filed a medical report or any medical report filed is believed to be noncompliant by the transferring party, the case be transferred to the MDL as a single case and the claims can be severed into individual cases after transfer. In a multiple-plaintiff case in which the claims of less than all of the plaintiffs are noticed for MDL transfer, we would recommend a two-step process. First, the party seeking to transfer the cases should request in the

original court that the claims of any plaintiff that is to be transferred to the MDL be severed into a single lawsuit that will be transferred to the MDL. Second, after transfer to the MDL, the claims of individual plaintiffs in the case will be severed into individual suits.

As the Subcommittee noted, the severance/transfer issue "is tough." By minimizing the number of severances that occur before transfer to the MDL, however, there will be a smaller number of files to transfer and the cost to the transferring party will not be unnecessarily increased. This approach should work to the benefit of all parties.

We would appreciate it if you would forward these comments to the Advisory Committee. Should you or the Committee have any questions, we will be happy to respond. 3M thanks you for the opportunity to be heard on this matter.

Sincerely,

Kevin F. Risley

COUNSEL FOR 3M COMPANY

May 7, 2005
20-2 vote p. 13923

TRCP 75a The court reporter or stenographer shall file with the clerk of the court all exhibits which were ~~admitted in evidence or tendered on bill of exception~~ [offered in evidence] during the course of any hearing, proceeding, or trial.

p. 13925

TRCP 75b All filed exhibits ~~admitted in evidence or tendered on bill of exception~~ shall, until returned or otherwise disposed of as authorized by Rule 14b. . . .

p. 13925-26

[no change to obj] but

p. 13926 TRAP 13.1 ~~[illegible]~~ change TRAP 13.1(c) = file all exhibits offered in evidence with....

Historical Notes

p. 13926 TRCP 14b In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered ~~or admitted~~ in evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

page 1

TRAP 13.1(b) (No change necessary to the language)

The official court reporter or court recorder must: . . .

(b) take all exhibits offered in evidence during a proceeding and ensure that they are marked; . . .

~~[redacted]~~ Court Reporters Uniform Format Manual

figure 5: . . . if any, offered in evidence . . .

figure 6: . . . physical ~~exhibit~~ evidence, offered in evidence . . .

The Uniform Format Manual for Texas Court Reporters is amended as follows:

OFFICIAL REPORTER'S RECORD - CERTIFICATION PAGE FOR TEXAS CSRs- figure 5

THE STATE OF TEXAS)
COUNTY OF ^COUNTY NAME)

I, ^REPORTER'S NAME, Official/Deputy Official Court Reporter in and for the ^### District Court of ^County Name County, Texas, do hereby certify that the following contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, ~~admitted, tendered in an offer of proof, or~~ offered in evidence.

* I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND on this, the ____ day of _____, _____.

_____

^REPORTER'S NAME, Texas CSR ^####
Expiration Date: ^##/##/##
Official Court Reporter, ^### District Court
^County Name County, Texas
^Address
^City, ^State ^Zip
^(###) ### - ####

(* To be included only in the final volume of the original of the Reporter's Record)

OFFICIAL REPORTER'S RECORD - CERTIFICATION PAGE FOR EXHIBITS - figure 6

TRIAL COURT CAUSE NO(S). ^##-###, ^##-###

^PLAINTIFF(S),	)	IN THE DISTRICT COURT
	)	
VS.	)	^COUNTY NAME COUNTY, TEXAS
	)	
^DEFENDANT(S)	)	^### JUDICIAL DISTRICT

I, ^Reporter's Name, Official Court Reporter in and for the ^### District Court of ^County Name County, Texas, do hereby certify that the following exhibits constitute true and complete duplicates of the original exhibits, excluding physical evidence, admitted, ~~tendered in an offer of proof, or~~ offered in evidence during the ^Proceeding Name in the above-entitled and numbered cause as set out herein before the Honorable ^Judge's Name, Judge of the ^### District Court of ^County Name County, Texas, and a jury trial, beginning ^Month ^Date, ^Year.

* I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND on this, the ____ day of _____, _____.

_____

^REPORTER'S NAME, Texas CSR ^####
Expiration Date: ^##/##/##
Official Court Reporter, ^### District Court
^County Name County, Texas
^Address
^City, ^State ^Zip
^(###) ### - ####

(* To be included only in the final volume of the original of the Reporter's Record)

DALE WAINWRIGHT
JUSTICE
THE SUPREME COURT OF TEXAS

P.O. BOX 12248
AUSTIN, TEXAS 78711
(512) 463-1332 P
(512) 936-2308 F

November 8, 2004

Mr. Charles L. Babcock
Jackson Walker LLP
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Exhibits in Court Reporter's Records

Dear Chip:

The Court would like the Advisory Committee to study the attached memorandum from Frank Montalvo, dated April 13, 2002. Judge Montalvo, who formerly chaired the Court Reporter's Certification Board, recommended that the Uniform Format Manual for Court Reporters, as well as any related court rules, be amended to clarify that any exhibit admitted, tendered in an offer of proof, or offered in evidence should be a part of the court reporter's record. In response to this recommendation, Lisa has drafted proposed revisions to several rules and court orders, including TRCPs 75a & 75b, the order issued under TRCP 14b, and TRAP 13.1. The Court would like this added to the agenda for discussion in the Nov. 12 SCAC meeting, if possible.

As always, thank you for all the hard work you do for the Court.

Sincerely,

Dale Wainwright

J. Dale Wainwright

cc: Court
Lisa Hobbs, Rules Attorney

COURT REPORTERS
CERTIFICATION BOARD

M E M O R A N D U M

To: Thomas R. Phillips, Chief Justice
Justices – Supreme Court

From: Frank Montalvo
District Judge, 288th District Court
Chairman, Court Reporters Certification Board

Subject: **PROPOSED MISCELLANEOUS ORDER**
Request Approval of Revised Uniform Format Manual
Effective September 1, 2002

Date: August 13, 2002

Dear Chief Justice Phillips and Justices of the Supreme Court:

The Board requests consideration by the Supreme Court of the following proposed *Miscellaneous Order:*

Approval of Revisions to the Uniform Format Manual for Texas Court Reporters

---

The current manual was first adopted for use by the Supreme Court in 1999. The Board approved revisions to the manual at the Board meeting on July 27, 2002, and is now submitting a draft for the Court's approval.

There is one area of confusion regarding **exhibits** that the Board respectfully requests a determination be made by the Supreme Court as to what language is applicable in accordance with Texas Statutes and Rules.

There appears to be a conflict between Rules 75a of the Texas Rules of Civil Procedure and Rule 14b. 75a says, "The court reporter or stenographer shall file with the clerk of the court all exhibits which were **admitted or tendered** on a bill of exception during the course of any hearing, proceeding, or trial."

In the Supreme Court's Order relating to retention and disposition of exhibits, it says, "In compliance with the provision of Rule 14B, the Supreme Court hereby directs that exhibits **offered or admitted** into evidence shall be retained and disposed of by the clerk of the court."

Post Office Box 13131, Austin TX 78711-3131
(512) 463-1630, ext. 0 FAX (512) 463-1117
Email: info@crcb.state.tx.us
Website: www.crcb.state.tx..us

Under the Government Code Section 52.045(b)(1), it states, "the evidence **offered** in the case."

Provided in the draft copy are three figure 5 pages (certification page for Texas CSRs) and three figure 6 pages (certification page for exhibits), on which the language regarding exhibits is presented three ways, " **admitted or tendered"** OR "**offered"** OR my recommendation, "**admitted, tendered in an offer of proof or offered into evidence"**.

Examples are as follows:

Figure 5, example 1: "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the **exhibits,** if any, **admitted or tendered** on an offer of proof."

OR

Figure 5, example 2: "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the **exhibits,** if any, **offered** into evidence."

OR

Figure 5, example 3 (my recommendation): "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the **exhibits,** if any, **admitted, tendered in an offer of proof or offered** into evidence."

Figure 6, example 1: "...do hereby certify that the foregoing exhibits constitute true and complete duplicates of the original **exhibits,** excluding physical evidence, **admitted or tendered** on an offer of proof into evidence..."

OR

Figure 6, example 2: "...do hereby certify that the foregoing exhibits constitute true and complete duplicates of the original **exhibits,** excluding physical evidence, **offered** into evidence..."

OR

Figure 6, example 3 (my recommendation): "...do hereby certify that the foregoing exhibits constitute true and complete duplicates of the original **exhibits,** excluding physical evidence, **admitted, tendered in an offer of proof or offered** into evidence..."

Reporters across the state continue to debate the issue as to whether they are required to retain and include in the Reporter's Record on appeal all exhibits **offered** or only those **admitted** into evidence. The Courts' decision on which form to include in the Uniform Format Manual will clarify the issue. I would respectfully suggest the appropriate language should be, "...**admitted, tendered in an offer of proof or offered** into evidence..."

Enclosed is a draft of the revised Uniform Format Manual and a proposed order, for your convenience.

If we may be of further assistance, please do not hesitate to contact Michele Henricks at:
Phone: (512)463-1747
Email: **Michele.henricks@crcb.state.tx.us**

Thank you very much for your consideration in this matter.

Sincerely Yours,

Frank Montalvo
Chairman, CRCB

FM/mlh

Enclosure(s)

PROPOSED AMENDMENTS RELATING TO EXHIBITS TO INCLUDE IN REPORTER'S RECORD

November 11, 2004

PROPOSED AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

Rule 75a Filing Exhibits: Court Reporter to File with Clerk

The court reporter or stenographer shall file with the clerk of the court all exhibits which were admitted, tendered in an offer of proof, or offered in evidence ~~or tendered on bill of exception~~ during the course of any hearing, proceeding, or trial.

Rule 75b Filed Exhibits: Withdrawal

All filed exhibits admitted, ~~in evidence or~~ tendered in an offer of proof, or offered in evidence ~~on bill of exception~~ shall, until returned or otherwise disposed of as authorized by Rule 14b, remain at all times in the clerk's office or in the court or in the custody of the clerk except as follows:

(a) The court may be order entered on the minutes allow a filed exhibit to be withdrawn by any party only upon such party's leaving on file a certified, photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

(b) The court reporter or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted, tendered in an offer of proof, or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter or stenographer to transmit such original exhibits to an appellate court under the provisions of Rule 379 or to otherwise discharge the duties imposed by law upon said court reporter or stenographer.

PROPOSED AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

13.1. Duties of Court Reporters and Recorders

The official court reporter or court recorder must:

***

(b) take all exhibits admitted, tendered in an offer of proof, or offered in evidence during a proceeding and ensure that they are marked;

***

The Order Relating to Retention and Disposition of Exhibits dated July 15, 1987, effective January 1, 1988, is amended as follows:

Supreme Court Order Relating to Retention and Disposition of Exhibits

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits ~~offered or~~ admitted, tendered in an offer of proof, or offered in ~~into~~ evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

[This order shall apply only to . . .]

The Uniform Format Manual for Texas Court Reporters is amended as follows:

OFFICIAL REPORTER'S RECORD - CERTIFICATION PAGE FOR TEXAS CSRs- figure 5

THE STATE OF TEXAS)
COUNTY OF ^COUNTY NAME)

I, ^REPORTER'S NAME, Official/Deputy Official Court Reporter in and for the ^### District Court of ^County Name County, Texas, do hereby certify that the following contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted, tendered in an offer of proof, or offered in evidence.

* I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND on this, the ____ day of _____, _____.

_____

^REPORTER'S NAME, Texas CSR ^####
Expiration Date: ^##/##/##
Official Court Reporter, ^### District Court
^County Name County, Texas
^Address
^City, ^State ^Zip
^(###) ### - ####

(* To be included only in the final volume of the original of the Reporter's Record)

TRIAL COURT CAUSE NO(S). ^##-###, ^##-###

^PLAINTIFF(S),	)	IN THE DISTRICT COURT
	)	
VS.	)	^COUNTY NAME COUNTY, TEXAS
	)	
^DEFENDANT(S)	)	^### JUDICIAL DISTRICT

I, ^Reporter's Name, Official Court Reporter in and for the ^### District Court of ^County Name County, Texas, do hereby certify that the following exhibits constitute true and complete duplicates of the original exhibits, excluding physical evidence, admitted, tendered in an offer of proof, or offered in evidence during the ^Proceeding Name in the above-entitled and numbered cause as set out herein before the Honorable ^Judge's Name, Judge of the ^### District Court of ^County Name County, Texas, and a jury trial, beginning ^Month ^Date, ^Year.

* I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND on this, the ____ day of _____, _____.

_____

^REPORTER'S NAME, Texas CSR ^####
Expiration Date: ^##/##/##
Official Court Reporter, ^### District Court
^County Name County, Texas
^Address
^City, ^State ^Zip
^(###) ### - ####

(* To be included only in the final volume of the original of the Reporter's Record)

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FEB 3 2005

Certified Shorthand Reporters

UNITED AMERICAN REPORTING SERVICES, INC.

David B. Jackson
CSR, RDR
d.b.jackson@charter.net

2725 Turtle Creek Boulevard
Suite 200
Dallas, Texas 75219

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Fax: (214) 855-1478
1-800-445-7718

Mr. Charles L. Babcock
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, Texas 77010

Re: Exhibits in Court Reporter's Records

Dear Mr. Babcock:

Pursuant to our discussion at the Supreme Court Advisory Committee Meeting on January 8th, 2005, I am by this letter attempting to address the issues raised in Judge Montalvo's Memorandum to the Supreme Court dated August 13, 2002 and Justice Wainwright's transmittal of that memorandum on November 8, 2004.

This has been a confusing issue for court reporters, and in my experience substituting for various courts around the Dallas area I've seen it handled pursuant to both interpretations of the Rules.

The court reporter's first concern is that exhibits that have not been admitted be kept separate from exhibits that go in the jury room. That's been the rationale I've most often heard for giving back any exhibit that has not been admitted or tendered on a bill of exception to the attorney who offered the exhibit before any exhibits go to the jury room.

Of course, the second rationale goes to the issue our committee discussed at length on Friday the 7th. Exhibits that have not been admitted nor properly tendered on a bill of exception are exhibits that are more likely to unnecessarily take up space in the already overcrowded district clerk's office.

Dealing with this from a practical standpoint, I would suggest that the wording in Rules 75a of the Texas Rules of Civil Procedure and Rule 14b in the Supreme Court's Order be consistent to reflect, "The court reporter or stenographer shall file with the clerk of the court all exhibits which were admitted or tendered on a bill of exception during the course of any hearing, proceeding, or trial."

However, if there is the possibility that exhibits that have not been properly tendered on a bill of exception could result in grounds for a successful appeal, I think Judge Montalvo's recommendation of consistent language in 75a and 14b of "admitted, tendered in an offer of proof or offered" would be the appropriate way to clear up the ambiguity.

So I'm assuming the debate will be the extent to which those exhibits would have an impact on the appeal and the related chain of custody issues versus the increased burden on the court reporter and the clerk to safeguard those exhibits.

Thank you for allowing me to address this issue.

Respectfully,

David B. Jackson, CSR #672, RDR

-----Original Message-----
From: Lisa Hobbs
Sent: Thursday, April 28, 2005 3:33 PM
To: SCAC Members
Subject: SCAC: Subcommittee Report on TRCP 223

Here is a report from Paula Sweeney on Texas Rule of Civil Procedure 223:

Pasted below is the most current work product of our subcommittee on the shuffle rule for discussion by the full committee, as I think we would benefit from full committee input at this stage. It is not a recommendation, but our work in progress, which is approaching consensus. I also expect that there will be a request from Judge Peeples that the committee vote to abolish the rule in its entirety.

MOST RECENT SHUFFLE RULE PROPOSAL:

"After assignment to a particular court, and prior to beginning of the voir dire examination, any party or attorney may request a jury shuffle. The judge or clerk will shuffle the names of all members of the assigned jury panel in the case by computer, manually, or by other process of random selection. The names shall then be transcribed on the jury list from which the jury is to be selected to try such case, in the order randomly selected. There shall be only one shuffle in each case."

This item will not be posted on the website before the meeting next week, but I will bring hard copies to the meeting.

JUDGE TRACY CHRISTOPHER
295TH CIVIL DISTRICT COURT
301 FANNIN
HOUSTON, TEXAS 77002
(713) 755-5541

COP

April 27, 2004

Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711-2248

Re: Rule 223 of the Texas Rules of Civil Procedure

Dear Justice Hecht:

We currently have our individual juror lists in Harris County printed out by computer. With a push of a button, our computer will "shuffle" the names on the list and reprint a new jury list. Unfortunately such a shuffle does not comply with a literal reading of Rule 223.

We are also in the process in Harris County of scanning our juror information cards into a computer. Once that is done, we would also be able to shuffle the jury list and then rearrange the juror information cards in the computer for quick reprinting.

As you know, an old fashioned shuffle can take 45 minutes to an hour to complete. Our jurors wait patiently (or not) for the process to be completed. The computerized system will allow a shuffle to be completed much more quickly.

The judges in Harris County would like to request a change to the language of Rule 223 to allow for the computer shuffle. Thank you for considering this.

Tracy Christopher

LEVI J. BENTON
JUDGE, 215TH DISTRICT COURT
COURTHOUSE
HOUSTON, TEXAS 77002

TELEPHONE
(713) 755-6382

February 21, 2005

The Honorable Nathan L. Hecht
Associate Justice
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711-2248

Re: Jury Shuffle under ***TRCP*** 223

Dear Justice Hecht:

I understand that the Supreme Court Advisory Committee is scheduled to consider proposed changes to rule 223, ***Texas Rules of Civil Procedure*** when the committee meets on March 4-5, 2005. As you know, this rule gives litigants a right to shuffle the venire panel in civil matters prior to voir dire. This letter addresses why I urge the Committee to recommend abolishing the right to shuffle. These are my personal opinions. I am not speaking on behalf of the Harris County judiciary.

Obviously, litigants and all interested persons want a process that has integrity and fairness. In any given case, one litigant or the other may not like the distribution of the venire panel. The current rule permitting a shuffle after litigants have the opportunity to see the panel and/or read the demographic information about them constitutes an attack on the integrity of the entire process by which jurors are summoned. This redundant shuffle should not be necessary if we indeed have jury statutes that produce lawfully sanctioned juries. My point stated differently is that:

1. We presume (as we must) that the jury selection statutes are constitutional;
2. We presume that the state and county agents charged with implementing and operating under the jury statutes on a daily basis do so in a lawful manner; and
3. The current process of randomly selecting a jury satisfies the constitutional guarantee that every litigant's claim will be decided by a jury of his or her peers. If we are not satisfied that the current system of jury selection meets all constitutional requirements, then we should address those root problems rather than continue to permit a redundant shuffle that does not address problem 1 or 2 above if they are problems and certainly does not cure those problems.

The Honorable Nathan L. Hecht
Associate Justice
Texas Supreme Court

Whether requested by a civil plaintiff or a defendant, a jury shuffle has enormous potential to discredit the work judges, lawyers and others do to bring a sense of fairness to the administration of justice. This potential blight raises its ugly head when the professionals or the relative low income earners or lesser educated are shuffled from back to front or vice versa and one of the litigants leaves the courthouse wondering whether it was the maneuvering of what was purportedly a random draw of citizens in a venire panel or whether it was the evidence admitted during the course of the trial that was the impetus for the result reached by the jury.

When we deal with the jury shuffle or any jury matter our focus should be on the petit jury statutory scheme and the integrity of the processes by which the statutory scheme is implemented and executed on a daily basis. (I intend to express my observations about our petit jury statutory scheme in a letter to Chief Justice Jefferson in the next few days.) Our focus should not be on contemporizing this blight on Texas law. We will not have served our state well if we but modernize the shuffle rule to bring it into the internet age. Instead, we must kill this germ which infects Texas law for good and devote ourselves to the enactment jury rules and statutes that produce juries that reflect cross sections of all communities in the trial court's venue. Since becoming the Judge of the 215th District Court, I have had a few jury shuffles.[1] Though no explanation is demanded or required, the reasons often expressed for the shuffle relate to a desire to alter the educational and/or vocational distribution of the venire panel. The problem with those reasons is that many Texans believe there to be a correlation between race, education and vocation. Therefore, many perceive any request to shuffle as being motivated by racial or other invidious reasons. This perception is not good for the wonderful civil justice system we are honored to participate in. This perception is an unnecessary distraction to all that is good about the jury system.

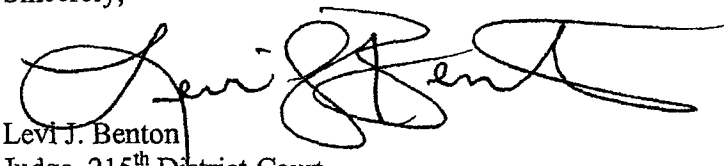
This letter would not be complete if I did not also address the shuffle in criminal proceedings. Quite obviously, I recognize that we in Texas have two courts of last resort. The Supreme Court has been the leader in developments in Texas law. I profoundly hope the Court will lead the Legislature and the Court of Criminal Appeals in bringing about long needed change in this area.[2] Jury shuffles and a claimed violation of equal protection rights are almost inseparable twins whenever a reviewing court addresses the jury shuffle in criminal cases. This has been the case approximately six times since 1995 according to my very brief and limited research. Quite often, a person whose skin has been affectionately kissed by the sun, like mine, raises the complaint. Whether the reviewing court found an equal protection violation or not was not my concern. Rather, I concerned myself with the fact that the equal protection argument was a consistent theme raised whenever a complaint on appeal related to a shuffle. This argument distracts from and devalues Texas jurisprudence. It also causes distrust of our civil and criminal justice systems. It leads to the wrong impression regarding our jury selection system. The only remedy for this bad impression is to rid ourselves of the instrument which causes it. If the

[1] I understand that we in Harris County do not maintain statistics on the number of jury shuffles.
[2] I have forwarded a copy of this letter to Judge Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals.

Supreme Court will lead by abandoning the rule in civil proceedings, perhaps we can cause the Legislature to critically look at the problems and distractions caused by the rule in criminal proceedings.[3]

I urge the Advisory Committee to send the Supreme Court a recommendation to abolish the right to a shuffle. If the Advisory Committee and/or the Court are not prepared to go that far, I hope that it will be abolished in counties that use electronic or mechanical methods of selection of persons for jury service pursuant to sec. 62.011, ***Texas Govt. Code***. If the rule is not abolished, I urge the Court to include equal protection provisions in the rule. Finally, I regret that I have other obligations that will preclude me from attending the March 4-5 meeting. Please bring my concerns and observations to the attention of the Committee. Feel free to call me if you have any questions.

Sincerely,



Levi J. Benton
Judge, 215th District Court

cc: The Honorable Wallace B. Jefferson
The Honorable Sharon Keller
✓Mr. Charles Babcock, Chairman, Supreme Court Rules Advisory Committee

[3] I am unaware of any appellate opinion addressing alleged equal protection violations arising from a jury shuffle in a civil matter. I have heard of such complaints being made in the trial courts. The absence of appellate complaints is not a good reason to continue to sanction this practice.

WHITEHURST, HARKNESS,
OZMUN & BREES

A PROFESSIONAL CORPORATION
ATTORNEYS & COUNSELORS AT LAW

1122 COLORADO STREET, 24TH FLOOR
AUSTIN, TEXAS 78701

MAILING ADDRESS:
P.O. BOX 1802
AUSTIN, TEXAS 78767

TELEPHONE: (512) 476-4346
TELEFAX: (512) 476-0018

WILLIAM O. WHITEHURST, JR.*
THOMAS R. HARKNESS*
SCOTT OZMUN*+
EUGENE W. (CHIP) BREES, II*
CYNTHIA K. STEWART
SALLY STARNES METCALFE
MICHELLE M. CHENG
SYLVIA H. IMHOFF
LAURIE M. HIGGINBOTHAM
JEFF EDWARDS

BOARD CERTIFIED-PERSONAL INJURY TRIAL LAW*
BOARD CERTIFIED - CIVIL APPELLATE LAW+
TEXAS BOARD OF LEGAL SPECIALIZATION

MAY 31, 2005

Mr. Chip Babcock
Supreme Court Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston TX 77010

Dear Chip:

It has come to my attention that the Supreme Court Advisory Committee recently considered a proposal to do away with the right to a jury shuffle. I was glad to see that the Committee voted not to make such a recommendation. I am writing in support of the Committee's decision. I understand that a Subcommittee is now studying this issue. Quite frankly, I believe that this is really a remedy in search of a problem.

I have been trying lawsuits for almost 20 years, and have only requested a shuffle on a few occasions. In fact, I can only recall 2 such instances. One case involved a medical liability case and the panel was overrepresented with healthcare professionals, and they were overrepresented in the first half of the panel. I cannot recall the specifics of the other occasion, however, I have every reason to suspect that it was for similar reasons. I can also recall an instance when the defense requested a shuffle in a case in which I was involved.

I do not believe that my experiences are unique. I do not believe there is any evidence that the jury shuffle is abused or overused. I believe it is an effective tool for litigants on both sides of the docket when, due to the luck of the draw, one gets a panel that appears to be "overrepresented" to one extent or the other.

Should there be *Batson* concerns with regards to the use of the shuffle, the rule can simply be amended to preclude the use of the shuffle for improper reasons.

Our current system acknowledges that our jury pools come with inherent biases and backgrounds that may make them unfit to serve as jurors in a particular case. That is why we are allowed to voir dire the jury, why we are allowed to challenge for cause, and why we are allowed to exercise peremptory challenges. All of these tools are available to litigants to help end up with a fair and impartial jury. The jury shuffle is simply one more tool for litigants to use in ensuring that justice is served.

I strongly encourage you to not take that tool away, especially in the absence of any evidence of a problem.

I would be happy to visit with you or other members of the committee in more detail about my experience if you so desire.

Sincerely,

Scott Ozmun

SAO/jc

Cc: Honorable Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin TX 78711-2248

Paula F. Sweeney
Howie & Sweeney, L.L.P.
2911 Turtle Creek Blvd., 14th Floor
Dallas TX 75219

AN ACT

relating to the filing of an affidavit of inability to pay in appealing a small claims court judgment.

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

SECTION 1. Section 28.052, Government Code, is amended by adding Subsection (c) to read as follows:

(c) A person determined by the court to be indigent may, in making an appeal under this section, file an affidavit of inability to pay as provided for in Rule 145, Texas Rules of Civil Procedure.

SECTION 2. This Act takes effect September 1, 2005.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1425 passed the Senate on April 28, 2005, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 1425 passed the House on May 20, 2005, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor

-----Original Message-----
From: Sales, James [mailto:jsales@fulbright.com]
Sent: Monday, July 18, 2005 10:55 AM
To: Harriet O'Neill
Cc: ejones@texasatj.org
Subject: July 14 TATJC meeting issues

Dear Justice O'Neill,

I met with all of the Texas Equal Access to Justice Foundation grantees in Houston on Wednesday, July 14, 2005. It was an excellent meeting that lasted most of the day. During the course of the multi-purpose meeting, I provided an overview to all of the Foundation grantees of the strategic plan of the Texas Access to Justice Commission as well as a status report on the various initiatives that comprise the strategic plan. After the extensive briefing, I requested the comments, input and suggestions of the foundation grantees on the initiatives of the commission as well as their input on problems they were confronting and that the commission might eventually address.

Several of the legal service providers - grantees raised what they suggest is a particularly serious problem for them that perhaps the Texas Supreme Court might consider. Apparently, a number of judges in numerous counties routinely, and without request from the other party in the case, require hearings on affidavits of inability to pay costs, even when the individual filing the affidavit is represented by a legal services provider within a recognized provider program. This practice apparently consumes an incalculable amount of valuable time and resources of the legal service attorneys and constitutes a barrier for these individuals to access the court system. Both Emily Jones and I perceive from the ensuing discussion that this problem is fairly widespread and creates a significant obstacle to the delivery of legal services.

Perhaps the Supreme Court might consider asking its rules committee to review and consider revising Rule 145 to more clearly define what constitutes "indigency" and articulate standards that would establish a prima facie case of indigency. For example, an individual be defined as an indigent for purposes of Rule 145 if such a person were a client of an identified and established Texas Equal Access to Justice Foundation grantee, or, perhaps the individual was presently receiving public benefits under an established government program. Of course, in light of the description of the problems which the legal service providers are confronting, even such clarification of what appears to be a vague rule might not fully resolve the problem. Perhaps it might be necessary for the court to consider issuing a comment to the rule that essentially informs the courts that, absent evidence overcoming the prima facie evidence of indigency, a routine hearing requiring evidence on such matters, would not be in compliance with the rule.

In any event, I thought the matter significant enough to bring to your attention. Whether the matter warrants presentation and consideration by the court is obviously a matter within your judgment and discretion.

Jim Sales

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 148

—taken from the TRCP RECODIFICATION PROJECT (December 1997)—

Rule 148. Affidavit on Indigency

(a) *Affidavit.* In lieu of paying or giving security for costs of an original action, a party who is unable to afford costs must file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Upon the filing of the affidavit, the clerk must docket the action, issue citation and provide other customary services as are provided any party.

(b) *Contents of Affidavit.* The affidavit must contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash, or checking account, dependents, debts, and monthly expenses. The affidavit must contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit must be sworn before a notary public or other officer authorized to administer oaths. If the party is represented by an attorney contingency, due to the party's indigency, the attorney may file a statement to that effect to assist the court in understanding the financial condition of the party.

(c) *IOLTA Certificate.* If the party is represented by an attorney who is providing free legal services, without contingency, due to the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate. The certificate must confirm that the party has been screened for income certificate. The certificate must confirm that the party has been screened for income eligibility under the IOLTA income guidelines by the IOLTA-funded program and the program represented that it has screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

(d) *Contest.* The defendant or the clerk may contest an affidavit that is not accompanied by an IOLTA certificate by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court finds at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement based on indigency) is able to afford costs, the party must pay the costs of the action. Reasons for such a finding must be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party must pay the costs of the action. If the court finds that another party to the suit can pay the costs of the action, the other party must pay the costs of the action.

(e) *Attorney's Fees and Costs.* Nothing herein will preclude any existing right to recover attorney's fees, expenses or costs from any other party.

[Current Rule: Tex. R. Civ. P. 145]

claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

(b) This section does not apply to pharmacists.

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

[Sections 74.005 to 74.050 reserved for expansion]

SUBCHAPTER B. NOTICE AND PLEADINGS

§ 74.051. Notice

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052.

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and Section 74.052 and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this chapter have been met.

(c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

(d) All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization in the form required by Section 74.052 executed by the claimant herein shall be considered compliance by the claimant with this subsection.

(e) For the purposes of this section, and notwithstanding Chapter 159, Occupations Code, or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization in the form required by Section 74.052 signed by a parent, spouse, or adult child of the deceased or incompetent person.

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

§ 74.052. Authorization Form for Release of Protected Health Information

(a) Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

(b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.

(c) The medical authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" (45 C.F.R. Parts 160 and 164).

AUTHORIZATION FORM FOR RELEASE OF PROTECTED HEALTH INFORMATION

A. I, _____ (name of patient or authorized representative), hereby authorize _____ (name of physician or other health care provider to whom the notice of health care claim is directed) to obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. To facilitate the investigation and evaluation of the health care claim described in the accompanying Notice of Health Care Claim; or

2. Defense of any litigation arising out of the claim made the basis of the accompanying Notice of Health Care Claim.

B. The health information to be obtained, used, or disclosed extends to and includes the verbal as well as the written and is specifically described as follows:

1. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated _____ (patient) in connection with the injuries alleged to have been sustained in connection with the claim asserted in the accompanying Notice of Health Care Claim. (Here list the name and current address of all treating physicians or health care providers). This authorization shall extend to any additional physicians or health care providers that may in the future evaluate, examine, or treat _____ (patient) for injuries alleged in connection with the claim made the basis of the attached Notice of Health Care Claim;

2. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated _____ (patient) during a period commencing five years prior to the incident made the basis of the accompanying Notice of Health Care Claim. (Here list the name and current address of such physicians or health care providers, if applicable.)

C. Excluded Health Information—the following constitutes a list of physicians or health care providers possessing health care information concerning _____ (patient) to which this authorization does not apply because I contend that such health care information is not relevant to the damages being claimed or to the physical, mental, or emotional condition of _____ (patient) arising out of the claim made the basis of the accompanying Notice of Health Care Claim. (Here state "none' ' or list the name of each physician or health care provider to whom this authorization does not extend and the

inclusive dates of examination, evaluation, or treatment to be withheld from disclosure.)

D. The persons or class of persons to whom the health information of _____ (patient) will be disclosed or who will make use of said information are:

1. Any and all physicians or health care providers providing care or treatment to _____ (patient);

2. Any liability insurance entity providing liability insurance coverage or defense to any physician or health care provider to whom Notice of Health Care Claim has been given with regard to the care and treatment of _____ (patient);

3. Any consulting or testifying experts employed by or on behalf of _____ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

4. Any attorneys (including secretarial, clerical, or paralegal staff) employed by or on behalf of _____ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of _____ (patient).

E. This authorization shall expire upon resolution of the claim asserted or at the conclusion of any litigation instituted in connection with the subject matter of the Notice of Health Care Claim accompanying this authorization, whichever occurs sooner.

F. I understand that, without exception, I have the right to revoke this authorization in writing. I further understand the consequence of any such revocation as set out in Section 74.052, Civil Practice and Remedies Code.

G. I understand that the signing of this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

H. I understand that information used or disclosed pursuant to this authorization may be subject to redisclosure by the recipient and may no longer be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative

_____

Date

_____

Name of Patient/Representative

_____

Description of Representative's Authority

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

§ 74.053. Pleadings not to State Damage Amount; Special Exception; Exclusion From Section

Pleadings in a suit based on a health care liability claim shall not specify an amount of money claimed as damages. The defendant may file a special exception to the pleadings on the ground the suit is not within the court's jurisdiction, in which event the plaintiff shall inform the court and defendant in writing of the total dollar amount claimed. This section does not prevent a party from mentioning the total dollar amount claimed in examining prospective jurors on voir dire or in argument to the court or jury.

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

[Sections 74.054 to 74.100 reserved for expansion]

SUBCHAPTER C. INFORMED CONSENT

§ 74.101. Theory of Recovery

In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

§ 74.102. Texas Medical Disclosure Panel

(a) The Texas Medical Disclosure Panel is created to determine which risks and hazards related to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients or persons authorized to consent for their patients and to establish the general form and substance of such disclosure.

(b) The disclosure panel established herein is administratively attached to the Texas Department of Health. The Texas Department of Health, at the request of the disclosure panel, shall provide administrative assistance to the panel; and the Texas Department of Health and the disclosure panel shall coordinate administrative responsibilities in order to avoid unnecessary duplication of facilities and services. The Texas Department of Health, at the request of the panel, shall submit the panel's budget request to the legislature. The panel shall be subject, except where inconsistent, to the rules and procedures of the Texas Department of Health; however, the duties and responsibilities of the panel as set forth in this chapter shall be exercised solely by the disclosure

THOMPSON & KNIGHT LLP

ATTORNEYS AND COUNSELORS

1700 PACIFIC AVENUE • SUITE 3300
DALLAS, TEXAS 75201-4693
(214) 969-1700
FAX (214) 969-1751
www.tklaw.com

AUSTIN
DALLAS
FORT WORTH
HOUSTON
NEW YORK

ALGIERS
MEXICO CITY
MONTERREY
PARIS
RIO DE JANEIRO

Direct Dial: (214) 969-1229
E-Mail: John.Martin@tklaw.com

June 7, 2005

Mr. Gilbert I. Low
Orgain, Bell & Tucker LLP
470 Orleans Street, 4th Floor
Beaumont, Texas 77706

Re: Administration of Rules of Evidence Committee
Proposed Rule 514

Dear Buddy:

I have reviewed Jack London's letter to you dated May 26, 2005. The Administration of the Rules of Evidence Committee's suggested revisions to the SCAC draft are acceptable to me if the SCAC decides to adopt a rule addressing this topic, with one exception. I think someone might try to argue that proposed Rule 514(b)(3) means that other attorney-client communications besides those in TRE 503(b)(1)(C) are not subject to the exception. Therefore, I think Rule 514(b)(3) should state "Communications pursuant to TRE 503(b)(1)" instead of "Communications pursuant to TRE 503(b)(1)(C)." I have changed the draft accordingly.

I still am not convinced that a rule of evidence on this topic is necessary or advisable. However, if the Supreme Court decides to adopt a rule, I think the SCAC Evidence Subcommittee's draft containing the AREC suggestions (as modified above) is preferable to the AREC version.

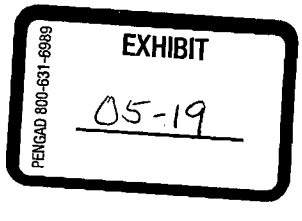
To facilitate discussion of these issues, I have attached a draft labeled "SCAC Evidence Subcommittee Draft Containing AREC Suggestions - June 7, 2005," and a copy of what I understand to be the AREC version.

Sincerely,

John H. Martin

JHM/ckh
Enclosure

cc: Mr. Jack London



SCAC Evidence Subcommittee Draft Containing
AREC Suggestions – June 7, 2005

TEXAS RULES OF EVIDENCE – RULE 514

(a) In a civil proceeding, a party or party's representative shall not obtain a person's protected health information from or communicate about that information with that person's health care provider outside of formal discovery except:

(1) By written authorization of the person or the person's representative; or

(2) Pursuant to a court order that specifies the scope and subject matters that may be disclosed and that states the health care provider is under no obligation to discuss those matters outside of formal discovery. A copy of the order must be provided to the health care provider before any protected health information is disclosed.

(b) Exceptions. This rule does not preclude a party or party's representative from obtaining a person's protected health information from or communicating about that information with a person's health care provider outside of formal discovery under circumstances where the communication would be privileged or disclosure would otherwise be permitted by state or federal law. This exception includes, but is not limited to:

(1) Communications among health care providers to carry out treatment, payment, and health care operations activities.

(2) Information protected by the peer review privilege, hospital committee privilege, and other privileges applicable to communications by health care providers.

(3) Communications pursuant to TRE 503(b)(1).

(c) Sanctions. A person who obtains protected health information in violation of this rule may be subject to sanctions as provided in Texas Rule of Civil Procedure 215.2.

Comment to 2004 change: This comment is intended to inform the construction and application of this rule. The U.S. Congress enacted the Health Insurance Portability & Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (2003) on August 21, 1996. Pursuant to HIPAA, the U.S. Department of Health & Human Services developed the Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule"), 45 C.F.R. Parts 160 and 164, to define administrative steps, policies, and procedures to safeguard individuals' personal private health information (known as "protected health information" or "PHI"). The purpose of this rule is to assure that parties and their representatives act consistently with the requirements of HIPAA and the Privacy Rule. It is not intended to make access to health information more restrictive than permitted by HIPAA and the Privacy Rule.

AREC VERSION

Version Control: November 19, 2004

Texas Rules of Evidence Rule 514

In a civil proceeding, a party or party's representative shall not obtain a patient's protected health information from or communicate about such information with that patient's health care provider outside of formal discovery except (1) by written authorization of the patient or the patient's representative, or (2) pursuant to a court order that specifies the scope and subject matters that may be disclosed and that states that the health care provider is under no obligation to discuss such matters outside of formal discovery. A copy of such order must be provided to the health care provider prior to any such communication or disclosure. A party who obtains evidence in violation of this rule may be subject to sanctions as provided in Rule of Civil Procedure 215.2. However, this rule does not prohibit a party, party's representative, or health care provider from communicating protected health information to another person or party where such communication would be privileged.

November 19, 2004 Action of the Committee: Approved and recommended to SCAC and Supreme Court as written

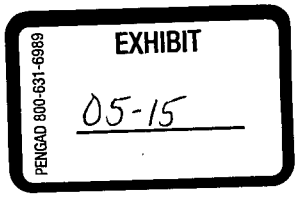
MEMORANDUM

To: Members, Texas Supreme Court Advisory Committee
cc: Justice Nathan L. Hecht and Lisa Hobbs
Re: August meeting
Date: August 9, 2005

Enclosed please consider the following matters that should be reviewed before the August meeting:

1. *Civil Cases - [Accelerated] Appeal As of Right.* A revised draft of suggested changes to TRAP 28.1 is attached together with a proposed comment. This draft is based on the discussions conducted and the votes taken at the May meeting. As you recall, on May 7, the Committee voted to adopt Alternative A of proposed Rule 28.1(a) and directed me to revise Rule 28.1(b). The Committee also directed me to prepare a Comment identifying the statutes to which proposed Rule 28.1 will be applicable. If this proposal is finally adopted, it will not be necessary to amend Rule 26.1

2. *Civil Cases - [Accelerated] Appeal By Permission.* The attached draft also contains proposed Rule 28.2, which was seminared and approved provisionally by the Committee in August, 2004. I have made no changes in the draft since incorporating Committee input after the August 2004 meeting. In this connection, please note that the version of H.B. No. 1294 passed by the Legislature in 2005 made changes in Civil Practice and Remedies Code Section 51.014(d)-(f). Specifically, the changes were amendments to subsections (d) and (e) extending the coverage of the permissive appeal statute to county level courts and the repeal of subsection (f). The repeal of subsection (f) eliminates the former statutory requirement that the "application [must be] made to the court of appeals that has appellate jurisdiction . . . not later than the 10th day after the date an interlocutory order under subsection (d) is entered." See former Section 51.014(f). As a result the Committee may want to consider making a change in proposed TRAP 28.2(a)(2). If this proposal is finally adopted, it will be necessary to amend Rule 12.1 (docketing the case) to include a reference to "the petition for permission to



appeal," in the opening sentence before the words "the petition for review". In addition, Appellate Rule 29.5 should also be amended to conform to the 2003 amendments to Civil Practice and Remedies Code 51.014(b). This proposed amendment, together with a proposed comment, follows:

> **Rule 29.5 Further Proceedings in Trial Court.** While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of an appeal. If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:
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> (a) is inconsistent with any appellate court temporary order; or
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> (b) interferes or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.
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> (c) Comment to 2005 change. Rule 29.5 is amended to correspond with section 51.014(b) of the Texas Civil Practice and Remedies Code, as amended in 2003, staying all proceedings in the trial court pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees and grants or denials of pleas to the jurisdiction by governmental units.

3. *Proposed Rule Concerning Transfer of Court of Appeal Cases.* For further discussion purposes, please also find a revised draft of a proposed Administrative Rule concerning the transfer of court of appeals' cases and particularly the subdivision dealing with Precedent in Transferred Cases. As discussed at the last meeting, this proposal could be injected into the Appellate Rules rather than in the Administrative Rules. For now, the principal question is what the rule should say, not where it should be codified. This draft is based on the discussion held and the votes taken at the May 6, 2005 meeting.

4. *Certificate of Conference on Motions for Rehearing.* I have also prepared the following proposal for the revision of TRAP 10.1 (a)(5) (certificates of conference on motions) and a companion revision of TRAP 49 consistent with the Committee's vote approving Chief Justice Sherry Radack's recommendation that "a certificate of conference on a motion for rehearing is unnecessary and

unproductive." See Radack letter to Hecht dated 6/2/04.

Proposed Amendment to TRAP 10.1(a)(5).

10.1 Contents of Motions; Response

(a) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

(5) in civil cases, *other than a motion for rehearing, a further motion for rehearing or a motion for en banc reconsideration of a panel decision of a court of appeals*, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.

Proposed Amendment to TRAP 49.

49.11. *Certificate of Conference Not Required.* A certificate of conference is not required for motions for rehearing, further motions for rehearing or for en banc reconsideration or review of a panel's decision.

5. *Proposed Change to TRAP 8.1.* The Court Rules Committee of the State Bar of Texas has proposed alternative changes in TRAP 8.1 due to the adoption of electronic filing of petitions in Bankruptcy Courts. A copy of the suggested changes is also attached.

6. *Amendments to TRAP's 52 and 53.* It has been suggested that Rules 53.2 (d)(8) and 52.3 (d)(5)(D) be amended to eliminate the requirement that petitioner (in a petition for review) and a relator (in an original proceeding) inform the Court whether the court of appeals opinion was unpublished and requiring the petitioner or relator to inform the Court whether the court of appeals designated its opinion as a memorandum opinion.

Please review each of the draft proposals and suggestions and provide me with your comments and suggestions, preferably by email at wdorsane@mail.smu.edu. If a conference call is necessary, I will arrange for one to be held after July 26, 2005. I will be out of the country until then.