INDEX

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9081

ORDER APPROVING AMENDMENT TO RULES GOVERNING GUARDIANSHIP CERTIFICATION

ORDERED that:

Pursuant to Texas Government Code sections 111.002 and 111.042(c), the Rules Governing Guardianship Certification are hereby amended by the addition of Rule XV, which addresses a voluntary alternative dispute resolution program adopted by the Guardianship Certification Board. The purpose of Rule XV is further described in the attached letter from Assistant General Counsel Katie Bond of the Office of Court Administration.

In Chambers, this 16th day of June, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

XV. ALTERNATIVE DISPUTE RESOLUTION

(a) Policy. The Board encourages the resolution and early settlement of all contested disciplinary matters through voluntary settlement procedures. By doing so, the Board does not waive immunity from suit or sovereign immunity under the Eleventh Amendment to the United States Constitution.

(b) Initiation of Settlement Conference. At any time after the filing of a complaint against a certified guardian or provisionally certified guardian, and before the Board has conducted a hearing on the complaint, the Director may initiate a Settlement Conference. The Director may initiate the Settlement Conference on the Director's own motion or on the request of any party; however, Settlement Conferences are completely voluntary. All parties must agree before a Settlement Conference can be convened.

(c) Parties to Settlement Conference. The Complainant and Respondent are the parties in a Settlement Conference. The Board (through one or more Board members, staff, or counsel) may also participate as a party in a Settlement Conference at the sole option of the Board Chair. A party may be represented by counsel.

(d) Purpose of Settlement Conference. A Settlement Conference may be used to reach agreement about all or a portion of the ultimate issues in a disciplinary proceeding or to reach agreement about how to handle disputed matters. The parties may use a mediator for the Settlement Conference pursuant to (f) below or conduct the Settlement Conference without a mediator.

(e) Power to Settle in Settlement Conference.

1) Does Not Bind Board. The Complainant and the Respondent may not bind the Board to any resolution of a complaint pending before the Board. If the Complainant and the Respondent are able to resolve some or all of the issues, the Board may consider this fact, and the terms of the agreement, in determining what action, if any, to take on the complaint.

2) Participation of Board Member. The Board Chair may appoint one or more Board members or staff to attend the Settlement Conference. The Board representative shall attend the Settlement Conference and participate in the proceedings in good faith and in an effort to resolve the dispute within the parameters of any instructions received from the Board.

3) Review of Settlement by Board. In the event a settlement of some or all of the disputed issues is reached during the Settlement Conference, the Board shall review the terms of the settlement at the next regularly-scheduled Board meeting.

(A) Upon review of the settlement, the Board may:

(i) Accept the settlement terms;

(ii) Reject the settlement terms and restore all proceedings on the complaint to the status quo as it existed immediately prior to the Settlement Conference; or

(iii) Refer the matter for further negotiation.

(B) The Director shall notify all parties of any action taken by the Board.

(f) Use of Mediator in Settlement Conference.

1) Agreement of Parties. The parties may agree to retain a mediator to assist with the Settlement Conference. Parties who wish to explore this option will be given a reasonable time to do so by the Chair.

(A)The parties shall notify the Chair in writing of their agreement to retain a mediator. That notice must include: the name, address, and telephone number of the mediator selected, a statement that the parties have entered into an agreement with the mediator as to the rate and method of his or her compensation, and an affirmation that the mediator is qualified to serve as described herein.

(B) Upon receipt of a properly-filed notice that complies with this section, the Chair will enter an order referring the case to the mediator.

2) Appointment if No Agreement. If the parties do not agree to a mediator, the Chair may appoint an individual to serve as mediator in the Settlement Conference. If any party objects promptly and with good cause to the mediator appointed, the Chair will appoint another qualified individual to serve as mediator. An objection will be considered prompt if it is received by the Director within ten (10) days of the date of the order appointing the mediator.

3) Qualifications of Mediator. An individual appointed to serve as a mediator under (1) or (2) above must meet the qualifications set forth in Section 154.052, Texas Civil Practice and Remedies Code. Pursuant to Section 154.052(c), an individual who has served as a probate judge in Texas may be appointed to serve as a mediator.

(g) Payment of Costs. The Board shall not pay any fees or costs associated with the Settlement Conference unless good cause is shown and the Board and the Office of Court Administration agree to do so prior to the Settlement Conference.

(h) Confidentiality of Communications. All communications in the Settlement Conference between or among the parties, and between each party and the mediator, if any, are confidential under the same terms as provided in Section 154.053(b) and (c) of the Civil Practice and Remedies Code. Information shared with the mediator in separate meetings will not be given to any other party unless the party sharing the information explicitly gives the mediator permission to do so. Material provided to the mediator is not required to be provided to the other parties and will not be filed or become a record in the disciplinary proceeding. Notes taken during the Settlement Conference by the parties and the mediator shall be destroyed at the end of the process.

(i) Time Frame for Settlement Conference and Schedule for Disciplinary Action. A Settlement Conference is not intended to delay the process, including the hearing of the action, except by order of the Chair. Deadlines and settings in the disciplinary action may be extended only by motion to, and order of, the Chair.

(j) Agreement to be Memorialized.

1) Any agreement reached by the parties will be reduced to writing and signed by the parties before the end of the Settlement Conference. These writings may be informal in nature. The parties may agree that the written agreement remain confidential if

there is no requirement of law to the contrary.

2) Any part of an agreement that may affect the disposition of the disciplinary action (such as agreements concerning relevant facts) must be filed in the record of the disciplinary action.
3) Whether a final written agreement reached through a Settlement Conference is subject to or excepted from required disclosure, or is confidential, will be determined in accordance with applicable law.

(k) Conduct of Mediator. If the parties use a mediator for the Settlement Conference, the mediator must maintain confidentiality in accordance with Section 2009.054 of the Government Code. The mediator may not communicate to the Board matters discussed with the parties in the Settlement Conference. The mediator will report to the Board in writing whether the Settlement Conference resulted in a settlement of the matter in dispute, or other stipulations or matters that the parties agreed be reported.

(l) Required Filings. Any request for the appointment of a mediator, any objection to the referral of the matter to a Settlement Conference, any objection to the appointment of a mediator, any notice required to be given, any settlement agreement, any report prepared by the mediator, and any similar documents as may become necessary or appropriate in the course of the Settlement Conference must be filed with the GCB.

(m) Other Disputes. Where appropriate and feasible, the Board will attempt to resolve other disputes in which the Board is a party using alternative dispute resolution procedures in lieu of litigation.

TEXAS GUARDIANSHIP CERTIFICATION BOARD

205 WEST 14TH STREET, SUITE 600 • TOM C. CLARK BUILDING • (512) 463-1625 • FAX (512) 463-1648
P. O. BOX 12066 • AUSTIN, TEXAS 78711-2066

May 30, 2008

The Honorable Phil Johnson, Liaison
Guardianship Certification Board
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, TX 78701

The Honorable Nathan L. Hecht, Liaison
Supreme Court Advisory Committee
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, TX 78701

Re: Proposed Addition of Alternative Dispute Resolution Rules to the Rules Governing Guardianship Certification

Dear Justice Johnson and Justice Hecht:

On behalf of the Guardianship Certification Board (Board), I am forwarding a copy of proposed Rule XV of the Rules Governing Guardianship Certification for approval by the Supreme Court under Section 111.002 of the TEXAS GOVERNMENT CODE. The proposed rule encourages the use of alternative dispute resolution procedures to assist in the resolution of disputes under the Board's jurisdiction. Proposed Rule XV is attached as Attachment A.

Background

Section 111.019 of the TEXAS GOVERNMENT CODE requires the Board to develop and implement a policy to encourage the use of appropriate alternative dispute resolution (ADR) procedures to assist in the resolution of disputes under the Board's jurisdiction. The statute also requires that the procedures must conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings (SOAH) for the use of alternative dispute resolution by state agencies.

The Board initially considered adopting a "policy" – the term used in the statute – rather than a rule, which requires Court approval. However, as the Board considered what should be included in such a policy, it determined that it wanted to develop specific procedures that parties to disputes would be required to follow rather than a general policy encouraging ADR. Because

the "policy" would contain procedural requirements, the Board determined that it would be more appropriate to include such procedures in a rule.

The Board's Rules Committee developed the proposed rule based on SOAH's Guidelines for the Use of Alternative Dispute Resolution by Texas State Agencies and also on the Court Reporter Certification Board's ADR policy. The Board considered the proposed rule at its February 1, 2008 public meeting and voted to publish it for comments. Two persons filed comments – one commenter agreed with the proposed rule, and one pointed out that the rule did not state that parties are permitted to have attorneys in an ADR proceeding. The Board met on May 2, 2008, revised the proposed rule to clarify that parties could have attorneys, and voted to submit the proposal to the Court for approval.

Proposed Rule XV

The key feature of the proposed rule is that alternative dispute resolution is completely voluntary; all parties must agree to participate in the process. Another important aspect of the proposal is that any settlement agreement reached by the parties must be approved by the Board. The rule also provides:

- By its terms, the rule applies to contested disciplinary matters within the Board's jurisdiction. It also states the Board's intention to use ADR procedures, where appropriate and feasible, to attempt to resolve other disputes in which the Board is involved. (Proposed Rule XV(a), (b), and (m))

- The Complainant and Respondent (the certified guardian) are the parties in a settlement conference under the rule and may be represented by counsel. The Board Chair may appoint one or more Board members or staff to participate as well. (Proposed Rule XV(c), (e)(2))

- The parties may use a mediator (but they are not required to do so). (Proposed Rule XV(f))

- A mediator must have received the training required by Section 154.052 of the Texas Civil Practice and Remedies Code for impartial third parties, or must have served as a probate judge in Texas. (Proposed Rule XV(f)(3))

- All communications between or among the parties, and between each party and the mediator, are confidential under the same terms as set forth Section 154.053(b) and (c) of the Civil Practice and Remedies Code. (Proposed Rule XV(h))

- Any agreement reached must be reduced to writing and provided to the Board for approval. The Board may (1) accept the settlement terms, (2) reject the terms and restore the complaint proceedings to the *status quo* as it existed immediately prior to the settlement conference, or (3) refer the matter for further negotiation. (Proposed Rule XV(e)(3)(A), (j)(1))

- Whether a final written agreement is subject to disclosure will be determined by applicable law, including Rule 12 of the Rules of Judicial Administration. (Proposed Rule XV(j)(3))

The Board respectfully requests that the Supreme Court approve the addition of proposed Rule XV to the Rules Governing Guardianship Certification. Please do not hesitate to contact me at 463-1461 if you have questions.

Sincerely,

Katie Bond

Katie Bond
Assistant General Counsel, OCA

cc: ✓Alice McAfee, General Counsel, Supreme Court of Texas
Jody Hughes, Rules Attorney, Supreme Court of Texas

ATTACHMENT A

PROPOSED RULE XV
RULES GOVERNING GUARDIANSHIP CERTIFICATION

XV. ALTERNATIVE DISPUTE RESOLUTION

(a) Policy. The Board encourages the resolution and early settlement of all contested disciplinary matters through voluntary settlement procedures. By doing so, the Board does not waive immunity from suit or sovereign immunity under the Eleventh Amendment to the United States Constitution.

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(c) Parties to Settlement Conference. The Complainant and Respondent are the parties in a Settlement Conference. The Board (through one or more Board members, staff, or counsel) may also participate as a party in a Settlement Conference at the sole option of the Board Chair. A party may be represented by counsel.

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2) Participation of Board Member. The Board Chair may appoint one or more Board members or staff to attend the Settlement Conference. The Board representative shall attend the Settlement Conference and participate in the proceedings in good faith and in an effort to resolve the dispute within the parameters of any instructions received from the Board.

3) Review of Settlement by Board. In the event a settlement of some or all of the disputed issues is reached during the Settlement Conference, the Board shall review the terms of the settlement at the next regularly-scheduled Board meeting.

(A) Upon review of the settlement, the Board may:

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(A)The parties shall notify the Chair in writing of their agreement to retain a mediator. That notice must include: the name, address, and telephone number of the mediator selected, a statement that the parties have entered into an agreement with the mediator as to the rate and method of his or her compensation, and an affirmation that the mediator is qualified to serve as described herein.

(B) Upon receipt of a properly-filed notice that complies with this section, the Chair will enter an order referring the case to the mediator.

2) Appointment if No Agreement. If the parties do not agree to a mediator, the Chair may appoint an individual to serve as mediator in the Settlement Conference. If any party objects promptly and with good cause to the mediator appointed, the Chair will appoint another qualified individual to serve as mediator. An objection will be considered prompt if it is received by the Director within ten (10) days of the date of the order appointing the mediator.

3) Qualifications of Mediator. An individual appointed to serve as a mediator under (1) or (2) above must meet the qualifications set forth in Section 154.052, Texas Civil Practice and Remedies Code. Pursuant to Section 154.052(c), an individual who has served as a probate judge in Texas may be appointed to serve as a mediator.

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the disciplinary action may be extended only by motion to, and order of, the Chair.

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1) Any agreement reached by the parties will be reduced to writing and signed by the parties before the end of the Settlement Conference. These writings may be informal in nature. The parties may agree that the written agreement remain confidential if there is no requirement of law to the contrary.

2) Any part of an agreement that may affect the disposition of the disciplinary action (such as agreements concerning relevant facts) must be filed in the record of the disciplinary action.

3) Whether a final written agreement reached through a Settlement Conference is subject to or excepted from required disclosure, or is confidential, will be determined in accordance with applicable law.

(k) Conduct of Mediator. If the parties use a mediator for the Settlement Conference, the mediator must maintain confidentiality in accordance with Section 2009.054 of the Government Code. The mediator may not communicate to the Board matters discussed with the parties in the Settlement Conference. The mediator will report to the Board in writing whether the Settlement Conference resulted in a settlement of the matter in dispute, or other stipulations or matters that the parties agreed be reported.

(l) Required Filings. Any request for the appointment of a mediator, any objection to the referral of the matter to a Settlement Conference, any objection to the appointment of a mediator, any notice required to be given, any settlement agreement, any report prepared by the mediator, and any similar documents as may become necessary or appropriate in the course of the Settlement Conference must be filed with the GCB.

(m) Other Disputes. Where appropriate and feasible, the Board will attempt to resolve other disputes in which the Board is a party using alternative dispute resolution procedures in lieu of litigation.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9115

AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. Pursuant to Section 22.004 of the Texas Government Code, the Texas Rules of Appellate Procedure are amended as follows.

2. By Order dated March 10, 2008, in Misc. Docket No. 08-9017, the Supreme Court proposed amendments to the Texas Rules of Appellate Procedure and invited public comment. Following public comment, the Court made additional revisions to the rules. This Order contains the final version of the amended rules that take effect on September 1, 2008.

3. The comments appended to these amended rules are intended to inform the construction and application of the rules.

4. This Order approves amendments to Texas Rules of Appellate Procedure governing civil cases. By Order dated June 30, 2008, in Misc. Docket No. 08-102, the Court of Criminal Appeals approved amendments to the Texas Rules of Appellate Procedure governing criminal cases. For convenience, all of the amendments are attached to this Order.

5. The Clerk is directed to:

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

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

c. send a copy of this Order to each member of the Legislature before December 1; and

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

SIGNED AND ENTERED this 20th day of August, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Rule 4. Time and Notice Provisions

4.5 No Notice of Judgment or Order of Appellate Court; Effect on Time to File Certain Documents

(a) *Additional Time to File Documents.* A party may move for additional time to file a motion for rehearing or en banc reconsideration in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not—until after the time expired for filing the document—either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order.

* * *

(c) *Where to File.*

(1) A motion for additional time to file a motion for rehearing or en banc reconsideration in the court of appeals must be filed in and ruled on by the court of appeals in which the case is pending.

* * *

(d) *Order of the Court.* If the court finds that the motion for additional time was timely filed and the party did not—within the time for filing the motion for rehearing or en banc reconsideration, petition for review, or petition for discretionary review, as the case may be—receive the notice or have actual knowledge of the judgment or order, the court must grant the motion. The time for filing the document will begin to run on the date when the court grants the motion.

Comment to 2008 change: Subdivision 4.5 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as a motion for rehearing.

Rule 8. Bankruptcy in Civil Cases

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; and

(d) the date when the bankruptcy petition was filed.

Comment to 2008 change: The requirement that the bankruptcy notice contain certain pages of the bankruptcy petition is eliminated, given that electronic filing is now prevalent in bankruptcy courts and bankruptcy petitions are available through the federal PACER system.

Rule 9. Papers Generally

9.3 Number of Copies

* * *

(b) *Supreme Court and Court of Criminal Appeals.* A party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court, only an original and two copies must be filed of a motion for extension of time or a response to the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

* * *

9.8 Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases

(a) *Alias Defined.* For purposes of this rule, an alias means one or more of a person's initials or a fictitious name, used to refer to the person.

(b) *Parental-Rights Termination Cases.* In an appeal or an original proceeding in an appellate court, arising out of a case in which the termination of parental rights was at issue:

(1) except for a docketing statement, in all papers submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a minor must be identified only by an alias unless the court orders otherwise;

(B) the court may order that a minor's parent or other family member be identified only by an alias if necessary to protect a minor's identity; and

(C) all documents must be redacted accordingly;

(2) the court must, in its opinion, use an alias to refer to a minor, and if necessary to protect the minor's identity, to the minor's parent or other family member.

(c) *Juvenile Court Cases.* In an appeal or an original proceeding in an appellate court, arising out of a case under Title 3 of the Family Code:

(1) except for a docketing statement, in all papers submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a minor must be identified only by an alias;

(B) a minor's parent or other family member must be identified only by an alias; and

(C) all documents must be redacted accordingly;

(2) the court must, in its opinion, use an alias to refer to a minor and to the minor's parent or other family member.

(d) *No Alteration of Appellate Record.* Nothing in this rule permits alteration of the original appellate record except as specifically authorized by court order.

Comment to 2008 change: Subdivision 9.3 is amended to reduce the number of copies of a motion for extension of time or response filed in the Supreme Court. Subdivision 9.8 is new. To protect the privacy of minors in suits affecting the parent-child relationship (SAPCR), including suits to terminate parental rights, Section 109.022(d) of the Family Code authorizes appellate courts, in their opinions, to identify parties only by fictitious names or by initials. Similarly, Section 56.01(j) of the Family Code prohibits identification of a minor or a minor's family in an appellate opinion related to juvenile court proceedings. But as appellate briefing becomes more widely available

through electronic media sources, appellate courts' efforts to protect minors' privacy by disguising their identities in appellate opinions may be defeated if the same children are fully identified in briefs and other court papers available to the public. The rule provides protection from such disclosures. Any fictitious name should not be pejorative or suggest the person's true identity. The rule does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases. Although appellate courts are authorized to enforce the rule's provisions requiring redaction, parties and amici curiae are responsible for ensuring that briefs and other papers submitted to the court fully comply with the rule.

Rule 10. Motions in the Appellate Courts

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, except for motions for rehearing and en banc reconsideration, 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.

10.2 Evidence on Motions. A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

(a) not in the record;

(b) not within the court's knowledge in its official capacity; and

(c) not within the personal knowledge of the attorney signing the motion.

10.5 Particular Motions

* * *

(b) *Motions to Extend Time.*

* * *

(2) Contents of Motion to Extend Time to File Notice of Appeal. A motion to extend the time for filing a notice of appeal must:

(A) comply with (1)(A) and (C);

(B) identify the trial court;

(C) state the date of the trial court's judgment or appealable order; and

(D) state the case number and style of the case in the trial court.

(3) Contents of Motion to Extend Time to File Petition for Review or Petition for Discretionary Review. A motion to extend time to file a petition for review or petition for discretionary review must also specify:

(A) the court of appeals;

(B) the date of the court of appeals' judgment;

(C) the case number and style of the case in the court of appeals; and

(D) the date every motion for rehearing or en banc reconsideration was filed, and either the date and nature of the court of appeals' ruling on the motion, or that it remains pending.

Comment to 2008 change: It happens so infrequently that a non-movant does not oppose a motion for rehearing or en banc reconsideration that such motions are excepted from the certificate-of-conference requirement in Subdivision 10.1(a)(5). Subdivision 10.2 is revised to clarify that facts supporting a motion need not be verified by the filer if supporting evidence is in the

record, the facts are known to the court, or the filer has personal knowledge of them. Subdivision 10.5(b)(3)(D) is added.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed motion for rehearing or en banc reconsideration, or timely filed motion to extend time to file such a motion, is then pending; or

(b) 30 days after the court overrules all timely filed motions for rehearing or en banc reconsideration, and all timely filed motions to extend time to file such a motion.

Comment to 2008 change: Subdivision 19.1 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as a motion for rehearing.

Rule 20. When Party Is Indigent

20.1 Civil Cases

(a) *Establishing Indigence.*

(1) By Certificate. If the appellant proceeded in the trial court without advance payment of costs pursuant to a certificate under Texas Rule of Civil Procedure 145(c) confirming that the appellant was screened for eligibility to receive free legal services under income guidelines used by a program funded by Interest on Lawyers Trust Accounts or the Texas Access to Justice Foundation, an additional certificate may be filed in the appellate court confirming that the appellant was rescreened after rendition of the trial court's judgment and again found eligible under program guidelines. A party's affidavit of inability accompanied by the certificate may not be contested.

(2) By Affidavit. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(A) the party files an affidavit of indigence in compliance with this rule;

(B) the claim of indigence is not contestable, is not contested, or, if contested, the contest is not sustained by written order; and

(C) the party timely files a notice of appeal.

(b) *Contents of Affidavit.* The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

* * *

(10) whether an attorney is providing free legal services to the party without a contingent fee;

(11) whether an attorney has agreed to pay or advance court costs; and

(12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

(c) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Texas Rule of Civil Procedure 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

* * *

(3) Extension of Time. The appellate court may extend the time to file an affidavit of indigence if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b). But the court may not dismiss the appeal or affirm the trial court's

judgment on the ground that the appellant has failed to file an affidavit or a sufficient affidavit of indigence unless the court has first provided the appellant notice of the deficiency and a reasonable time to remedy it.

(d) *Duty of Clerk.*

(1) Trial Court Clerk. If the affidavit of indigence is filed with the trial court clerk under (c)(1), the clerk must promptly send a copy of the affidavit to the appropriate court reporter.

(2) Appellate Court Clerk. If the affidavit of indigence is filed with the appellate court clerk and if the filing party is requesting the preparation of a record, the appellate court clerk must:

(A) send a copy of the affidavit to the trial court clerk and the appropriate court reporter; and

(B) send to the trial court clerk, the court reporter, and all parties, a notice stating the deadline for filing a contest to the affidavit of indigence.

(e) *Contest to Affidavit.* The clerk, the court reporter, the court recorder, or any party may challenge an affidavit that is not accompanied by a TAJF certificate by filing—in the court in which the affidavit was filed—a contest to the affidavit. The contest must be filed on or before the date set by the clerk if the affidavit was filed in the appellate court, or within 10 days after the date when the affidavit was filed if the affidavit was filed in the trial court. The contest need not be sworn.

Comment to 2008 change: Subdivision 20.1(a) is added to provide, as in Texas Rule of Civil Procedure 145, that an affidavit of indigence accompanied by an IOLTA or other Texas Access to Justice Foundation certificate cannot be challenged. Subdivision 20.1(c)(1) is revised to clarify that an affidavit of indigence filed to proceed in the trial court without advance payment of costs is insufficient to establish indigence on appeal; a separate affidavit must be filed with or before the notice of appeal. Subdivision 20.1(c)(3) is revised to provide that an appellate court must give an appellant who fails to file a proper appellate indigence affidavit notice of the defect and an opportunity to cure it before dismissing the appeal or affirming the judgment on that basis. *See Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006). The limiting phrase "under (c)(2)" in Subdivision 20.1(d)(2) is deleted to clarify that the appellate clerk's duty to forward copies of the affidavit to the trial court clerk and the court reporter, along with a notice setting a deadline

to contest the affidavit, applies to affidavits on appeal erroneously filed in the appellate court, not only to affidavits in other appellate proceedings properly filed in the appellate court under subdivision 20.1(c)(2). Although Subdivision 3.1(g) defines "court reporter" to include court recorder, subdivision 20.1(e) is amended to make clear that a court recorder can contest an affidavit.

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.2 Amount of Bond, Deposit, or Security

* * *

(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(1)(A) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. An affidavit that meets these requirements is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit, or security required to suspend enforcement of the judgment. A trial court clerk must receive and file a net-worth affidavit tendered for filing by a judgment debtor.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings; Additional Security. The trial court must hear a judgment creditor's contest of the judgment debtor's claimed net worth promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for twenty days after the trial court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

24.4 Appellate Review

(a) *Motions; Review.* A party may seek review of the trial court's ruling by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case. A party may seek review of the court of appeals' ruling on the motion by petition for writ of mandamus in the Supreme Court. The appellate court may review:

(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

(5) the trial court's exercise of discretion under Rule 24.3(a).

* * *

Comment to 2008 change: Subdivision 24.2(c) is amended to clarify the procedure in determining net worth. A debtor's affidavit of net worth must be detailed, but the clerk must file what is tendered without determining whether it complies with the rule. If the trial court orders that additional or other security be given, the debtor is afforded time to comply. Subdivision 24.4(a) is revised to clarify that a party seeking relief from a supersedeas ruling should file a motion in the court of appeals that has or presumably will have jurisdiction of the appeal. After the court of appeals has ruled, a party may seek review by filing a petition for writ of mandamus in the Supreme Court. *See In re Smith / In re Main Place Custom Homes, Inc.*, 192 S.W.3d 564, 568 (Tex. 2006) (per curiam).

Rule 25. Perfecting Appeal

25.2. Criminal Cases

* * *

(b) *Perfection of Appeal.* In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. In a death-penalty case it is unnecessary to file a notice of appeal, but, in every death-penalty case, the clerk of the trial court shall file a notice of conviction with the Court of Criminal Appeals within thirty days after the defendant is sentenced to death.

Rule 26. Time to Perfect Appeal

26.2. Criminal Cases

* * *

(b) *By the State.* The notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.

Rule 28. Accelerated and Agreed Interlocutory Appeals in Civil Cases

28.1 Accelerated Appeals

(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 30 days after the date of the order or judgment being appealed are accelerated appeals.

(b) *Perfection of Accelerated Appeal.* Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. 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 file findings of fact and conclusions of law but may do so within 30 days after the order is signed.

(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 and 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 35.1 and 38.6.

28.2 Agreed Interlocutory Appeals in Civil Cases

(a) *Perfecting Appeal.* An agreed appeal of an interlocutory order permitted by statute must be perfected as provided in Rule 25.1. The notice of appeal must be filed no later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time for filing pursuant to Rule 26.3.

(b) *Other Requirements.* In addition to perfecting appeal, the appellant must file with the clerk of the appellate court a docketing statement as provided in Rule 32.1 and pay to the clerk of the appellate court all required fees authorized to be collected by the clerk.

(c) *Contents of Notice.* The notice of accelerated appeal must contain, in addition to the items required by Rule 25.1(d), the following:

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

(2) a copy of the trial court's order granting permission to appeal;

(3) a copy of the trial court order appealed from;

(4) a statement that all parties to the trial court proceeding agreed to the trial court's order granting permission to appeal;

(5) a statement that all parties to the trial court proceeding agreed that the order granting permission to appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(6) a brief statement of the issues or points presented; and

(7) a concise explanation of how an immediate appeal may materially advance the ultimate termination of the litigation.

(d) *Determination of Jurisdiction.* If the court of appeals determines that a notice of appeal filed under this rule does not demonstrate the court's jurisdiction, it may order the appellant to file an amended notice of appeal. On a party's motion or its own initiative, the court of appeals may also order the appellant or any other party to file briefing addressing whether the appeal meets the statutory requirements, and may direct the parties to file supporting evidence. If, after providing an opportunity to file an amended notice of appeal or briefing addressing potential jurisdictional defects, the court of appeals concludes that a jurisdictional defect exists, it may dismiss the appeal for want of jurisdiction at any stage of the appeal.

(e) *Record; Briefs.* The rules governing the filing of the appellate record and briefs in accelerated appeals apply. A party may address in its brief any issues related to the court of appeals' jurisdiction, including whether the appeal meets the statutory requirements.

(f) *No Automatic Stay of Proceedings in Trial Court.* An agreed appeal of an interlocutory order permitted by statute does not stay proceedings in the trial court except as agreed by the parties and ordered by the trial court or the court of appeals.

Comment to 2008 change: Rule 28 is rewritten. Subdivision 28.1 more clearly defines accelerated appeals and provides a uniform appellate timetable. But many statutes that provide for accelerated or expedited appeals also set appellate timetables, and statutory deadlines govern over deadlines provided in the rule. Subdivision 28.2 provides procedures for an agreed appeal of an interlocutory order permitted by statute. Such appeals are now permitted under Section 51.014(d) of the Civil Practice and Remedies Code. The requirements for perfecting appeal are generally set out in Rule 25.1, and as provided there, only the notice of appeal is jurisdictional.

Rule 29. Orders Pending Interlocutory Appeal in Civil Cases

29.5. Further Proceedings in Trial Court. While an 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 on 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 with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

Comment to 2008 change: Rule 29.5 is amended to be consistent with Section 51.014(b) of the 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 orders granting or denying a governmental unit's plea to the jurisdiction.

Rule 38. Requisites of Briefs

38.1 Appellant's Brief. The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

* * *

(e) *Any Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of the party's brief.

(f) *Issues Presented.* [no change to rule text]

(g) *Statement of Facts.* [no change to rule text]

(h) *Summary of the Argument.* [no change to rule text]

(I) *Argument.* [no change to rule text]

(j) *Prayer.* [no change to rule text]

(k) *Appendix in Civil Cases.* [no change to rule text]

Comment to 2008 change: A party may choose to include a statement in the brief regarding oral argument.

38.4 **Length of Briefs.** An appellant's brief or appellee's brief must be no longer than 50 pages, exclusive of the pages containing the identity of parties and counsel, any statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix. A reply brief must be no longer than 25 pages, exclusive of the items stated above. But in a civil case, the aggregate number of pages of all briefs filed by a party must not exceed 90, exclusive of the items stated above. The court may, on motion, permit a longer brief.

Comment to 2008 changes: The optional statement regarding oral argument does not count toward the briefing page limit.

Rule 39. Oral Argument; Decision Without Argument

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

(a) the appeal is frivolous;

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

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

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

39.8 Cases Advanced Without Oral Argument. [deleted]

39.8 Clerk's Notice. [former 39.9, renumbered, no change to rule text]

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

Rule 41. Panel and En Banc Decision

41.1 Decision by Panel

* * *

(b) *When Panel Cannot Agree on Judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must:

(1) designate another justice of the court to sit on the panel to consider the case;

(2) request the Chief Justice of the Supreme Court to temporarily assign an eligible justice or judge to sit on the panel to consider the case; or

(3) convene the court en banc to consider the case.

The reconstituted panel or the en banc court may order the case reargued.

(c) *When Court Cannot Agree on Judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign an eligible justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.2 Decision by En Banc Court

* * *

(b) *When En Banc Court Cannot Agree on Judgment.* If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign an eligible justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

* * *

41.3 Precedent in Transferred Cases. 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 precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. The court's opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court's precedent.

Comment to 2008 change: Subdivisions 41.1 and 41.2 are amended to acknowledge the full authority of the Chief Justice of the Supreme Court to temporarily assign a justice or judge to hear a matter pending in an appellate court. The statutory provisions governing the assignment of judges to appellate courts are located in Chapters 74 and 75 of the Government Code. Other minor changes are made for consistency. Subdivision 41.3 is added to require, in appellate cases transferred by the Supreme Court under Section 73.001 of the Government Code for docket equalization or other purposes, that the transferee court must generally resolve any conflict between the precedent of the transferor court and the precedent of the transferee court — or that of any other intermediate appellate court the transferee court otherwise would have followed — by following the precedent of the transferor court, unless it appears that the transferor court itself would not be bound by that precedent. The rule requires the transferee court to "stand in the shoes" of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred. The transferee court is not expected to follow the transferor court's local rules or otherwise supplant its own local procedures with those of the transferor court.

Rule 47. Opinions, Publication, and Citation

47.2 Designation and Signing of Opinions; Participating Justices.

(a) *Civil and Criminal Cases.* Each opinion of the court must be designated either an "Opinion" or a "Memorandum Opinion." A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases.* In addition, each opinion and memorandum opinion in a criminal case must bear the notation "publish" or "do not publish" as determined — before the opinion is handed down — by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change the notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

(c) *Civil Cases.* Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated "do not publish."

47.7 Citation of Unpublished Opinions.

(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

(b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the courts of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

Comment to 2008 change: Effective January 1, 2003, Rule 47 was amended to prospectively discontinue designating opinions in civil cases as either "published" or "unpublished." Subdivision

47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. Motion for Rehearing and En Banc Reconsideration

49.5 Further Motion for Rehearing. After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues a different opinion.

49.6 Amendments. A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc consideration. While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

49.8 Extension of Time. A court of appeals may extend the time for filing a motion for rehearing or en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

* * *

49.11 Relationship to Petition for Review. A party may not file a motion for rehearing or en banc reconsideration in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or en banc reconsideration or preclude the court of appeals from ruling on the motion. If a motion for rehearing or en banc reconsideration is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.12 Certificate of Conference Not Required. A certificate of conference is not required for a motion for rehearing or en banc reconsideration of a panel's decision.

Comment to 2008 change: Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration. Subdivision 49.5(c) is amended to clarify that a further motion for rehearing may be filed if the court issues a different opinion, irrespective of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. Issuance of a new opinion that is not substantially different should not occasion a further motion for rehearing, but a motion's lack of merit does not affect appellate deadlines. The provisions of former Rule 53.7(b) that address motions for rehearing are moved to new subdivision 49.11 without change, leaving the provisions of Rule 53.7(b) that address petitions for review undisturbed. Subdivision 49.12 mirrors Rule 10.1(a)(5) in excepting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within 60 days after a petition for discretionary review is filed with the clerk of the court of appeals that delivered the decision, the justices who participated in the decision may, as provided by subsection (a), reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

(a) If the court's original opinion or judgment is corrected or modified, that opinion or judgment is withdrawn and the modified or corrected opinion or judgment is substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court

of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.

(b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.

Rule 52. Original Proceedings

52.3 Form and Contents of Petition. The petition must, under appropriate headings and in the order here indicated, contain the following:

* * *

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

* * *

(5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals:

* * *

(D) the citation of the court's opinion;

* * *

(g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in the appendix or record.

* * *

(j) *Certification.* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(k) *Appendix.* [52.3(j) redesignated as (k), no change to rule text]

52.6 Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, the certification, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 25 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Comment to 2008 change: The reference to "unpublished" opinions in Subdivision 52.3(d)(5)(D) is deleted. The filer should provide the best cite available for the court of appeals' opinion, which may be a LEXIS, Westlaw, or other citation to an electronic medium. Subdivision 52.3 is further amended to delete the requirement that all factual statements be verified by affidavit. Instead, the filer — in the usual case of a party with legal representation, the lead counsel — must include a statement certifying that all factual statements are supported by competent evidence in the appendix or record to which the petition has cited. The certification required by subdivision 52.3(j) does not count against the page limitations.

Rule 53. Petition for Review

53.2 Contents of Petition

* * *

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

* * *

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

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

53.7 Time and Place of Filing

(a) *Petition.* Unless the Supreme Court orders an earlier filing deadline, the petition must be filed with the Supreme Court clerk within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.

(b) *Premature Filing.* A petition filed before the last ruling on all timely filed motions for rehearing and en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review.

Comment to 2008 change: Subdivision 53.7(a) is amended to clarify that the Supreme Court may shorten the time for filing a petition for review and that the timely filing of a motion for en banc reconsideration tolls the commencement of the 45-day period for filing a petition for review until the motion is overruled. Subdivision 53.2(d)(8) is amended to delete the reference to unpublished opinions in civil cases. Subdivision 53.2(d)(9) is amended to require a party that prematurely files a petition for review to notify the Supreme Court of any panel rehearing or en banc reconsideration motions still pending in the court of appeals. Subdivision 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.11 those provisions governing motions for rehearing.

Rule 64. Motion for Rehearing

64.4 Second Motion. The Court will not consider a second motion for rehearing unless the Court modifies its judgment, vacates its judgment and renders a new judgment, or issues a different opinion.

Comment to 2008 change: Subdivision 64.4 is amended to reflect the Court's practice of considering a second motion for rehearing after modifying its judgment or opinion in response to a prior motion for rehearing. When the Court modifies its opinion without modifying its judgment, the Court will ordinarily deny a second motion for rehearing unless the new opinion is substantially different from the original opinion.

Rule 68. Discretionary Review With Petition

68.7 Court of Appeals Clerk's Duties

* * *

(b) *Reply.* The opposing party has 30 days after the timely filing of the petition in the court of appeals to file a reply to the petition with the clerk of the court of appeals. Upon receiving a reply to the petition, the clerk for the court of appeals must file the reply and note the filing on the docket.

(c) *Sending Petition and Reply to Court of Criminal Appeals.* Unless a petition for discretionary review is dismissed under Rule 50, the clerk of the court of appeals must, within 60 days after the petition is filed, send to the clerk of the Court of Criminal Appeals the petition and any copies furnished by counsel, the reply, if any, and any copies furnished by counsel, together with the record, copies of the motions filed in the case, and copies of any judgments, opinions, and orders of the court of appeals. The clerk need not forward any nondocumentary exhibits unless ordered to do so by the Court of Criminal Appeals.

68.9 Reply [deleted]

Rule 70. Brief on the Merits

70.3 Brief Contents and Form. Briefs must comply with the requirements of Rule 38, except that they need not contain the appendix (Rule 38.1(k)). Copies must be served as required by Rule 68.11.

Rule 71. Direct Appeals

71.3 **Briefs.** Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(k)), and the brief in a case in which the death penalty has been assessed may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9115a.

TECHNICAL CORRECTIONS TO THE AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The amendments to the Texas Rules of Appellate Procedure promulgated by Order dated August 20, 2008, in Misc. Docket No. 08-9115, are corrected as follows, effective September 1, 2008.

2. In the comment under Rule 9, the reference to Section 109.022(d) of the Family Code is changed to Section 109.002(d) of the Family Code.

3. In the first sentence of Subdivision 28.1(d), the second reference to the term "Rule" is removed.

4. The letter "s" is removed from the term "changes" in the comment under Subdivision 38.4, the phrase "regarding oral argument" is removed from the comment under Subdivision 38.4, and the comments for Subdivisions 38.1 and 38.4 are combined and placed at the end of Rule 38.

5. In the second sentence of Subdivision 49.7, the phrase "en banc consideration" is changed to "en banc reconsideration."

6. The Clerk is directed to:

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

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

   c. send a copy of this Order to each member of the Legislature before December 1; and

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

SIGNED AND ENTERED this 25th day of August, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9116

ORDER ADOPTING AMENDMENTS TO TEXAS RULE OF DISCIPLINARY PROCEDURE 1.06

ORDERED that:

1. The Court hereby adopts the following amendments to Texas Rule of Disciplinary Procedure 1.06, which the State Bar Board of Directors approved in substantially similar form on April 25, 2008.

2. By Order dated May 14, 2008, in Misc. Docket No. 08-9047, the Supreme Court of Texas proposed amendments to Texas Rule of Disciplinary Procedure 1.06 and invited public comment. The Court then made additional revisions to the rule. This Order contains the final version of the amended rule.

3. Amended Texas Rule of Disciplinary Procedure 1.06 takes effect on September 1, 2008.

4. The Clerk is directed to:

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

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

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

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

In Chambers, this 20th day of August, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

1.06 Definitions

A. "Address" means the registered address provided by the attorney who is the subject of the Grievance, as that address is shown on the membership rolls maintained by the State Bar on behalf of the Clerk of the Supreme Court at the time of receipt of the Grievance by the Chief Disciplinary Counsel.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9117

ORDER ADOPTING AMENDMENTS TO ARTICLE I OF STATE BAR RULES

ORDERED that:

1. The Court hereby adopts the following amendments to Article I of the State Bar Rules, which the State Bar Board of Directors approved in substantially similar form on January 25, 2008.

2. By Order dated May 14, 2008, in Misc. Docket No. 08-9048, the Supreme Court of Texas proposed amendments to Articles I and III of the State Bar Rules and invited public comment. This Order contains the final version of amended Article I. The Court is still considering Article III.

3. Amended Article I of the State Bar Rules takes effect on September 1, 2008.

4. The Clerk is directed to:

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

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

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

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

In Chambers, this 20th day of August, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

ARTICLE I — DEFINITIONS

7. "Registered Address" is the address of a member as shown on the membership rolls maintained by the State Bar on behalf of the clerk of the Supreme Court. A member's registered address will be used for receiving official notices from the State Bar, including membership compliance information, member benefits, and disciplinary matters.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08- 9118

ORDER PROMULGATING RULE OF JUDICIAL ADMINISTRATION 15

ORDERED that:

1. Pursuant to article V, section 31(a) of the Texas Constitution and Section 74.024 of the Texas Government Code, the Texas Rules of Judicial Administration are amended by adding Rule 15 regarding appeals from trial courts in counties assigned to multiple appellate districts, as follows.

2. By Order dated March 10, 2008, in Misc. Docket No. 08-9004, the Supreme Court proposed Texas Rule of Judicial Administration 15 and invited public comment, after which the Court made additional revisions to the rule.

3. Texas Rule of Judicial Administration 15 takes effect on September 1, 2008.

4. The Clerk is directed to:

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

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

c. send a copy of this Order to each member of the Legislature before December 1; and

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

SIGNED AND ENTERED this 20th day of August,2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Rule 15. Appeals from Trial Courts in Counties Assigned to Multiple Appellate Districts.

15.1 Applicability. This rule applies to appeals from an order or judgment issued by a trial court in a county assigned by law to more than one court of appeals district unless assignment of such appeals is governed by statute. This rule does not apply to appeals to the Courts of Appeals for the First and Fourteenth Districts from trial courts in counties in those districts, as assignment of such appeals is governed by statute.

15.2 When Consolidation Required. If notices of appeal filed by two or more parties from a single judgment or order designate different courts of appeals that have jurisdiction of the appeal because the county in which the trial court sits is assigned to more than one appellate district, the appeals must be consolidated in one of the courts of appeals.

15.3 Consolidation by Agreement; Notice to Courts of Appeals.

(a) *Appealing Parties to Confer Regarding Consolidation.* When any appealing party learns that two or more parties have properly designated different courts of appeals, that party must promptly confer with lead counsel for all other appealing parties (if represented, otherwise counsel must confer with the pro se party) and determine if all appealing parties will agree to consolidate the appeals in one of the courts of appeals.

(b) *Time to Provide Notice.* No later than 30 days —20 days in an accelerated appeal — after the filing date of the first-filed notice of appeal described in paragraph (a), the parties must submit to the clerks of both courts of appeals written notice either of the appealing parties' agreement to consolidate the appeals or of the appealing parties' inability to reach agreement regarding consolidation.

(c) *Contents of Notice.* The notice must identify each appealing party and the party's counsel (if represented, or state that the party is pro se), and must either identify the court of appeals designated by agreement or state that the appealing parties were unable to agree to consolidate all appeals in a particular court. The notice must also contain a certificate stating that the filing parties conferred, or made a reasonable attempt to confer, with all other appealing parties regarding consolidation of the appeals. If the notice states that all appealing parties have agreed to consolidation, it must identify every party or party's attorney who agreed to the consolidation.

(d) *Consolidation by Agreement of All Appealing Parties.* If the clerks of both courts of appeals receive notice that all appealing parties have agreed to consolidation, the chief justices of both courts will request the Chief Justice of the Supreme Court to transfer all pending appeals in the case to the court of appeals designated by the parties' agreement.

15.4 Consolidation When Appealing Parties Unable to Agree.

(a) *Clerks of Courts of Appeals to Jointly Notify Trial Court Clerk.*

(1) If both courts of appeals receive notice of the appealing parties' inability to reach agreement regarding consolidation, the clerks of both appellate courts must jointly notify the clerk of the trial court in writing of that fact.

(2) If the period described in Rule 15.3(b) has passed and the clerks of the two courts of appeals have not received any notice from the appealing parties regarding consolidation, the chief justices of the two courts of appeals shall confer and instruct the clerks of their respective courts to jointly notify the clerk of the trial court in writing that the appealing parties failed to timely submit notice of agreement regarding consolidation, and instruct the clerk to perform the selection process in Rule 15.4(b).

(b) *Consolidation by Trial Court Clerk.* After the trial court clerk receives notice from the clerks of the courts of appeals regarding either the appealing parties' inability to reach agreement as to consolidation or their failure to timely submit notice of agreement, the clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container folded in half or otherwise arranged so that the numbers are completely hidden from view. The trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case to the court of appeals for the corresponding number drawn.

15.5 All Appeals From Same Judgment or Order to be Consolidated Together. When appeals to multiple courts of appeals have been consolidated pursuant to this rule, other parties' appeals from the same judgment or order underlying the consolidated appeals must be assigned to the same court of appeals in which the previous appeals were consolidated.

Comment

Assignments to the Courts of Appeals for the First and Fourteenth Districts are governed by Tex. Gov't Code § 22.202(h).

The Supreme Court of Texas

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

Chambers of
Justice Nathan L. Hecht

September 25, 2007

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

Re: Referral of Rules Issues

Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several potential changes to the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Uniform Format Manual for Texas Court Reporters. These proposals are summarized in the attached appendix A. A copy of the SBOT Rules Committee proposal to amend Tex. R. Civ. P. 301 and Tex. R. App. P. 26.1(a) is separately attached in electronic format.

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all on October 19th.

Sincerely,

Nathan L. Hecht
Justice

RULES OF CIVIL PROCEDURE

Rule: 301

Current Text:

Rule 301 Judgments. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

Summary of Issue:

The State Bar of Texas (SBOT) Rules Committee recently submitted to the Court a proposal to amend Rule 301 to provide a clear post-judgment deadline for filing a motion for judgment non obstante veredicto (JNOV). *See Gomez v. Tex. Dep't of Criminal Justice*, 896 S.W.2d 176, 176-77 (Tex. 1995) (per curiam) (holding that "bill of review" filed within 30 days of judgment extended time to perfect appeal under former Appellate Rule 41(a)(1) because it "assailed the trial court's judgment"); *Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex. App.—San Antonio 1998, no pet.) (noting that Tex. R. Civ. P. 301 provides no explicit time limit to file JNOV motion, but concluding that, under *Gomez*, JNOV motion filed within time for filing motion for new trial extends appellate timetable). The Advisory Committee is asked to consider the SBOT Rules Committee's proposed revisions to Rule 301, which are set forth below, as well as its corresponding proposal to amend Appellate Rule 26.1(a), shown on page 3.

Proposed Revised Text:

Rule 301 Judgments.

1. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the parties all the relief to which each may be entitled either in law or equity.

FG - "disregard" FG - consider moving to new rule (on motions)

2. After the verdict has been entered under Rule 293, upon motion and reasonable notice the court may render judgment not withstanding the verdict if a directed verdict would have been proper. The court may, upon like motion and notice, set aside any jury finding on a question that has no support in the evidence. Such motions and any amended motions shall be filed not later than the time for filing a motion for new trial under Rule 329b. Any timely filed motion or amended motion shall

New provision

- no timing in current rule

same relief with post-jdm to modify (329b mtn. to modify)

Treat like MNT and motion to modify

extend the trial court's plenary power to grant a judgment notwithstanding the verdict, set aside any jury finding, grant a new trial or to vacate, modify, correct, or reform the judgment or appealable order for the same period as would a timely filed motion for new trial under Rule 329b. In the event an original or amended motion under this rule is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on the expiration of that period.

3. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

BD: underlined text varies from 1996 version

RULES OF APPELLATE PROCEDURE

Rule: 26.1(a)

Current Text (with proposed changes shown):

26.1 Civil Cases. The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; ~~or~~

(4) a motion for judgment notwithstanding the verdict or to disregard jury findings under Texas Rule of Civil Procedure 301; or

(~~4~~5) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court;

Summary of Issue:

The SBOT Rules Committee proposes amending Tex. R. App. P. 26.1(a) as shown in conjunction with its proposal, summarized above on pages 2-3, to amend Tex. R. Civ. P. 301. The Court requests the Advisory Committee's analysis of this proposal.

Rule: 53.7(a)

Note - See 8/20/08 amendments; do not address issue described here

Current Text:

53.7 Time and Place of Filing.

(a) ***Petition.*** The petition must be filed with the Supreme Court clerk within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing.

Summary of Issue:

Appellate Rule 4.3(a) provides that if the trial-court judgment is modified in any respect while the trial court has plenary power, any period that runs from the signing of the judgment is extended to run from the date the modified judgment is signed. But Rule 53.7(a), which governs the time period for filing a petition for review, does not contain any provision extending the time to file if the court of appeals alters its judgment or opinion during its plenary power—unless the modification is made in conjunction with the court of appeals's ruling on a timely filed motion for rehearing, in which case the ruling on the motion extends the time to file under Rule 53.7(a)(2). The Committee is asked to consider whether Rule 53.7(a) or another Appellate Rule should be amended to address this issue.

UNIFORM FORMAT MANUAL FOR TEXAS COURT REPORTERS

Provision: Section 16.16

Current text:

16.16 Audio/Video Recordings. Generally, audio/video recordings played in court are entered as an exhibit in the proceedings. When the exhibits are played in court, a contemporaneous record of the proceedings will not be made unless the Court so orders.

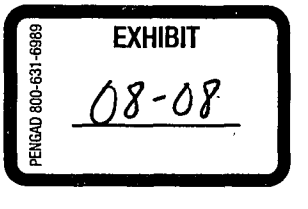
Summary of Issue:

At the 2007 State Bar Advanced Civil Appellate Practice Course, Stephen Tipps noted that the above provision appears to conflict with Appellate Rule 13.1, which requires the official court reporter or court recorder to, "unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings." Tex. R. App. P. 13.1(a). Mr. Tipps notes that when videotape deposition excerpts or other audio or audiovisual recordings are played for the jury, court reporters sometimes rely on Uniform Format Manual §16.16 and do not transcribe the recording being played.

Although this may not be problematic if a prior transcription of the recording is offered in evidence, in other cases—where either no transcription exists, or an existing transcription is never admitted in evidence—the trial reporter's failure to transcribe may result in no transcription of the material presented appearing in the appellate record, potentially frustrating appellate review. The Committee is asked to consider the relationship between the TRAP and UFM provisions governing transcription and recommend whether either set of rules should be amended to address the issue.

Proposed:

16.16 Audio/Video Recordings: If audio/video recordings are played in court, a written transcript of the portions played must be provided to the official reporter by the proponent of the testimony before the audio/video recordings are played. A copy of the written transcript must be served on all parties and filed with the court before the recordings are played. A contemporaneous record of the proceedings will then be made unless the Court orders otherwise. If there is a conflict between the contemporaneous record and the written transcript, the contemporaneous record will control for purposes of judicial review.



Kennon L. Peterson

From: Stephen.Tipps@bakerbotts.com
Sent: Wednesday, August 20, 2008 3:43 PM
To: cwatson@lockelord.com; wdorsane@mail.smu.edu; mahatchell@lockelord.com; smagill@mail.smu.edu; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

Could this mean electronically?

I am in general agreement with Mike and Skip. The rule needs to obligate the reporter to take down what is played in court as he or she understands it. With regard to recordings that were not transcribed contemporaneously at the time they were made, namely, recordings other than depositions, we might also have the rule provide that the recording itself should be included in the record so that the appellate court can listen to it itself if it chooses to do so.

-----Original Message-----
From: Watson, Charles "Skip" [mailto:cwatson@lockelord.com]
Sent: Wednesday, August 20, 2008 3:31 PM
To: Dorsaneo, William; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; Tipps, Stephen; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I agree with Mike. Some reporters will simply transcribe the supplied transcript, regardless. As it is many just give the backup tape recording to a typist with the reporter's notes consulted only when something is inaudible. That said, this rule forces them to stay seated and that recording notes. It remains up to the trial lawyer to read the transcript and call discrepancies to the attention of the reporter who will then consult the tape and notes. I have generally found the tape more useful than the notes when there is a significant discrepancy. Skip

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Wednesday, August 20, 2008 3:08 PM
To: Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

Good points. What say the rest of you?

From: Hatchell, Mike [mailto:mahatchell@lockelord.com]
Sent: Wed 8/20/2008 2:24 PM
To: Magill, Sharon; David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

This is a very useful rule. But, I would change the wording slightly as indicated below. I don't see any utility in giving trial court's discretion to excuse reporters from recording what's played in court.

The absence of a contemporancous recording is the problem we're trying to fix. Also, it seems unwise to me if the proponent can file a transcript that is not what's played in court. That's also part of the problem. Allowing the proponent to file a ream of material that is not played to the jury (i) invites conflict down the road and (ii) puts in the record extraneous material that may actually be relied upon indavertently by the parties or the court or that subtly influences the analysis.

16.16 Audio/Video Recordings: When audio/video recordings are played in court, a written transcript of the portions played must be provided to the official reporter by the proponent of the testimony at or before the time the audio/video recordings are played in court. The transcript must be served on all parties and filed with the court. The official court reporter must record the portions of the recording played in court. If there is a conflict between the transcript provided by the proponent and the notes of the official court reporter, the reporter's notes will control for purposes of judicial review.

Again, we need to think about court recorders

From: Magill, Sharon [mailto:smagill@mail.smu.edu]
Sent: Wednesday, August 20, 2008 1:43 PM
To: David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Hatchell, Mike; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: Proposed 16.16

To: SCAC Appellate Rules Subcommittee

From: Bill Dorsaneo

Re: Proposed 16.16

Date: August 20, 2008

Kennon L. Peterson

From: Jan Patterson

Sent: Wednesday, August 20, 2008 3:49 PM

To: 'Hatchell, Mike'; Magill, Sharon; David Gaultney; Dorsaneo, William; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; Kennon L. Peterson

Subject: RE: Proposed 16.16

I am trying to recall our history of discussions on this. I wonder if we could have a default for smaller cases in which if no transcript is provided at the time it is played, the reporter's notes will control. Sometimes, transcripts are prepared for appeal. Otherwise, I agree with Mike's comments. JPP

From: Hatchell, Mike [mailto:mahatchell@lockelord.com]
Sent: Wednesday, August 20, 2008 2:25 PM
To: Magill, Sharon; David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

This is a very useful rule. But, I would change the wording slightly as indicated below. I don't see any utility in giving trial court's discretion to excuse reporters from recording what's played in court. The absence of a contemporancous recording is the problem we're trying to fix. Also, it seems unwise to me if the proponent can file a transcript that is not what's played in court. That's also part of the problem. Allowing the proponent to file a ream of material that is not played to the jury (i) invites conflict down the road and (ii) puts in the record extraneous material that may actually be relied upon indavertently by the parties or the court or that subtly influences the analysis.

16.16 Audio/Video Recordings: When audio/video recordings are played in court, a written transcript of the portions played must be provided to the official reporter by the proponent of the testimony at or before the time the audio/video recordings are played in court. The transcript must be served on all parties and filed with the court. The official court reporter must record the portions of the recording played in court. If there is a conflict between the transcript provided by the proponent and the notes of the official court reporter, the reporter's notes will control for purposes of judicial review.

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Sent: Wednesday, August 20, 2008 1:43 PM
To: David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Hatchell, Mike; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: Proposed 16.16

To: SCAC Appellate Rules Subcommittee
From: Bill Dorsaneo
Re: Proposed 16.16

Kennon L. Peterson

From: Frank Gilstrap [fgilstrap@hillgilstrap.com]
Sent: Wednesday, August 20, 2008 4:39 PM
To: Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

I agree that "record the portions of the recording" is not clear. Here is an attempt to make the proposed rule clearer. It is wordy, but I think that it covers all the bases:

16.16 Audio and/or video recordings: Before an audio and/or video recording of testimony is played in court, the party offering the recording must file a written transcript of that portion of the recorded testimony that will be offered in evidence. When an audio and/or video recording of testimony is played in court, the court reporter must transcribe the testimony as if the witness were testifying in person. If there is a conflict between the transcript of testimony as prepared by the court reporter and the transcript of testimony filed by the proponent, the court reporter's transcript will control.

consider using a different term to account for diff. b/w shorthand reporting and transcribing

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From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
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To: Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Frank Gilstrap; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I don't understand the end of the third sentence.

From: Watson, Charles "Skip" [mailto:cwatson@lockelord.com]
Sent: Wed 8/20/2008 3:31 PM
To: Dorsaneo, William; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

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Skip

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kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

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16.16 Audio/Video Recordings: When audio/video recordings are played in court, a written transcript of the portions played must be provided to the official reporter by the proponent of the testimony at or before the time the audio/video recordings are played in court. The transcript must be served on all parties and filed with the court. The official court reporter must record the portions of the recording played in court. If there is a conflict between the transcript provided by the proponent and the notes of the official court reporter, the reporter's notes will control for purposes of judicial review.

From: Magill, Sharon [mailto:smagill@mail.smu.edu]
Sent: Wednesday, August 20, 2008 1:43 PM
To: David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Hatchell, Mike; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: Proposed 16.16

To: SCAC Appellate Rules Subcommittee

From: Bill Dorsaneo

Re: Proposed 16.16

Date: August 20, 2008

Kennon L. Peterson

From: Dorsaneo, William [wdorsane@mail.smu.edu]
Sent: Friday, August 22, 2008 3:20 PM
To: David Gaultney; Jan Patterson; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

Thanks. All of this loooks good to me.

From: David Gaultney [mailto:David.Gaultney@courts.state.tx.us]
Sent: Fri 8/22/2008 12:27 PM
To: Dorsaneo, William; Jan Patterson; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

As Stephen notes, recordings other than depositions generally are not transcribed contemporaneously at the time they are made--police DWI traffic stop videos,and video statements of accuseds and witnesses, for example. I agree the rule should provide the recording itself is to be included in the record. I assume the proposed rule would not require the proponent of that type of evidence to transcribe the audio, but would require the court reporter to transcribe what happens in court.
I agree it would be helpful to have a rule that expressly requires what is played in the courtroom to be transcribed (although in my view
13.1(a) already does that; it is 16.16 that does not).
And then there are the expert witness demonstrative exhibits, like slide or powerpoint presentations. Trial court records are sometimes difficult for an appellate court to follow without the visual portion of recordings that were played in court.

Looking at AR 13, what about the following aditional language.
13.1 The official court reporter or court recorder must:...
(f) when an audio/video recording is played in court, including a video deposition, make a contemporaneous record of the proceedings unless excused by agreement of the parties; (g) take and mark any audio/video recording played in court, and any transcript offered by a party of that portion of a video deposition played in court;
(h) after a proceeding ends, file with the trial court clerk any audio/video recording played in court, and that portion of a video deposition transcript offered by a party. If there is a conflict between the transcript of video deposition testimony as prepared by the official court reporter and the transcript of video deposition testimony offered by a party, the court reporter's transcript will control.

This would be in addition to the change in 16.16. It is wordy, but I think there may need to be a distinction in the rule between video depositions and other recordings. Some conflicts may be reporter inaccuracies better corrected under 34.6(e).
I could not figure how to add the notice and service requirements to this appellate rule, so that's missing. Maybe the trial court can deal with that on a case by case basis with scheduling orders, or maybe it's a problem that needs uniform treatment, and we should find a place in the rules for the requirements. Also, this proposal does not make mandatory the filing of a transcript by the proponent. Maybe that should be added.

I agree with Jan, a telephone conference or meeting may be helpful at some point.
My apologies for the length of this message.

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Thursday, August 21, 2008 10:28 AM

To: Jan Patterson; David Gaultney; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

I agree that the primary place to make it plain that there must be a contemporaneous transcription of an audio-visual recording is AR 13.
Then David's point about revising the manual to refer to the rule is itself a very good idea, as long as the manual is clear about what is proper and what is not.

From: Jan Patterson [mailto:Jan.Patterson@3rdcoa.courts.state.tx.us]
Sent: Thu 8/21/2008 7:10 AM
To: David Gaultney; Frank Gilstrap; Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

It might be helpful to meet before the meeting or before we report. JPP

-----Original Message-----
From: David Gaultney
Sent: Wednesday, August 20, 2008 7:07 PM
To: 'Frank Gilstrap'; Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

My concern is that the proposed amendment to subsection 16.16 looks more like a rule of procedure, governing the parties and appellate review, yet it is in the Uniform Format Manual for Texas Court Reproters, governing the form of official reporter records and the reporter's conduct. Given its location and purpose, the subsection could be amended to say: "When an audio/video recording is played in court, a contemporaneous record of the proceedings must be made by the official court reporter, unless excused by agreement of the parties. See Tex.R.App.P 13.1(a)". If we need a rule requiring the parties to file written transcripts or serve other parties (I'm not sure we do), I suggest we put it in the rules of procedure, so the parties will know what to do.
On appeal, TRAP 34.6(e) and TRAP 13.1 should be able to handle any problems with inaccuracies in the reporter's record. But if we need to say that the court reporter's transcript controls in the event of a conflict, I would prefer we put it in the appellate rules, maybe rule 34.6, rather than in subsection 16.16.

-----Original Message-----
From: Frank Gilstrap [mailto:fgilstrap@hillgilstrap.com]
Sent: Wednesday, August 20, 2008 4:39 PM
To: Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

I agree that "record the portions of the recording" is not clear. Here is an attempt to make the proposed rule clearer. It is wordy, but I think that it covers all the bases:

16.16 Audio and/or video recordings: Before an audio and/or video recording of testimony is played in court, the party offering the recording must file a written transcript of that portion of the recorded testimony that will be offered in evidence. When an audio and/or video recording of testimony is played in court, the court reporter must transcribe the testimony as if the witness were testifying in person.

If there is a conflict between the transcript of testimony as prepared by the court reporter and the transcript of testimony filed by the proponent, the court reporter's transcript will control.

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Wednesday, August 20, 2008 4:25 PM
To: Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Frank Gilstrap; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I don't understand the end of the third sentence.

From: Watson, Charles "Skip" [mailto:cwatson@lockelord.com]
Sent: Wed 8/20/2008 3:31 PM
To: Dorsaneo, William; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I agree with Mike. Some reporters will simply transcribe the supplied transcript, regardless. As it is many just give the backup tape recording to a typist with the reporter's notes consulted only when something is inaudible. That said, this rule forces them to stay seated and that recording notes. It remains up to the trial lawyer to read the transcript and call discrepancies to the attention of the reporter who will then consult the tape and notes. I have generally found the tape more useful than the notes when there is a significant discrepancy.
Skip

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Wednesday, August 20, 2008 3:08 PM
To: Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

Good points. What say the rest of you?

From: Hatchell, Mike [mailto:mahatchell@lockelord.com]
Sent: Wed 8/20/2008 2:24 PM
To: Magill, Sharon; David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

This is a very useful rule. But, I would change the wording slightly as indicated below. I don't see any utility in giving trial court's discretion to excuse reporters from recording what's played in court.
The absence of a contemporancous recording is the problem we're trying to fix. Also, it seems unwise to me if the proponent can file a transcript that is not what's played in

court. That's also part of the problem. Allowing the proponent to file a ream of material that is not played to the jury (i) invites conflict down the road and (ii) puts in the record extraneous material that may actually be relied upon indavertently by the parties or the court or that subtly influences the analysis.

16.16 Audio/Video Recordings: When audio/video recordings are played in court, a written transcript of the portions played must be provided to the official reporter by the proponent of the testimony at or before the time the audio/video recordings are played in court. The transcript must be served on all parties and filed with the court. The official court reporter must record the portions of the recording played in court. If there is a conflict between the transcript provided by the proponent and the notes of the official court reporter, the reporter's notes will control for purposes of judicial review.

From: Magill, Sharon [mailto:smagill@mail.smu.edu]
Sent: Wednesday, August 20, 2008 1:43 PM
To: David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Hatchell, Mike; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: Proposed 16.16

To: SCAC Appellate Rules Subcommittee

From: Bill Dorsaneo

Re: Proposed 16.16

Date: August 20, 2008

Kennon L. Peterson

From: Dorsaneo, William [wdorsane@mail.smu.edu]
Sent: Friday, August 29, 2008 12:04 PM
To: Jan Patterson; David Gaultney; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Cc: d.b.jackson@charter.net
Subject: RE: Proposed 16.16

Well, I am back to work on this project. First, I believe that Appellate Rule 13.1(a) should state more clearly what it means to make a record of the proceedings. I suggest something like this language.
"(a) unless excused by agreement of the parties, attend all court sessions and make a contemporaneous stenographic record of all of the proceedings conducted in open court, including the live testimony of witnesses, any deposition testimony, any audio-visual recordings played in court, and any statements made by counsel, by the court or by any other person, during the proceedings."

Second, I would also suggest revision of the Uniform Manual. At a minimum, I would use the language included in David Gaultney's email (see below). I suggest, however, that we may want to include some additional guidance for reporters. David Jackson should be able to help
us with that aspect of the job.

Civil Procedure Rule 203.6 includes some information about transcribing a nonstenographic recording before its use at trial. But does not say how the trial record should be made. Maybe it should do so.

Have a nice holiday!!!!!!

Professor of Law and
Chief Justice John and Lena Hickman
Distinguished Faculty Fellow

Tel. 214-768-2626
Fax. 214-768-4330

-----Original Message-----
From: Jan Patterson [mailto:Jan.Patterson@3rdcoa.courts.state.tx.us]
Sent: Thursday, August 21, 2008 7:11 AM
To: David Gaultney; Frank Gilstrap; Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

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From: David Gaultney
Sent: Wednesday, August 20, 2008 7:07 PM
To: 'Frank Gilstrap'; Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
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Sent: Wednesday, August 20, 2008 4:39 PM
To: Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
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Sent: Wednesday, August 20, 2008 4:25 PM
To: Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Frank Gilstrap; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
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Sent: Wed 8/20/2008 3:31 PM
To: Dorsaneo, William; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
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To: Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

Good points. What say the rest of you?

From: Hatchell, Mike [mailto:mahatchell@lockelord.com]
Sent: Wed 8/20/2008 2:24 PM
To: Magill, Sharon; David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

This is a very useful rule. But, I would change the wording slightly as indicated below. I don't see any utility in giving trial court's discretion to excuse reporters from recording what's played in court.
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Sent: Wednesday, August 20, 2008 1:43 PM
To: David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Hatchell, Mike; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: Proposed 16.16

To: SCAC Appellate Rules Subcommittee

From: Bill Dorsaneo

Re: Proposed 16.16

Date: August 20, 2008

Main Identity

From: "Dee Dee Jones" <dee2jones@hwtx.com>
To: "Dee Dee Jones" <dee2jones@hwtx.com>
Sent: Sunday, September 21, 2008 3:54 PM
Attach: Proposed 1616.doc
Subject: Fw: Proposed 16.16

-----Original Message-----
From: David Gaultney
Sent: Thursday, September 04, 2008 2:32 PM
To: 'Dorsaneo, William'; Stephen.Tipps@bakerbotts.com; Jan Patterson; fgilstrap@hillgilstrap.com; cwatson@lockelord.com; mahatchell@lockelord.com; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Cc: d.b.jackson@charter.net; Kennon L. Peterson
Subject: RE: Proposed 16.16

The proposals look good. Defining demonstrative evidence may be more of an evidence committee or trial rule committee issue.

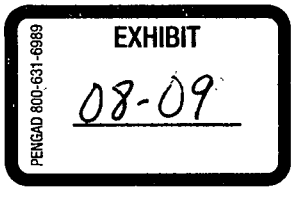
-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Thursday, September 04, 2008 1:45 PM
To: Stephen.Tipps@bakerbotts.com; Jan Patterson; David Gaultney; fgilstrap@hillgilstrap.com; cwatson@lockelord.com; mahatchell@lockelord.com; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Cc: d.b.jackson@charter.net; Kennon L. Peterson
Subject: RE: Proposed 16.16

What do the rest of you think? 13.1(b) could read: "(b) obtain all exhibits presented during a proceeding, including exhibits that have been marked and formally offered in evidence, exhibits that have been marked but not formally offered in evidence and copies of all demonstrative exhibits that have been shown to the trier of facts during the proceeding and ensure that they are marked;"
We may want to define demonstrative exhibits in Appellate Rule 3
Professor of Law and Chief Justice John and Lena Hickman Distinguished Faculty Fellow

Tel. 214-768-2626
Fax. 214-768-4330

-----Original Message-----
From: Stephen.Tipps@bakerbotts.com [mailto:Stephen.Tipps@bakerbotts.com]

Sent: Thursday, September 04, 2008 12:55 PM
To: Dorsaneo, William; Jan.Patterson@3rdcoa.courts.state.tx.us; David.Gaultney@courts.state.tx.us; fgilstrap@hillgilstrap.com;



cwatson@lockelord.com; mahatchell@lockelord.com; Magill, Sharon; Jody.Hughes@courts.state.tx.us; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; terry.jennings@1stcoa.courts.state.tx.us; richard@momnd.com; sarahbduncan@yahoo.com; Kennon.Peterson@courts.state.tx.us
Cc: d.b.jackson@charter.net; Kennon.Peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I would put the obligation to get the material on the court reporter. In time, trial lawyers, or their in-trial appellate sidekicks, may learn to do it--though very few of them have so far--but if we have a rule that tells the court reporter that it is his or her responsibility to get the demonstratives--or reduced versions of them--from the lawyer, for the most part he or she will do it.

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Thursday, September 04, 2008 12:50 PM
To: Tipps, Stephen; Jan.Patterson@3rdcoa.courts.state.tx.us; David.Gaultney@courts.state.tx.us; fgilstrap@hillgilstrap.com; cwatson@lockelord.com; mahatchell@lockelord.com; Magill, Sharon; Jody.Hughes@courts.state.tx.us; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; terry.jennings@1stcoa.courts.state.tx.us; richard@momnd.com; sarahbduncan@yahoo.com; Kennon.Peterson@courts.state.tx.us
Cc: d.b.jackson@charter.net; Kennon.Peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

Good point. What you are saying is that the court reporters actually do not make a full record of the proceedings How and where should we impose that obligation? Could we effectively put that obligation on the official court reporter? Should we punt that issue to Buddy' subcommittee or coordinate with them?

Professor of Law and
Chief Justice John and Lena Hickman
Distinguished Faculty Fellow

Tel. 214-768-2626
Fax. 214-768-4330

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Sent: Thursday, September 04, 2008 12:33 PM
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Cc: d.b.jackson@charter.net; Kennon.Peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I agree that what Bill has put together is good.

The only thing that I would add--and I realize that it is a bit off-topic--is something that addresses the need for litigants to provide the reporter with copies of all demonstrative exhibits, including PowerPoints, so that he or she can include them as a subpart of the reporter's record that goes to the court of appeals. These materials don't go into the jury room, and technically aren't evidence, but as Jan (I think) has commented, the written reporter's record oftentimes is incomprehensible if the reader cannot see the demonstrative material that the trial judge and the jury are seeing at the time that the witnesses and lawyers speak on the record. Trials these days are visual presentations, and the appellate court should not be handicapped by withholding from it that which everyone at the trial gets to see.

Unfortunately, I am obligated to be in Connecticut tomorrow for a family wedding and will miss the meeting. I look forward, though, to seeing what the committee comes up with.

-----Original Message-----
From: Jan Patterson [mailto:Jan.Patterson@3rdcoa.courts.state.tx.us]
Sent: Thursday, September 04, 2008 12:01 PM
To: Dorsaneo, William; David Gaultney; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; Tipps, Stephen; sarahbduncan@yahoo.com; Kennon L. Peterson
Cc: d.b.jackson@charter.net; Kennon L. Peterson
Subject: RE: Proposed 16.16

It's good. JPP

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Thursday, September 04, 2008 11:50 AM
To: Dorsaneo, William; Jan Patterson; David Gaultney; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Cc: d.b.jackson@charter.net; Kennon L. Peterson
Subject: RE: Proposed 16.16

I have not heard from anyone. I assume that you either like or hate my proposal. Which is it?

Professor of Law and
Chief Justice John and Lena Hickman
Distinguished Faculty Fellow

Tel. 214-768-2626
Fax. 214-768-4330

-----Original Message-----
From: Dorsaneo, William
Sent: Friday, August 29, 2008 12:04 PM
To: 'Jan Patterson'; David Gaultney; Frank Gilstrap; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Cc: 'd.b.jackson@charter.net'
Subject: RE: Proposed 16.16

Well, I am back to work on this project. First, I believe that Appellate Rule 13.1(a) should state more clearly what it means to make a record of the proceedings. I suggest something like this language.
"(a) unless excused by agreement of the parties, attend all court sessions and make a contemporaneous stenographic record of all of the proceedings conducted in open court, including the live testimony of witnesses, any deposition testimony, any audio-visual recordings played in court, and any statements made by counsel, by the court or by any other person, during the proceedings."

Second, I would also suggest revision of the Uniform Manual. At a minimum, I would use the language included in David Gaultney's email (see below). I suggest, however, that we may want to include some additional guidance for reporters. David Jackson should be able to help us with that aspect of the job.

Civil Procedure Rule 203.6 includes some information about transcribing a nonstenographic recording before its use at trial. But does not say how the trial record should be made. Maybe it should do so.

Have a nice holiday!!!!!!

Professor of Law and
Chief Justice John and Lena Hickman
Distinguished Faculty Fellow

Tel. 214-768-2626
Fax. 214-768-4330

-----Original Message-----
From: Jan Patterson [mailto:Jan.Patterson@3rdcoa.courts.state.tx.us]
Sent: Thursday, August 21, 2008 7:11 AM
To: David Gaultney; Frank Gilstrap; Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

From: David Gaultney
Sent: Wednesday, August 20, 2008 7:07 PM
To: 'Frank Gilstrap'; Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

My concern is that the proposed amendment to subsection 16.16 looks more like a rule of procedure, governing the parties and appellate review, yet it is in the Uniform Format Manual for Texas Court Reporters, governing the form of official reporter records and the reporter's conduct. Given its location and purpose, the subsection could be amended to say: "When an audio/video recording is played in court, a contemporaneous record of the proceedings must be made by the official court reporter, unless excused by agreement of the parties. See Tex.R.App.P 13.1(a)". If we need a rule requiring the parties to file written transcripts or serve other parties (I'm not sure we do), I suggest we put it in the rules of procedure, so the parties will know what to do. On appeal, TRAP 34.6(e) and TRAP 13.1 should be able to handle any problems with inaccuracies in the reporter's record. But if we need to say that the court reporter's transcript controls in the event of a conflict, I would prefer we put it in the appellate rules, maybe rule 34.6, rather than in subsection 16.16.

-----Original Message-----
From: Frank Gilstrap [mailto:fgilstrap@hillgilstrap.com]
Sent: Wednesday, August 20, 2008 4:39 PM
To: Dorsaneo, William; Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; Kennon L. Peterson
Subject: RE: Proposed 16.16

I agree that "record the portions of the recording" is not clear. Here is an attempt to make the proposed rule clearer. It is wordy, but I think that it covers all the bases:

16.16 Audio and/or video recordings: Before an audio and/or video recording of testimony is played in court, the party offering the recording must file a written transcript of that portion of the recorded testimony that will be offered in evidence. When an audio and/or video recording of testimony is played in court, the court reporter must transcribe the testimony as if the witness were testifying in person. If there is a conflict between the transcript of testimony as prepared by the court reporter and the transcript of testimony filed by the proponent, the court reporter's transcript will control.

It might be helpful to meet before the meeting or before we report. JPP

-----Original Message-----

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Wednesday, August 20, 2008 4:25 PM
To: Watson, Charles "Skip"; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; Frank Gilstrap; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I don't understand the end of the third sentence.

From: Watson, Charles "Skip" [mailto:cwatson@lockelord.com]
Sent: Wed 8/20/2008 3:31 PM
To: Dorsaneo, William; Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

I agree with Mike. Some reporters will simply transcribe the supplied transcript, regardless. As it is many just give the backup tape recording to a typist with the reporter's notes consulted only when something is inaudible. That said, this rule forces them to stay seated and that recording notes. It remains up to the trial lawyer to read the transcript and call discrepancies to the attention of the reporter who will then consult the tape and notes. I have generally found the tape more useful than the notes when there is a significant discrepancy. Skip

-----Original Message-----
From: Dorsaneo, William [mailto:wdorsane@mail.smu.edu]
Sent: Wednesday, August 20, 2008 3:08 PM
To: Hatchell, Mike; Magill, Sharon; David Gaultney; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

Good points. What say the rest of you?

From: Hatchell, Mike [mailto:mahatchell@lockelord.com]
Sent: Wed 8/20/2008 2:24 PM
To: Magill, Sharon; David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Terry Jennings;

richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: RE: Proposed 16.16

This is a very useful rule. But, I would change the wording slightly as indicated below. I don't see any utility in giving trial court's discretion to excuse reporters from recording what's played in court. The absence of a contemporancous recording is the problem we're trying to fix. Also, it seems unwise to me if the proponent can file a transcript that is not what's played in court. That's also part of the problem. Allowing the proponent to file a ream of material that is not played to the jury (i) invites conflict down the road and (ii) puts in the record extraneous material that may actually be relied upon indavertently by the parties or the court or that subtly influences the analysis.

16.16 Audio/Video Recordings: When audio/video recordings are played in court, a written transcript of the portions played must be provided to the official reporter by the proponent of the testimony at or before the time the audio/video recordings are played in court. The transcript must be served on all parties and filed with the court. The official court reporter must record the portions of the recording played in court. If there is a conflict between the transcript provided by the proponent and the notes of the official court reporter, the reporter's notes will control for purposes of judicial review.

From: Magill, Sharon [mailto:smagill@mail.smu.edu]
Sent: Wednesday, August 20, 2008 1:43 PM
To: David Gaultney; Dorsaneo, William; Jody Hughes; Jan Patterson; psbaron@austin.rr.com; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Hatchell, Mike; Terry Jennings; richard@momnd.com; stephen.tipps@bakerbotts.com; Watson, Charles "Skip"; sarahbduncan@yahoo.com; kennon.peterson@courts.state.tx.us
Subject: Proposed 16.16

To: SCAC Appellate Rules Subcommittee

From: Bill Dorsaneo

Re: Proposed 16.16

Date: August 20, 2008

No virus found in this incoming message.
Checked by AVG.
Version: 7.5.524 / Virus Database: 270.6.21/1678 - Release Date: 9/18/2008
9:01 AM

No virus found in this incoming message.
Checked by AVG.
Version: 7.5.524 / Virus Database: 270.7.0 - Release Date: 9/18/2008 12:00 AM

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF CIVIL COURT PROCEEDINGS IN _____[1] BY ELECTRONIC AUDIO OR VIDEO RECORDING

1. **Application.** The following rules govern the procedures in the _____[2] in proceedings in civil matters in which a record is made by electronic audio or video recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

   a. Assuring that the recording system is functioning and that a complete, distinct, clear, and transcribable recording is made;

   b. Making a detailed, legible log for all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission, or exclusion of all exhibits;

   c. Filing with the clerk the original electronic recording including all exhibits;

   d. Storing or providing for storing of the electronic audio or video recording to assure its preservation as required by law;

   e. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

   f. Preparing or obtaining a certified copy of the original recording of any proceeding, upon full payment of $150.00 per copy imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court; and

   g. Performing such other duties as may be directed by the judge presiding.

3. **Reporter's Record.** The reporter's record on appeal from any proceeding of which an electronic recording has been made shall be labeled to reflect clearly the numbered contents

---

[1]Insert a description of the affected court or courts.

[2]Insert a description of the affected court or courts.

certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding. Any exhibits designated by the parties for inclusion in the reporter's record shall be arranged in numerical order and firmly bound together so far as practicable, together with an index consisting of a brief description identifying each exhibit.

4. **Time for Filing.** The court recorder shall file the reporter's record with the court of appeals within fifteen days after the perfection of an appeal. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded reporter's record and a copy of all exhibits relevant to the issues raised on appeal. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any issues raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic audio or video recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded reporter's record.

8. **Paupers.** Texas Rule of Appellate Procedure 20.1(j) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded reporter's record and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in the transcriptions of the recorded reporter's record may be corrected by agreement of the parties. Should any dispute arise after the reporter's record or appendices are filed as to whether an electronic audio or video recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the audio or video recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the reporter's record or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic audio or video recording.

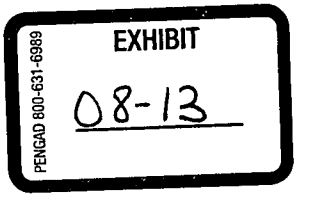
Admonitory Instruction Subcommittee
PJC Oversight Committee

Report to Supreme Court Advisory Committee
On Plain Language Rewrite of Admonitory Instructions

Draft of
August 2008

After discussion at SCAC at October 18, 2007 meeting and April 4, 2008

Clean



Proposed Texas Rule of Civil Procedure 226a(I) (PJC 100.1)
Instructions to the panel before jury selection

Members of the Jury Panel [*or* Ladies and Gentlemen of the Jury Panel]: Thank you for being here. We are about to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all mobile phones and electronic devices. Do not record or photograph any part of these court proceedings, because it is prohibited by law

Here is some background about this case. This is a civil case, which means it is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____.

[description of the current case]

Every juror must obey my instructions. If you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions:

1. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so they will not be offended when you follow the instructions.

2. Do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me immediately.

   We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

[new bias and prejudice insert]

5. Remember that you took an oath that you will tell the truth, so be honest when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin asking questions.

Proposed Texas Rule of Civil Procedure 226a(II) (PJC 100.2)
Instructions for the jury after it has been selected

Members of the Jury [*or* Ladies and Gentlemen]: You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions]

You have received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all mobile phones and electronic devices. Do not communicate with anyone electronically during court proceedings. [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so they will not be offended when you follow them.

3. Do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me immediately.

   We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

5. Do not talk about the case with anyone during the trial, not even with the other jurors, until the end of the trial. After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then discuss the case with the other jurors and reach a verdict.

   We ask you not to discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

6. Do not investigate this case on your own. Do not inspect places or items from this case unless they are presented as evidence in court. Do not let anyone do those things for you. This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it. For example:

    - Do not try to get information about the case from outside this courtroom.
    - Do not go to places mentioned in the case to inspect the places.
    - Do not look things up in law books, dictionaries, public records, or on the Internet.

7. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not presented in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider insurance or who might be covered by insurance unless I tell you to. Do not guess about who might or might not be covered by insurance.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not take notes. Any notes you take are for your own personal use and may be taken back into the jury room and consulted during deliberations. Do not share your notes with other jurors. Do not rely on another juror's notes.

11. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side should win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

Proposed Texas Rule of Civil Procedure 226a(III) (PJC 100.3)
General Instructions to the jury before answering the questions and reaching a verdict

Charge of the Court

Members of the Jury [*or* Ladies & Gentlemen of the Jury]: You are about to go to the jury room to discuss the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else. Do not do any independent investigation about the case. Do not look up any words in dictionaries or on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your mobile phone during your discussions. Any notes you have taken are for your own personal use and may be taken back into the jury room and consulted during deliberations. Do not share your notes with other jurors. Do not rely on another juror's notes.

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not presented in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise.

    - The term "preponderance of the evidence" means the greater weight and degree of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say "I will answer this question your way if you answer another question my way."

11. The answers to the questions must be based on the decision of at least 10 of the 12 jurors unless the question has a different instruction. The same 10 jurors must agree on all the answers and then to the entire verdict. Specifically—

    - Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

    - If all 12 jurors agree, the presiding juror signs the verdict certificate for the entire jury.

    - If all 12 jurors do not agree, the 10 or more jurors who agree to every answer should each sign the verdict certificate.

As I have said before, if you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. It is also possible that you may be held in contempt or punished in some other way. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions and special instructions given to the jury will be transcribed here.]

When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

The presiding juror has these duties:

1. Read the complete charge aloud.

2. Preside over your deliberations. This means the presiding juror will take the lead in discussions, write down the answers that 10 or more of you agree on, and see that you follow the instructions.

3. Give written questions or comments to the bailiff who will give them to the judge.

4. Sign the verdict certificate if all 12 jurors agree or get the signatures of all those who agree if the verdict is not by all 12. Remember: if the verdict is not by all 12 of you, the same 10 or 11 who sign the verdict certificate must have agreed to every answer.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Once you have reached a verdict, the presiding juror must tell the bailiff. Do not tell the bailiff that you have reached a verdict until—

1. You have answered all the questions, and

2. The presiding juror has written down the answers, and

3. The presiding juror has signed the verdict certificate if all 12 jurors agree with the verdict, or had all those who agree sign the verdict certificate.

_____

Judge Presiding

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate below.

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

If unanimous, the presiding juror signs here.

_____ _____

PRESIDING JUROR Printed Name of Presiding Juror

If the answers to some questions were not unanimous, the jurors 10 or 11 jurors who agreed to every answer must sign below:

	SIGNATURE	NAME PRINTED
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

Additional Certificate

[used when some questions require unanimous answers]

I certify that the jury was unanimous in answering "yes" to the following questions. All 12 of us agreed to the answer.

[Judge to list questions that require a unanimous "yes" answer]

_____

Presiding Juror

Admonitory Instruction Subcommittee
PJC Oversight Committee

Report to Supreme Court Advisory Committee
On Plain Language Rewrite of Admonitory Instructions

Draft of
August 2008

After discussion at SCAC at October 18, 2007 meeting and April 4, 2008

Blackline

Proposed Texas Rule of Civil Procedure 226a(I) (PJC 100.1)
Instructions to the panel before jury selection

Members of the Jury Panel [*or* Ladies and Gentlemen of the Jury Panel]: Thank you for being here. We are about to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all mobile phones and electronic devices. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Here is some background about this case. This is a civil case, which means it is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____.

[description of the current case]

Every juror must obey my instructions. If you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions:

1. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so they will not be offended when you follow the instructions.

2. Do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me immediately.

   We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

Comment [T1]: New intro

Comment [T2]: Old 226a "whether you are selected as a juror for this case or not you are performing a significant service which only free people can perform".

Comment [T3]: New per SCAC discussion

Comment [T4]: Old 226a. The case that is now on trial is _____ v. _____. This is a civil action that will tried before a jury.

Comment [T5]: Old 226a. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.

Comment [T6]: Old 226a. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

Comment [T7]: Old 226a. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

Comment [T8]: Old 226a. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case.

Comment [T9]: new

Comment [T10]: Old 226a. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

[new bias and prejudice insert]

5. Remember that you took an oath that you will tell the truth, so be honest when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin asking questions.

Comment [T11]: Old 226a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Proposed Texas Rule of Civil Procedure 226a(II) (PJC 100.2)
Instructions for the jury after it has been selected

Members of the Jury [*or* Ladies and Gentlemen]: You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions]

You have received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

Comment [T12]: Old 226a By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey throughout this trial.

1. Turn off all mobile phones and electronic devices. Do not communicate with anyone electronically during court proceedings. [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Comment [T13]: New per SCAC discussions

2. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so they will not be offended when you follow them.

3. Do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me immediately.

   We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

Comment [T14]: Repeat from first instruction

5. Do not talk about the case with anyone during the trial, not even with the other jurors, until the end of the trial. After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then discuss the case with the other jurors and reach a verdict.

   We ask you not to discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

Comment [T15]: Old 226a Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

Comment [T16]: new

6. Do not investigate this case on your own. Do not inspect places or items from this case unless they are presented as evidence in court. Do not let anyone do those things for you. This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it. For example:

    - Do not try to get information about the case from outside this courtroom.
    - Do not go to places mentioned in the case to inspect the places.
    - Do not look things up in law books, dictionaries, public records, or on the Internet.

7. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not presented in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider insurance or who might be covered by insurance unless I tell you to. Do not guess about who might or might not be covered by insurance.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not take notes. Any notes you take are for your own personal use and may be taken back into the jury room and consulted during deliberations. Do not share your notes with other jurors. Do not rely on another juror's notes.

11. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Comment [T17]: Old 226a. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

Comment [T18]: Old 226a. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

Comment [T19]: Old 226a. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.

Comment [T20]: Old 226a. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

Comment [T21]: New per SCAC discussion

Comment [T22]: Old 226a. At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

Comment [T23]: Same as first set

Comment [T24]:

Comment [T25]:

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

Proposed Texas Rule of Civil Procedure 226a(III) (PJC 100.3)
General Instructions to the jury before answering the questions and reaching a verdict

Charge of the Court

Members of the Jury [*or* Ladies & Gentlemen of the Jury]: You are about to go to the jury room to discuss the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else. Do not do any independent investigation about the case. Do not look up any words in dictionaries or on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your mobile phone during your discussions. Any notes you have taken are for your own personal use and may be taken back into the jury room and consulted during deliberations. Do not share your notes with other jurors. Do not rely on another juror's notes.

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not presented in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no", your answer must be based on a preponderance of the evidence unless you are told otherwise.

    - The term "preponderance of the evidence" means the greater weight and degree of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

Comment [T26]: Re-enforcement of previous instructions needed and cell phone and note taking added.

Comment [T27]: Old 226a In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case

Comment [T28]: Old 266a You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge.

Comment [T29]: Old 226a When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Comment [T30]: Old 226a Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

Comment [T31]: Not actually in 226a but in all charges per the PJC. Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless otherwise instructed.
Also include new more likely than not language approved by the SCAC and all of the PJC committees

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say "I will answer this question your way if you answer another question my way."

11. The answers to the questions must be based on the decision of at least 10 of the 12 jurors unless the question has a different instruction. The same 10 jurors must agree on all the answers and then to the entire verdict. Specifically—

    - Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

    - If all 12 jurors agree, the presiding juror signs the verdict certificate for the entire jury.

    - If all 12 jurors do not agree, the 10 or more jurors who agree to every answer should each sign the verdict certificate.

As I have said before, if you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. It is also possible that you may be held in contempt or punished in some other way. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions and special instructions given to the jury will be transcribed here.]

Comment [T32]: Old 226a You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

Comment [T33]: Old 226a You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

Comment [T34]: Old 226a You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

Comment [T35]: Approved by SCAC to beef up contempt issue here.

When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

The presiding juror has these duties:

1. Read the complete charge aloud.

2. Preside over your deliberations. This means the presiding juror will take the lead in discussions, write down the answers that 10 or more of you agree on, and see that you follow the instructions.

3. Give written questions or comments to the bailiff who will give them to the judge.

4. Sign the verdict certificate if all 12 jurors agree or get the signatures of all those who agree if the verdict is not by all 12. Remember: if the verdict is not by all 12 of you, the same 10 or 11 who sign the verdict certificate must have agreed to every answer.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Once you have reached a verdict, the presiding juror must tell the bailiff. Do not tell the bailiff that you have reached a verdict until—

1. You have answered all the questions, and

2. The presiding juror has written down the answers, and

3. The presiding juror has signed the verdict certificate if all 12 jurors agree with the verdict, or had all those who agree sign the verdict certificate.

_____

Judge Presiding

Comment [T36]: Not in 226a. Current instructions from PJC. After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.
It is the duty of the presiding juror-
1.to preside during your deliberations,
2.to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3.to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4.to vote on the questions,
5.to write your answers to the questions in the spaces provided, and
6.to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.
You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.
When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate below.

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

If unanimous, the presiding juror signs here.

_____ _____

PRESIDING JUROR Printed Name of Presiding Juror

If the answers to some questions were not unanimous, the jurors 10 or 11 jurors who agreed to every answer must sign below:

	SIGNATURE	NAME PRINTED
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

CHIEF JUSTICE
JOSH R. MORRISS, III

JUSTICES
JACK CARTER
BAILEY C. MOSELEY

Court of Appeals
Sixth Appellate District
State of Texas

CLERK
DEBBIE AUTREY

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75501
903/798-3046

November 13, 2007

The Honorable Nathan L. Hecht, Liaison
Supreme Court Advisory Committee
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, TX 78701

The Honorable Phil Johnson, Liaison
Council of Chief Justices
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, TX 78701

Re: Request for Referral to Supreme Court Advisory Committee

Dear Justice Hecht and Justice Johnson:

The Council of Chief Justices of the intermediate courts of appeals has directed me to ask for your assistance. It has been brought to our attention that the courts of appeals are split in whether they designate certain proceedings as criminal or civil. We find no guidance in the Rules of Appellate Procedure regarding this issue. This classification issue has recently been seen in mandamus proceedings based on, or arising out of, criminal matters, for example, mandamus cases resulting from officials attempting to collect criminal court costs from inmate trust accounts.

The classification of an action affects where subsequent relief is sought. If a court of appeals uses a criminal classification, then further relief is ordinarily sought in the Court of Criminal Appeals. A civil classification results in relief being sought in the Supreme Court.

On behalf of the Council, I ask that you refer this matter to the Supreme Court Advisory Committee to study whether the Rules of Appellate Procedure should provide guidance on how to classify certain cases as civil or criminal.

Sincerely,

Josh R. Morriss, III
(Chair, Council of Chief Justices)

cc: The Honorable Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals

The Supreme Court of Texas

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

December 12, 2007

Hon. Josh R. Morriss III
Chair, Council of Chief Justices
The Court of Appeals for the
Sixth Appellate District of Texas
100 North State Line Avenue #20
Texarkana TX 75501

Re: Request for referral to Supreme Court Advisory Committee on case classifications as civil or criminal

Dear Chief Justice Morriss:

Thank you for your letter. A few times I have seen case numbers that caused me to wonder about the classification scheme, and I think it will be useful to clarify the matter. I appreciate your calling it to my attention.

Of course, the Advisory Committee and the Court will want the advice of the Council of Chief Justices.

Cordially,

Nathan L. Hecht
Justice

c: Hon. Phil Johnson, Justice
The Supreme Court of Texas
Hon. Sharon Keller, Presiding Judge
The Court of Criminal Appeals of Texas
Charles L. Babcock, Chair
The Supreme Court Advisory Committee
Jody Hughes, Rules Attorney
The Supreme Court of Texas

MEMORANDUM

TO: Bill Dorsaneo March 3, 2008

FROM: Jody Hughes

RE: Categorization of Certain Cases as Civil or Criminal

Chief Justice Morriss's letter to Justices Hecht and Johnson dated November 13, 2007 notes that "the courts of appeals are split in whether they designate certain proceedings as civil or criminal" and asked the Court to refer the matter to the Advisory Committee to study whether the Appellate Rules could provide more definitive guidelines. In an effort to better understand the problem, I asked the clerks of the courts of appeals to help identify categories of cases in which the civil/criminal designation is unclear or inconsistent, which they did; Sharri Roessler, Clerk of the Waco Court of Appeals, and Kay Waters, a staff attorney with the El Paso Court of Appeals, provided some particularly helpful insights and research materials. The following memo summarizes the law in several categories of proceedings.

The first category listed below—inmate trust fund litigation—reflects perhaps the widest divergence currently among the courts of appeals; however, the split may be resolved soon, as one case is currently pending in the Court of Criminal Appeals on petition for discretionary review. The next three categories—disclosure of grand jury proceedings, bail bond forfeitures, and habeas proceedings—reflect narrower disagreement over categorization but nonetheless could benefit from clarification. The next three categories—expunction of arrest records, juvenile cases, and a catchall "other proceedings ancillary to criminal prosecution"—do not reflect disagreement among the courts of appeals, but I included them because they seemed relevant to the larger issue of how cases are categorized as either civil or criminal.

The appellate courts have struggled to apply a consistent standard to decide what distinguishes a criminal case from a civil one. For example, in a robbery case where the jury found the defendant sane during the robbery but insane at the time of trial, and the trial court ordered further proceedings suspended until the defendant became sane, the Court of Criminal Appeals concluded that the appeal was not a criminal case over which the court had jurisdiction because the defendant had not been found guilty of anything and no punishment had been assessed. *See Hardin v. State*, 248 S.W.2d 487 (Tex. Crim. App. 1952). In a later case, the Court of Criminal Appeals dismissed for lack of jurisdiction an appeal of a denied motion to expunge arrest records, concluding that it was not a criminal case because there were no criminal penalties attached to the proceeding, it was not brought by or in the name of the State, and the defendant was not charged with a crime. *Ex parte Paprskar*, 573 S.W.2d 525 (Tex. Crim. App. 1978).

The court later disavowed *Paprskar*'s reasoning, however, noting that the case likely "would have been decided differently had there been a statute authorizing the appeal." *Kutzner v. State*, 75 S.W.3d 427, 430 (Tex. Crim. App. 2002) (concluding that a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal case for jurisdictional purposes because it is

"closely connected to, and could affect," the underlying criminal prosecution); *see also Weiner v. Dial*, 653 S.W.2d 786, 787 & n.1 (Tex. Crim. App. 1983) (rejecting argument that court lacked mandamus jurisdiction over petition filed by court-appointed defense attorney seeking payment for representing indigent defendant in appeal of denial of bail, and overruling *Paprskar* "[t]o the extent of any conflict") ("The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is certainly itself a criminal law matter"). The Court of Criminal Appeals recently discussed these and other holdings and concluded: "'The overriding principle to be gleaned from all of these authorities is that this Court will entertain an appeal when it is expressly authorized by statute and when it is related to the 'standard definition' of a criminal case,' in which there has been a finding of guilt and an assessment of punishment." *Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006) (holding that appeal of denial of a registered sex offender's motion for non-publication of home address pursuant to statutory endangerment exception is a criminal matter).

I. Deduction of Court Costs From Inmate Trust Accounts

Appellate decisions addressing reimbursement of court costs and attorney's fees from non-indigent inmates have cited two statutes that take procedurally distinct approaches. Civil Practice & Remedies Code §63.007(a) provides that a writ of garnishment may be issued against an inmate trust fund to encumber monies in the fund held for the inmate's benefit, such as monies received during confinement. In addition, the Code of Criminal Procedure authorizes a court to order a non-indigent defendant to offset, to the extent he can pay them, the costs of legal services provided, including any expenses and costs; for convicted defendants, these amounts may be ordered paid as court costs. *See* Tex. Code Crim. Proc. art. 26.05(g).[1]

As discussed below, the appellate decisions differ as to whether garnishment procedures or other due process must be followed before court costs and legal fees can be deducted from an inmate's trust account. The courts of appeals are also split as to whether separate litigation over such costs is more properly characterized as civil or criminal in nature, a label that in some cases affects the appellate court's jurisdiction and the availability of appellate relief.

The Texarkana court has treated a dispute over deduction of court costs from an inmate trust account as civil in nature. *Abdullah v. State*, 211 S.W.3d 938 (Tex. App.—Texarkana 2006, no pet.) *Abdullah* docketed as a civil case an inmate's appeal of a 2006 order directing payment, from the inmate's trust account to the county clerk, of court costs incurred in his 1998 conviction. The trial court had apparently relied on Civil Practice and Remedies Code §14.006, which allows a court to order an inmate "who has filed a claim" to pay court costs; however, Abdullah had not filed a claim, and was instead only contesting the assessment of costs from his 1998 conviction. The court of appeals noted that a summary bill of costs documented the amount sought but the judgment itself

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[1]Tex. Code Crim. Proc. art. 26.05(g) provides: "If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay."

assessed no costs against Abdullah. Citing Civil Practice & Remedies Code §63.007(a), the court reversed the order directing payment because the State had not followed garnishment procedures or otherwise provided Abdullah due process. *Id.* at 941-43.

By contrast, the Amarillo Court of Appeals has designated an inmate trust account appeal as a criminal case. *See Gross v. State*, 2007 WL 2089365 (Tex. App.—Amarillo 2007, no pet.). In *Gross*, the court disagreed with *Abdullah* while simultaneously distinguishing it on the basis that the judgment against Gross incorporated the assessment of court costs and attorney fees against him:

> Unlike the situation in *Abdullah*, appellant was assessed court costs and attorney fees at the conclusion of trial. The reimbursement of the expenses incurred by the taxpayers were incorporated into the judgment which was signed by the trial court on October 16, 2003. By virtue of the inclusion of these fees in the judgment, appellant had notice that he would be required to pay court costs and attorney fees. Hence, we conclude that the issue of recoupment of attorney fees is closely related to the criminal case.

2007 WL 2089365, at *1. Significantly, the court cited Tex. Code Crim. Proc. 26.05(g), which authorizes reimbursement of attorney's fees and costs from non-indigent defendants, whether convicted or not, and does not mention garnishment procedures.

Gross also relied on *Curry v. Wilson*, 853 S.W.2d 40 (Tex. Crim. App. 1993). That case arose when Judge Wilson concluded that Curry, a criminal defendant found not guilty after a jury trial, was not actually indigent, and ordered him to reimburse the county for the costs of his legal defense. Curry sought a writ of prohibition against Judge Wilson's attempt to enforce her order. As an initial matter, the Court of Criminal Appeals rejected Wilson's argument that the court lacked jurisdiction on the theory that the matter was civil in nature. *Id.* at 43 ("Disputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters.") However, it denied Curry's petition for a writ of prohibition, concluding that: (1) Article 26.05 was not unconstitutional for authorizing collection of legal fees from a non-indigent defendant who is acquitted; and (2) Curry's acquittal did not divest the trial court of jurisdiction to order fees collected. *Id.* at 44-47.

A divided Waco Court of Appeals has consistently treated inmate trust account cases as criminal, in one case explicitly following *Gross*'s reasoning. *Zink v. State*, No. 10-07-00026-CR, 2007 WL 4260533 (Tex. App.—Waco 2007, no pet. h.) ("We agree with the Amarillo court's determination [in *Gross*] that this is a criminal case. The order being appealed is "closely connected" to the criminal case in which Zink was convicted.") (citation omitted); *Crawford v. State*, 226 S.W.3d 688 (Tex. App.—Waco 2006, no pet.) (dismissing, on appellant's motion, appeal of order allowing payment of court costs from inmate trust account) (per curiam); *id.* at 688-89 (Gray, C.J., dissenting) (discussing issues relevant to civil/criminal dichotomy, such as filing fees for civil cases and appointment of counsel in criminal cases, and noting that Crawford's complaint was that costs ordered withdrawn from account significantly exceeded amount shown in judgment and bill of costs, not that the wrong procedure was followed); *In re Keeling*, 227 S.W.3d 391 (Tex. App.—Waco 2007, orig. proceeding) (following *Abdullah* and granting mandamus relief to inmate

whose trust account was, without following garnishment procedures, debited for court costs from 1992 conviction in 2006 following parole release and subsequent re-incarceration); *but see id.* at 395 (Gray, C.J., dissenting) (objecting to majority's docketing of mandamus proceeding as criminal case, and concluding that court order was not void and that adequate legal remedies available to petitioner precluded mandamus relief).

In *Zink*, having deemed the matter a criminal appeal, the majority concluded that it lacked jurisdiction because no statute authorized the appeal in a criminal case. 2007 WL 4260533 at *1. In so holding, the majority cited—apparently to demonstrate the procedural distinction—its earlier *Keeling* decision granting mandamus relief in a different case where an inmate's trust fund was garnished without following garnishment procedures. *Id.* Chief Justice Gray concurred in the judgment, disagreeing with the majority's characterization of the case as criminal and noting his views previously expressed in *Keeling* and *Crawford*: "This is a civil garnishment proceeding. Pure and simple. It was brought to recover court costs and fees from a criminal defendant's trust account, funds being held by the State." *Id.* at *1 n.* (Gray, C.J., concurring).

In the most recent inmate trust case in the Waco Court of Appeals, an inmate's appeal was dismissed for lack of jurisdiction, but he subsequently sought and obtained mandamus relief. *See Goad v. State*, No. 10-07-00113-CR, 2007 WL 2994078 (Tex. App.—Waco 2008, no pet. h.) (dismissing appeal from 2006 order that "in effect, garnishes funds from Goad's inmate trust account to satisfy court costs from his July 17, 2003 conviction"); *In re Goad*, No. 10-07-00331-CR, 2008 WL 191637 (Tex. App.—Waco 2008, orig. proceeding) (concluding that order violated inmate's due process and granting mandamus relief, citing *Abdullah* and *Keeling*). In the mandamus proceeding, the State—represented by the district attorney—conceded that "*Keeling*'s procedural due process mandates have not been met" and that the trial court's were are therefore void. 2008 WL 191637, at *1. In a somewhat unusual twist, the trial judge has sought mandamus relief in the Court of Criminal Appeals. *See In re Matt Johnson v. Tenth Court of Appeals*, WR-69,327-01 (petition for writ of mandamus filed February 4, 2008). If review is granted, this proceeding may provide an answer to the question of whether inmate trust fund cases are criminal in nature.

CCA granted review and heard oral argument

Although the decisions discussed above reflect tension in the case law, the differences may stem more from the categorization of the cases as civil or criminal than from differing interpretations of the substantive law. If the attorney's fees and court costs are included in the judgment of conviction, but the inmate contests the costs at a later time (such as when they are ordered deducted from the trust account), then perhaps the garnishment procedures need not be followed, as the Amarillo Court of Appeals held in *Gross*, because the judgment itself provides sufficient notice. It is not yet clear whether deducting fees and costs from an inmate account requires the State to follow garnishment procedures, either because the taking of such funds is inherently a garnishment action or because §63.007(a) mandates it. Nor is it clear what procedures—if any—must be followed under article 26.05(g), to the extent the amount of fees sought to be deducted are fully reflected in the judgment.

SC granted review of a case involving a similar Q — Harrell v. State of TX, 07-0806

oral argument 11/13

A dispute over inmate trust funds seems more appropriately categorized as civil in nature. Reimbursement is not punitive in nature; a non-indigent defendant is required to make reimbursement under article 25.06(g) regardless of whether he was convicted or acquitted. But regardless, a defendant must have some opportunity to contest the deduction of fees from his trust account, particularly when—as in *Crawford*—the amount ordered deducted exceeds the amount reflected in the judgment. To foreclose the defendant's ability to appeal the cost order simply because the costs arose from the underlying criminal prosecution seems to be an unsatisfactory solution and inconsistent with the classification of other types of cases.

II. Disclosure of Grand Jury Proceedings

Article 20.02 of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." Tex. Code Crim. Proc. art. 20.02(a). Subsection (d) provides:

> The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.

Id. art. 20.02(d). "A petition for disclosure under Subsection (d) must be filed in the district court in which the case is pending," and the "defendant must also file a copy of the petition with the attorney representing the state, the parties to the judicial proceeding, and any other persons required by the court to receive a copy of the petition." *Id.* art 20.02(e).

Litigation over the secrecy of grand jury proceedings—other than a criminal defendant's efforts within a prosecution to access information about the grand jury that indicted him—is usually considered civil in nature. *See United States Government v. Marks*, 949 S.W.2d 320 (Tex. 1997); *In re Reed*, 227 S.W.3d 273 (Tex. App.—San Antonio 2007, orig. proceeding); *Kelly v. State*, 151 S.W.3d 683 (Tex. App.—Waco 2004, no pet.); *Harrison v. Vance*, 34 S.W.3d 660 (Tex. App.—Dallas 2000, no pet.). I have found only one such appellate case docketed as a criminal matter. *In re Grand Jury Proceedings 198G.J.20*, 129 S.W.3d 140 (Tex. App.—San Antonio 2003, pet. denied).

Of the decisions cited above, *Kelly* is the only case that explicitly addressed the civil/criminal distinction. Kelly appealed the trial court's denial of her motion for disclosure of grand jury proceedings under Code of Criminal Procedure 20.02, which she filed three years after the State dismissed criminal charges against her. The Waco Court of Appeals held it was without jurisdiction to consider Kelly's appeal because it was a criminal matter and no statute authorized the appeal. 151 S.W.3d at 684-85. Kelly had argued that the case should be treated as civil because: (1) *In re Grand Jury Proceedings 198G.J.20* was treated as a civil appeal; (2) the matter did not arise during a pending prosecution; (3) Kelly's motion did not "concern the administration of penal justice;" (4) only private parties, and not the State, had appeared in the case; and (5) Kelly could not obtain relief through habeas corpus. *Id.* at 684.

While acknowledging that "some of these statements are true," the court declined to consider the matter a civil case. *Id.* at 685. Addressing Kelly's arguments, the court noted that (1) *In re Grand Jury Proceedings 198G.J.20* did not expressly consider the civil/criminal distinction; (2) the absence of a pending prosecution was held irrelevant in *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002), which concluded that a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal case for jurisdictional purposes because it is "closely connected to, and could affect," the underlying criminal prosecution; (3) the secrecy of grand jury proceedings is a fundamental component of the criminal justice system, and attempts to defeat such secrecy should be adjudicated by the Court of Criminal Appeals as the court of last resort; (4) the State was participating through the district attorney's and others' responses to Kelly's motion; and (5) habeas was not Kelly's only potential avenue for relief. *Id.* at 685-86. Chief Justice Gray concurred in the judgment of dismissal, noting that because there was no prosecution against Kelly when she filed her motion, Article 20.02 did not give the trial court jurisdiction. *Id.* at 687 (Gray, C.J., concurring).

In re Grand Jury Proceedings 198G.J.20 involved a motion to disclose grand jury testimony filed by Shields, who had been indicted for sexual assault of a minor. Shields did not match the minor's description of the perpetrator in several key respects, and after she recanted, the indictment was dismissed. Shields then sued for malicious prosecution and sought to depose grand jurors under Code of Criminal Procedure art. 20.02(d); Shields sought to ask the grand jurors if the prosecutor had presented certain exculpatory evidence. The trial court denied the motion, concluding that Shields could not demonstrate a particularized need for the information because Texas law does not require prosecutors to present exculpatory evidence to the grand jury.

A majority of the court of appeals affirmed on the same basis, docketing the appeal as a civil proceeding without discussing the civil versus criminal dichotomy. One justice dissented, opining that prosecutors should have a limited duty to present exculpatory evidence. *See id.* at 144 (Lopez, J., dissenting). The dissent also did not discuss the civil/criminal dichotomy. However, under the reasoning of *Kutzner* the motion for disclosure in this case presumably would be deemed more closely related to the civil suit for malicious prosecution than to the underlying criminal proceedings that were dismissed after indictment.

In the other cases cited above, the appellate court docketed as a civil matter an appellate or original proceeding concerning the secrecy of grand jury proceedings, without discussing the civil versus criminal dichotomy. Notably, unlike *Kelly* and *In re Grand Jury Proceedings 198G.J.20*, none of the other cases involved a person whose criminal indictment was dismissed before trial attempting to access information about the grand jury proceedings.

In *Marks*, the target of a federal grand jury investigation of his tax returns—Marks—sought under the predecessor to Tex. R. Civ. P. 202 a pre-suit deposition of Feldman, his former accountant and a witness in the investigation. Feldman moved to vacate an order permitting the deposition, and the federal government intervened. At a hearing on the motion to vacate, a lawyer for the federal government offered to tell the trial court enough about the investigation to show how Feldman's deposition might hamper it, but she refused to disclose the same information to Feldman, Marks, or anyone else because of federal rules prescribing secrecy for grand jury proceedings. The judge heard

counsel's statements in chambers and *ex parte* but had a court reporter transcribe them, and later sealed the court reporter's record. Marks later sued Feldman for accounting malpractice, but the courts continued to delay Feldman's deposition pending completion of the federal investigation. After Marks was indicted, the federal government withdrew its objection to Feldman's deposition and the deposition took place, but Marks pursued his efforts to disclose the record of the hearing through appeal and mandamus. The Supreme Court held that the sealing of the hearing record did not violate either Tex. R. Civ. P. 76a, due to the rule's exception for court documents "to which access is otherwise restricted by law," or Marks' due process rights. 949 S.W.2d at 325-26.

In *Reed*, the court of appeals denied a district attorney's petition for writ of mandamus or prohibition seeking to vacate the trial court's order quashing portions of grand jury summonses addressed to school officials. It held that the trial court did not clearly abuse its discretion in quashing the portion of the summons stating that the summons itself was confidential, because Texas law, unlike federal law, does not clearly make issuance of summonses confidential. The court docketed the matter as a civil proceeding but applied the stricter criminal mandamus standard.

In *Harrison v. Vance*, the court affirmed the trial court's dismissal as frivolous of a convicted felon's mandamus petition seeking disclosure of grand jury proceedings from the petitioner's criminal case that resulted in his incarceration. 34 S.W.3d at 663. The court noted that grand jury proceedings are not subject to disclosure under the Open Records Act; instead, they are generally secret under the Code of Criminal Procedure, although the trial court has limited discretion to allow disclosure when necessary to the administration of justice. *Id.* (citing *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 622 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (discussing the various Code of Criminal Procedure provisions requiring secrecy)).

Under *Kutzner*'s "closely connected" standard that the *Kelly* court applied to litigation over the secrecy of grand jury proceedings, *Harrison* perhaps would have been more appropriately docketed as a criminal case; presumably the inmate sought the grand jury proceedings in an effort to collaterally attack his conviction. *Reed*, however, is more difficult to categorize. On the one hand, the applicant below—the school district—was not a party, and was merely being asked to provide records relevant to a criminal investigation. On the other hand, because the criminal investigation was apparently ongoing, the prosecutor's desire to keep the summons secret was directly related to the apparently as-yet-unfiled criminal prosecution.

Marks appears to fall more clearly on the civil side. Although at the time he sought to depose Feldman there was a federal investigation against Marks—and later an indictment—Marks' efforts to depose Feldman were within the rules of civil procedure and took place in the context of what quickly became a separate civil suit against Feldman. While Feldman's testimony was evidently relevant to the criminal proceedings against Marks, it was more immediately relevant to the civil suit against Feldman. Perhaps more importantly, the trial court allowed the *ex parte* summary of the investigation and then sealed it to protect the integrity of the federal criminal proceedings, which the Supreme Court recognized in generally upholding the trial court's actions.

III. Bail Bond Forfeiture Proceedings

Bail bond forfeitures are governed by Chapter 22 of the Code of Criminal Procedure. If a defendant fails to appear in court when required, a judgment nisi is entered against him and his sureties on the bond. After entry of a judgment nisi, forfeiture proceedings are generally governed by the same rules as govern civil cases. *See* Tex. Code Crim. Proc. art. 22.10; *Roberts v. State*, 729 S.W.2d 624 (Tex. App.—Fort Worth 1988) (citing *Tinker v. State*, 561 S.W.2d 200, 201 (Tex. Crim. App. 1978)). However, the Court of Criminal Appeals and the Supreme Court both consider them to be criminal cases for purposes of review because the bail proceeding is too closely connected to the underlying criminal proceeding to separate them. *See Jeter v. State*, 26 S.W. 49 (Tex. 1894); *Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006); *State ex rel. Vance v. Routt*, 571 S.W.2d 903, 906 (Tex. Crim. App. 1978).

Civil court costs may be assessed in a bail bond forfeiture proceeding after entry of judgment nisi. *Dees v. State*, 865 S.W.2d 461, 462 (Tex. Crim. App. 1993). Intermediate appellate courts have held that all costs traditionally associated with a civil appeal, including the filing fee, should be imposed in an appeal from a bond forfeiture proceeding. *See Olivarez v. State*, 183 S.W.3d 59, 60 (Tex. App.—Waco 2005, no pet.) (per curiam). However, the Attorney General has opined that a bond forfeiture is not a "civil suit" for purposes of Local Government Code §133.154(a), which imposes a $37 filing fee "on the filing of any civil suit" to fund judicial pay raises, because a bond forfeiture is not generally considered to be a "civil case." Op. Tex. Att'y Gen. No. GA-0484, at 3 (2006) (citing *Burr* and *Jeter*). The same opinion concludes that a $4 fee generally required to be paid as court costs by a person "convicted of any offense" under Local Gov't Code §133.105(a) does not apply to bond forfeiture cases because they do not result in a criminal conviction. *Id.* at 4.

The El Paso Court of Appeals gives bond forfeiture cases a "CV" designation whether they are before the Court on direct appeal or in a mandamus proceeding. *See e.g., Safety Nat. Cas. Corp. v. State*, 225 S.W.3d 684 (Tex. App.—El Paso 2006, pet. granted);[2] *In re State ex rel. Rodriguez*, 166 S.W.3d 894 (Tex. App.—El Paso 2005, orig. proceeding). It does so because the cases arise from the trial court's civil docket and the court is required to collect fees and impose costs as in civil cases generally. Tex. R. App. P. 5. However, the Waco Court of Appeals designates them as criminal. *See Olivarez*, 183 S.W.3d at 60-61 (dismissing bail bond forfeiture appeal following appellant's failure to file docketing statement, but suspending Appellate Rule 5 and ordering clerk to "write off all unpaid filing fees in this case"); *but see id.* at 61 (Gray, C.J., dissenting) (objecting to majority's failure to collect filing fees in civil case as required by Rule 5, and to dismissal on unclear grounds); *id.* at 63 (per curiam) (withdrawing judgment of dismissal on rehearing after appellant filed docketing statement and paid filing fee).

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[2]Note, however, that despite the court of appeals' civil designation, a petition for discretionary review was submitted to—and has been granted by—the Court of Criminal Appeals. *See* PD-0413-07 (petition granted June 20, 2007; case submitted November 7, 2007).

IV. Habeas Corpus

The writ of habeas corpus may be used by a person restrained in her liberty may use to test the legality of her custody or restraint. Tex. Code Crim. Proc. art. 11.01. However, it is an extraordinary remedy, available only when there is no other adequate remedy at law, and is not to be used as a substitute for appeal. *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). The Texas Constitution provides that the writ of habeas corpus is a writ of right that shall never be suspended, and requires the Legislature to "enact laws to render the remedy speedy and effectual." Tex. Const. art. I, §12. Statutes governing the writ are found in Chapter 11 of the Code of Criminal Procedure, which "applies to all cases of habeas corpus for the enlargement of persons illegally held in custody or in any manner restrained in their personal liberty." Tex. Code Crim. Proc. art. 11.64.

The writ itself "is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." Tex. Code Crim. Proc. art. 11.02. A petition for writ of habeas corpus must state that the applicant is illegally restrained in his liberty, and by whom; include a copy of the order of confinement and a prayer for relief; and be supported by allegations sworn to be true by the applicant. art. 11.14. The writ must be granted "without delay" by the judge receiving it, unless it is manifest that the applicant is entitled to no relief. *Id.* art. 11.15. The writ is issued to the person having custody of the applicant, who then must make a return admitting whether the applicant is in his custody and showing authority for his detention. *Id.* art. 11.02, .27, .30. After the person confining the applicant brings the applicant before the court, the applicant is no longer detained on the original warrant or process, but under the authority of the habeas corpus. *Id.* art. 11.31, 32. After examining the return and hearing any testimony offered, the court shall, "according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail or discharge him." *Id.* art. 11.44. If it appears that there is no legal basis to maintain the applicant's confinement, the applicant must be discharged. *Id.* art. 11.40.

An initial distinction must be drawn between what are typically known as "post-conviction" writ applications, *see id.* arts. 11.07, .071, and other habeas proceedings. (For purposes of this memo, I include in the "post-conviction" category habeas petitions filed by confinees indicted on misdemeanor and felony charges, *see id.* arts. 11.08 - .09, as well as petitions filed by convicted defendants seeking relief from community supervision orders, *see id.* art. 11.072, since both likewise directly relate to a criminal prosecution.) Chapter 11 applies to all habeas petitions, not merely to post-conviction habeas petitions. *Id.* art. 11.64. While post-conviction applications always fall on the criminal side of the docket, with other habeas applications the court's jurisdiction depends on the nature of the underlying proceeding. However, this distinction is not always clear in the case law; moreover, habeas corpus proceedings are difficult to label, as the Court of Criminal Appeals has acknowledged.[3]

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[3]The Court of Criminal Appeals in *Rieck* discussed the general difficulty in labeling habeas proceedings:

A. Post-Conviction Habeas Applications

"[W]hen a person is confined for violating a criminal statute and files an application for a writ of habeas corpus challenging his confinement, the proceeding is criminal, not civil, in nature. *Aranda v. District Clerk*, 207 S.W.3d 785, 786 (Tex. Crim. App. 2006) (per curiam); *Ex parte Davis*, 542 S.W.2d 192, 198 (Tex. Crim. App.1976); *see also Ex parte Rieck*, 144 S.W.3d 510, 516 (Tex. Crim. App. 2004) ("Such proceedings are categorized as 'criminal' for jurisdictional purposes, and the Texas Rules of Civil Procedure do not ordinarily apply"). Post-conviction habeas petitions are under the criminal jurisdiction of the district courts and the Court of Criminal Appeals. *See* Tex. Code Crim. Proc. art. 11.07 (post-conviction habeas for felony convictions in which death penalty has not been assessed); *id.* art. 11.071 (post-conviction habeas for death penalty cases). The courts of appeals do not have jurisdiction to grant post-conviction habeas relief. *See id.* art. 11.05.

B. Restraints of Liberty Resulting from Actions Other than Criminal Conviction

The remainder of this section addresses habeas petitions filed by persons whose liberty has been restrained for reasons other than being convicted of or indicated for a crime. Perhaps the most commonly-seen example of non-conviction-based confinement is confinement for contempt of court.

1. Contempt

A court of appeals lacks jurisdiction to review a contempt order on direct appeal. *See Tex. Animal Health Comm'n v. Nunley*, 647 S.W.2d 951, 952 (Tex. 1983). Instead, a contempt order involving confinement may be reviewed by writ of habeas corpus.

The Supreme Court's authority to issue writs of habeas corpus is statutorily limited to restraints of liberty resulting from incidents in civil cases. *See* Tex. Gov't Code §22.002(e) ("The

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> To the extent that the criminal nature of a proceeding might be a stumbling block to characterizing the proceeding as a lawsuit, it should be observed that most jurisdictions have traditionally regarded habeas corpus as a civil remedy, even when the relief sought is from confinement in the criminal justice system. Yet courts have struggled with how to characterize habeas proceedings and have sometimes characterized them as "neither civil nor criminal but rather *sui generis*" or "an exercise of special constitutional and statutory jurisdiction." The United States Supreme Court has conceded that habeas corpus proceedings are characterized as "civil" but called that label "gross and inexact," stating that, "Essentially, the proceeding is unique." And while a habeas proceeding is considered in Texas to be separate from the criminal prosecution—being a collateral, rather than direct, attack on the judgment of conviction—Texas has gone further in eschewing the civil label for habeas proceedings arising from criminal prosecutions or convictions. Such proceedings are categorized as "criminal" for jurisdictional purposes, and the Texas Rules of Civil Procedure do not ordinarily apply.
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> *Ex parte Rieck*, 144 S.W.3d 510, 515-16 (Tex. Crim. App. 2004) (holding that statute allowing for forfeiture of good conduct time for the filing of frivolous lawsuits does not apply to habeas corpus proceedings) (citations omitted).

supreme court or a justice of the supreme court . . . may issue a writ of habeas corpus when a person is restrained in his liberty by virtue of an order, process, or commitment issued by a court or judge on account of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case.").[4] The courts of appeals likewise have jurisdiction to issue writs of habeas corpus when a person's liberty is restrained due to violation of a court order in a civil case.[5] Thus, habeas petitions filed by persons imprisoned for reasons other than being convicted of a crime are treated as civil matters if the underlying proceeding in which the behavior took place was civil in nature. *See In re Gawerc*, 165 S.W.3d 314 (Tex. 2005) (civil contempt for violation of child support orders); *Ex parte Sanchez*, 703 S.W.2d 955 (Tex. 1986) (denying habeas relief to court reporter held in contempt by court of appeals for failing to timely file reporter's record in civil case on appeal, when failure was partially due to reporter's imprisonment for failing to timely file record in criminal prosecution; and noting Court of Criminal Appeals' denial of reporter's habeas petition in connection with criminal case). The courts of appeals designate such habeas petitions as civil regardless of whether the *contempt* is civil in nature,[6] *see, e.g.. Ex parte Wong*, No. 08-06-00227-CV, 2006 WL 2844405 (Tex. App.—El Paso 2006, orig. proceeding) (civil contempt for non-compliance with divorce decree); criminal, *see, e.g., In re McGonagill*, No. 02-07-034-CV, 2007 WL 704888

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[4] The Texas Constitution grants both the Supreme Court and the Court of Criminal Appeals the power to issue writs of habeas corpus, mandamus, procedendo, certiorari, and other writs. *Compare* Tex. Const. art. V, §3(a) ("The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."), *with id.* art. V, §5 ("Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments.").

[5]Section 22.201(d) provides:

> Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

Tex. Gov't Code §22.201(d).

[6]Contempt proceedings are "quasi-criminal in nature" and "should conform as nearly as practicable to those in criminal cases." *Sanchez*, 703 S.W.2d at 957.

(Tex. App.—Fort Worth 2007, orig. proceeding) (criminal contempt for disobedience of court orders in divorce case); or both, *see, e.g., In re Garza*, No. 04-04-00140-CV, 2004 WL 839671 (Tex. App.—San Antonio 2004, orig. proceeding) (civil and criminal contempt for attorney's disobedience of discovery orders).

The Court of Criminal Appeals, by contrast, has broad statutory authority to grant habeas relief. *See* Tex. Code Crim. Proc. art. 11.05.[7] This includes the power to grant habeas relief to persons jailed for contempt that occurred during criminal proceedings. *See Ex parte Gibson*, 811 S.W.2d 594 (Tex. Crim. App. 1991) (granting habeas relief to prosecutor found in criminal contempt for remarks to judge during criminal trial); *Ex parte Curtis*, 568 S.W.2d 363 (Tex. Crim. App. 1978).

Notably, article 11.05 does not include the courts of appeals among the courts authorized to issue writs of habeas corpus. Given this omission, and Gov't Code §22.221(d)'s limitation on habeas jurisdiction to violations of orders in civil cases, several courts of appeals have concluded that they lack jurisdiction to issue a writ of habeas corpus to address a restraint of liberty resulting from contempt in a criminal proceeding. The El Paso Court of Appeals has stated:

> This Court's jurisdiction is not dependent upon characterization of the contempt proceeding as a civil case, nor is our jurisdiction limited to matters of civil contempt. Rather, our jurisdiction is limited by Section 22.221(d) to those situations in which the alleged contemnor violated an order, judgment or decree previously made, rendered, or entered by the court or judge in a civil case. Thus, under Section 22.221(d), this Court would have original habeas corpus jurisdiction to hear matters involving either civil contempt or criminal contempt, or both, so long as the order, judgment, or decree violated had been entered in a civil case. Applying that test to the facts before us, we find that the contempt judgment and Relator's subsequent restraint are not based upon a violation of an order entered by the trial court in a civil case. Rather, the order Relator was found to have violated, namely, an order to appear for trial, was entered in a criminal proceeding. Thus, this Court does not have original habeas corpus jurisdiction and we dismiss the petition for want of jurisdiction.

Ex parte Hawkins, 885 S.W.2d 586 (Tex. App.—El Paso 1994, orig. proceeding). The Beaumont Court of Appeals has reached a similar conclusion. *See Ex parte Powell*, 883 S.W.2d 775, 778 (Tex. App.—Beaumont 1994, orig. proceeding) (dismissing habeas petition of mother found in contempt of court and imprisoned for making false statement in connection withdrawal of funds in court registry set aide for use of minor daughter) ("Since the acts of contempt committed by the Relator were in fact criminal in nature, and did not arise from a violation of an order, judgment or decree in a civil case, the Court of Appeals does not have the power to issue a Writ of Habeas Corpus in this case nor to inquire into the punishment assessed against Relator."). *But see Gonzalez v. State*, 187

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[7]Article 11.05 provides: "The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law."

S.W.3d 166 (Tex. App.—Waco 2006, orig. proceeding) (per curiam) (granting habeas relief to petitioner jailed on criminal contempt for violating bond condition in underlying drug prosecution).

It is not clear whether a court of appeals has jurisdiction to consider an appeal of a trial court's denial of a petition for habeas relief. An application for writ of habeas corpus filed in an appellate court is an original proceeding, and therefore presumably not appealable. *See* Tex. R. App. P. 52.1. However, it appears that a court of appeals may have appellate jurisdiction to consider an appeal of a trial court's denial of habeas relief. *See In re Commitment of Richards*, 202 S.W.2d 779 (Tex. App.—Beaumont 2006, no pet.) (holding that court lacked jurisdiction over direct appeal of biennial review order, and affirming trial court's denial of application for writ of habeas corpus); *Ex parte Woodall*, 154 S.W.3d 698 (Tex. App.—El Paso 2004, pet. ref'd) (affirming trial court's denial of habeas petition filed by smoker fined for violation of municipal anti-smoking ordinance).

2. Other Non-Conviction-Based Restraints on Liberty

A person's liberty also may be restrained under the sexually violent predator statute, which allows a court to place restrictions on a person's liberty though "outpatient civil commitment." *See* Tex. Health & Safety Code ch. 841; *In re Fisher*, 164 S.W.3d 637 (Tex. 2005) (concluding that the sexually violent predator statute is civil in nature, not punitive, and therefore due process does not require competence to stand trial). Restrictions imposed through outpatient civil commitment may be subject to challenge through habeas corpus. *See Richards*, 202 S.W.2d 779 (holding that court lacked jurisdiction over direct appeal of biennial review order, and affirming trial court's denial of application for writ of habeas corpus); *but see id.* at 794 (Gaultney, J., dissenting) (opining that court had jurisdiction over direct appeal, and that supervision and treatment requirements at issue were not proper subject of habeas proceeding under the circumstances) ("In my view, the majority's approach unnecessarily complicates the review process for commitment orders and makes the extraordinary habeas remedy the ordinary method for challenging commitment requirements.").

C. Conclusion

The distinctions between post-conviction habeas petitions and non-conviction habeas petitions—and of the latter type between civil and criminal matters—are not clearly explained in either the Code of Criminal Procedure. However, the only area where the case law appears to be in tension is to what extent the courts of appeals have jurisdiction over habeas applications filed by a person held in contempt in a criminal proceeding. By statute, the courts of appeals apparently lack such jurisdiction, although at least one court has concluded otherwise, and others have considered appeals of a trial court's denial of habeas relief. Also, the statutory outpatient civil commitment procedures for sexually violent predators are relatively new and have resulted in some disagreement as to the availability of habeas relief from liberty restrictions imposed under Chapter 841.

V. Expunction of Arrest Records

"A statutory expunction proceeding is civil rather than criminal in nature." *In re Expunction of J.A.*, 186 S.W.3d 592, 596 (Tex. App.—El Paso 2006, no pet.). The Supreme Court presumably

has jurisdiction of appellate expunction proceedings. *See State v. Beam*, 226 S.W.3d 392 (Tex. 2007); *Ex parte Elliot*, 815 S.W.2d 251 (Tex. 1991).

In *Ex parte Paprskar*, the Court of Criminal Appeals dismissed for lack of jurisdiction an appeal of a denied motion to expunge arrest records. 573 S.W.2d 525 (Tex. Crim. App. 1978). The court noted that Tex. Const. art. V, §5, gives the Court appellate jurisdiction over criminal cases only, and concluded that this was not a criminal case because there were no criminal penalties attached to the proceeding, it was not brought by or in the name of the State, and the defendant was not charged with a crime. It also declined to treat the matter as a habeas corpus application. Absent a statute authorizing appeal, the court concluded that it lacked jurisdiction. *See also Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006) (citing *Paprskar* and noting that expunction of arrest records is one type of proceeding related to a criminal case that itself is not criminal in nature).

Expunction of arrest records is governed by Code of Criminal Procedure art. 55.01. At least two other Texas statutes provide for judicial expunction in particular circumstances and do not require institution of a lawsuit, but would presumably be considered civil matters in light of *Paprskar*. *See* Tex. Code Crim. Proc. art. 45.055 (authorizing, after applicant's 18th birthday, expunction of conviction for failure to attend school and related records, upon payment of $30 fee to defray cost of notifying state agencies); Tex. Alco. Bev. Code §106.12 (authorizing, after applicant's 21st birthday, expunction of conviction for violation of Alcoholic Beverage Code and related records, upon payment of $30 fee to defray cost of notifying state agencies).

VI. Juvenile Cases

Juvenile cases are civil in nature. *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex. 1987); *In re J.R.R..*, 696 S.W.2d 382 (Tex.1985); *In re B.P.H.*, 83 S.W.3d 400, 405 (Tex. App.—Fort Worth 2002, no pet.). Accordingly, they "remain on the civil side of our justice system unless transferred to a criminal court." *Ex parte Valle*, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003) (dismissing for want of jurisdiction habeas application of juvenile adjudicated as delinquent for committing capital murder; because juvenile adjudication is not a criminal conviction, statutory post-conviction habeas provisions inapplicable).

VII. Other Proceedings Ancillary to Criminal Prosecution

A. Matters Considered Criminal

1. Sex offender registration

An appeal of a trial court's denial of a registered sex offender's motion for non-publication of home address pursuant to statutory endangerment exception is a criminal matter. *Ex parte Burr*, 185 S.W.3d 451, 453-54 (Tex. Crim. App. 2006).

2. Post-conviction DNA testing

A post-conviction motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal matter. *See Kutzner v. State*, 75 S.W.3d 427, 429 (Tex. Crim. App. 2002) (citing *Jeter*); *accord Rose v. State*, 198 S.W.3d 271, 272 (Tex. App.—San Antonio 2006, p.d.r. ref'd) (designating inmate's appeal from post-conviction DNA hearing as criminal case) ("A hearing on post-conviction DNA testing is a collateral attack on a judgment comparable to a habeas corpus proceeding.").

3. Appointment and compensation of defense counsel for indigents

The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is a criminal law matter. *Weiner v. Dial*, 653 S.W.2d 786, 787 (Tex. Crim. App. 1983); *see also Burr*, 185 S.W.3d at 453 (citing *Wiener*).

4. Request for medical records

The Waco Court of Appeals dismissed for want of jurisdiction an inmate's appeal of an order, filed under the cause number of his criminal case and submitted to the court that convicted him, denying his request for certain medical records he apparently sought in connection with a potential civil suit against state and county officials. *See Reyes v. State*, 166 S.W.3d 333, 335 (Tex. App.—Waco 2005, no pet.) (Vance, J., concurring) (explaining original decision dismissing appeal, and interpreting additional filings as petition for discretionary review); *but see id.* at 333 (Gray, J., dissenting) (objecting to designation of appeal as criminal case, explaining that dismissal was appropriate for any of several reasons, and suggesting that court should treat Reyes's "petition for Coram Nobis" as motion for rehearing, grant the writ and withdraw the original opinion and judgment, and order cause number changed to reflect civil designation).

B. Matters Considered Civil

1. Forfeiture of contraband property

A proceeding for forfeiture of property derived from a criminal offense is a civil proceeding. *See Ex parte Rogers*, 804 S.W.2d 945, 948 (Tex. App.—Dallas 1990, orig. proceeding); *see also Burr*, 185 S.W.3d at 453 (citing *Rogers*). Similarly, *in rem* forfeiture proceedings under Article 18.18(b) of the Code of Criminal Procedure, which applies to certain contraband when "there is no prosecution or conviction following seizure," are of a civil nature and the rules of civil procedure apply. Tex. Code Crim. Proc. art. 18.18(b); *see id.* art. 59.05(b) (All cases under this chapter ["Forefeiture of Contraband"] shall proceed to trial in the same manner as in other civil cases."); *Hardy v. State*, 102 S.W.2d 123, 126-27 (Tex. 2003); *F & H Invs., Inc. v. State*, 55 S.W.3d 663, 667-68 (Tex. App.—Waco 2001, no pet.).

2. Malicious prosecution

Although arising from criminal proceedings, malicious prosecution is a civil matter over which the Supreme Court has jurisdiction. *See In re Bexar County Crim. Dist. Attorney's Office*, 224 S.W.3d 182 (Tex. 2007); *Kroger Tex. Ltd. P'Ship v. Suberu*, 216 S.W.3d 788 (Tex. 2006).

3. Application for restoration of property

The Code of Criminal Procedure provides that upon the conclusion of a prosecution for theft or other illegal acquisition of property, the court shall order the property returned to its owner. Tex. Code Crim. Proc. art. 47.02. The Code of Criminal Appeals has held that it lacks jurisdiction over an appeal from an order denying an application for restoration of property under article 47.02. *See Bretz v. State*, 508 S.W.2d 97 (Tex. Crim. App. 1974). The concurring opinion noted that "Texas law books are replete with confusing overlap, necessitated by the two courts of last resort." *Id.* at 98-99 (Roberts, J., concurring).

VIII. Inconsistent Docketing of Original Proceedings in the Courts of Appeals

An additional factor that complicates the problem of clearly defining civil versus criminal matters is that the courts of appeals are not all consistent about how cases are docketed. For example, in the Second, Third, and Fourteenth Courts of Appeals, every original proceeding is given a civil ("CV") designation. *See, e.g.*, *In re Hancock*, No. 02-06-431-CV, 212 S.W.3d 922 (Tex. App.—Fort Worth 2007, orig. proceeding). This currently appears to be the generally accepted practice among most of the courts of appeals. However, some courts of appeals give criminal ("CR") designations to original proceedings related to criminal cases.[8] *See In re Goad*, No. 10-07-00331-CR, 2008 WL 191637 (Tex. App.—Waco 2008, orig. proceeding); *In re Hearon*, 10-07-00183-CR, 228 S.W.3d 466 (Tex. App.—Waco 2007, orig. proceeding); *In re Hayes*, No. 01-05-00899-CR, 2005 WL 2989878 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *In re State*, No. 08-03-00004-CR, 116 S.W.3d 376 (Tex. App.—El Paso 2003, orig. proceeding); *In re State*, No. 08-01-00203-CR, 50 S.W.3d 100 (Tex. App.—El Paso 2001, orig. proceeding).

The *In re Hayes* case cited above is particularly instructive, because the petitioner, a TDCJ inmate, filed similar mandamus petitions in numerous courts of appeals, in each case apparently seeking mandamus relief against the trial-court clerk for failing to file his tort claims against the director of TDCJ. The Waco Court of Appeals docketed Hayes's mandamus petition as a criminal case, but its memorandum opinion notes the disposition of Hayes's similar petitions by the Houston [Fourteenth], San Antonio, Texarkana, Amarillo, and Corpus Christi Courts of Appeals, each of which gave Hayes's mandamus petition a civil designation. *See In re Hayes*, No. 10-05-00304-CR, 2005 WL 2044924 (Tex. App.—Waco 2005, orig. proceeding) (listing cases).

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[8]Peggy Culp, Clerk of the Seventh Court of Appeals, reports that in deciding whether to give an original proceeding a "CR" or "CV" designation, the Amarillo court attempts to ascertain which court of last resort would have jurisdiction over the case.

TO: SCAC Committee Members
FROM: David Gaultney
RE: Report of Subcommittee on Categorization of Cases as Criminal or Civil
DATE: June 7, 2008

The Issue:

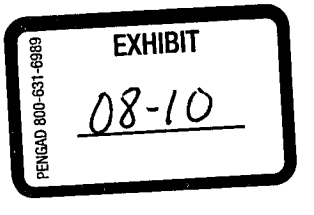
Texas Rule of Appellate Procedure 12.2(a)(4) provides that the clerk of a court of appeals, when assigning a docket number to a case filed in the court of appeals, include the designation "CV" for a civil case or "CR" for a criminal case. The Council of Chief Justices requested a study on "whether the Rules of Appellate Procedure should provide guidance on how to classify certain cases as civil or criminal." The letter from the Chair of the Council states, "It has been brought to our attention that the courts of appeals are split in whether they designate certain proceedings as criminal or civil."

The designation of a case as civil or criminal may have consequences beyond docketing:

1. The designation of a case might be assumed by a party to be consistent with the jurisdictions of the Court of Criminal Appeals and the Supreme Court. The Court of Criminal Appeals has jurisdiction over criminal cases and the Supreme Court has jurisdiction over civil cases. The type of case suggests which case law is applicable and where the next proceeding, after the court of appeals, should be filed. *See generally Ex parte Rhodes,* 974 S.W.2d 735, 740 (Tex. Crim. App. 1998) (prior criminal contempt in civil proceeding considered civil case, so "we are bound by Texas Supreme Court precedent on this matter . . . .").

2. Filing fees are charged in civil cases but generally not in criminal cases. *See generally* TEX. GOV'T CODE ANN. § 51.207 (Vernon 2005); *see also generally* TEX. R. APP. P. 5.

3. The file retention periods are different for civil and criminal cases. *See* TEX. GOV'T CODE ANN. § 51.204 (Vernon 2005). In criminal cases, the retention period is determined by the length of the sentence. *See id.* § 51.204(e) (Vernon 2005).



The Jurisdiction of the Supreme Court and the Court of Criminal Appeals:

What is a criminal or a civil case is defined by the Supreme Court and the Court of Criminal Appeals as they assess their jurisdiction. The Supreme Court has noted that a criminal case is an action, suit, or cause instituted to secure conviction and punishment for crime. *Ex parte Green*, 116 Tex. 515, 295 S.W. 910, 912 (1927). More recently, the Court of Criminal Appeals has said that the "over-riding principle" "is that this Court will entertain an appeal when it is expressly authorized by statute and when it is related to the 'standard definition' of a criminal case." *Kutzner v. State*, 75 S.W.3d 427, 431 (Tex. Crim. App. 2002), *superseded on other grounds by statute, as explained in Smith v. State,* 165 S.W.3d 361 (Tex. Crim. App. 2005).

The Court of Criminal Appeals has general writ jurisdiction "in criminal law matters." Generally, this means "[d]isputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution...." *Curry v. Wilson,* 853 S.W.2d 40, 43 (Tex. Crim. App. 1993). The term includes "all legal issues arising directly out of a criminal prosecution." *Lanford v. Fourteenth Court of Appeals*, 847 SW2d 581, 585 (Tex. Crim. App. 1993)

The Supreme Court has broad mandamus jurisdiction, including over criminal law matters. TEX. CONST. art. V, § 3. Although the Supreme Court has mandamus jurisdiction over criminal law matters, the Court generally transfers the petition to the Court of Criminal Appeals. *See, e.g., Thomas v. Stevenson*, 561 S.W.2d 845 (Tex. Crim. App. 1978).

Similarly, the Court of Criminal Appeals has broad habeas corpus jurisdiction, but generally will refrain from issuing a writ in a case where relief could be sought in the Texas Supreme Court. *See Ex parte Wolf,* 116 Tex. Crim. 127, 34 S.W.2d 277, 279 (1930).

Before the *Kutzner* decision, one commentator suggested that:

> "The Court of Criminal Appeals would be well-advised to reconsider its traditional case law defining "criminal case," especially in light of its more recent decisions defining "criminal law matters" in which it may now exercise extraordinary writ power . . . [T]he value of having criminal law matters subject to final review in the appellate court with

> general final authority in criminal prosecutions argues strongly for construing "criminal case" as including those that are ancillary to criminal prosecutions, even if they are not in a technical sense prosecutions of particular individuals for specific criminal offenses." GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURES § 44.02 (2nd ed. 2001).

In *Kutzner*, the Court of Criminal Appeals used the language "related to."

Conflicts in the Courts of Appeals:

Courts of appeals have reached differing results on designation of some cases as civil or criminal. Jody Hughes's Memo of March 3, 2008, available on the SCAC website, identifies certain splits among the courts.

Courts may have relied on the traditional classification of a type of proceeding. For example, a petition for writ of mandamus may be docketed as a civil case in the court of appeals, even when the next step in the process is to the Court of Criminal Appeals. *See generally Ex parte Rieck,* 144 S.W.3d 510, 515-16 (Tex. Crim. App. 2004) (noting that most jurisdictions have traditionally regarded habeas corpus as a civil remedy, though in Texas such proceedings arising from criminal prosecutions or convictions are categorized as "criminal" for jurisdictional purposes).

Bail forfeiture proceedings suggest another reason for differences in designation. The Code of Criminal Procedure provides:

> When a forfeiture has been declared upon a bond, the court or clerk shall docket the case upon the scire facias or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, if any, as defendants; and, except as otherwise provided by this chapter, the proceedings had therein shall be governed by the same rules governing other civil suits. TEX. CODE CRIM. PROC. § 22.10 (Vernon Supp. 2007).

A clerk may designate a case as CV (a civil case), because that is how it is docketed in the trial court. However, the Court of Criminal Appeals has held that bond forfeiture is a criminal matter, and section 22.10 does not change the character of the

case. *See Kubosh v. State,* 241 S.W.3d 60, 64 (Tex. Crim. App. 2007); *State v. Sellers,* 790 S.W.2d 316, 321 (Tex. Crim. App. 1990); *see also State ex rel. Rodriguez v. Marguez,* 4 SW.3d 227 (Tex. Crim. App. 1999)(mandamus).

The Recommended Amendment:

Rather than designating a case as civil or criminal based on the traditional classification of the proceeding, or based on the trial court's docket designation, the committee recommends the designation be consistent with the jurisdictions of the Supreme Court and the Court of Criminal Appeals. The designations by the clerks of the courts of appeals should be uniform throughout the State, and the designation on filing should be consistent with which of the two courts -- the Supreme Court or the Court of Criminal Appeals -- will subsequently have jurisdiction over the case.

The committee recommends amending Rule 12.2(a)(4) as follows:

> "the designation 'CV' for causes over which the Supreme Court exercises jurisdiction, including appeals related to civil cases and original proceedings in civil law matters; or
>
> the designation 'CR' for causes over which the Court of Criminal Appeals exercises jurisdiction, including appeals related to criminal cases and original proceedings in criminal law matters."

Other Possible Consequences of the Proposed Amendment:

Fees:

This amendment may result in appellate filing fees not being charged in certain "criminal" cases, previously docketed as "civil." *See* TEX. GOV'T CODE ANN. § 51.207 (Vernon 2005)(fees and costs in a "civil" case).

Retention of Files:

The suggested amendment to Rule 12.2(a)(4) could result in a different retention period for "criminal" files previously designated "civil." *See* TEX. GOV'T CODE ANN. § 51.204 (Vernon 2005).

A Related Concern:

If a case is incorrectly designated and a party files in the wrong court, should there be a provision in the rules concerning transfer of the case between the Supreme Court and the Court of Criminal Appeals to preserve a timely filing?