SCAC MEETING AGENDA
Friday, November 1, 2019, 9:00 a.m. – 5:00 p.m.
Saturday, November 2, 2019, 9:00 a.m. – 12:00 p.m.

Location: **South Texas College of Law**
1303 San Jacinto Street
Emilie Slohm Conference Room, 6th Floor
Houston, TX 77002
(713) 659-8040

1. WELCOME (Babcock)

2. STATUS REPORT FROM CHIEF JUSTICE HECHT

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the September 13-14, 2019 meetings.

3. COMMENTS FROM JUSTICE BLAND

4. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

Appellate Sub-Committee Members:
Pamela Baron – Chair
Professor William Dorsaneo – Vice Chair
Hon. Bill Boyce
Professor Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(a) September 5, 2019 Memo: Appeals in Parental Termination Cases

5. OUT OF TIME APPEALS IN PARENTAL RIGHTS TERMINATION CASES

Appellate Sub-Committee Members:
Pamela Baron – Chair
Professor William Dorsaneo – Vice Chair
Hon. Bill Boyce
Professor Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

6. PROTECTIVE ORDER REGISTRY FORMS

E-Filing Sub-Committee Members:
Richard Orsinger – Chair
Lamont Jefferson – Vice Chair
Hon. Tracy Christopher
Kimberly Phillips
Sharena Gilliland
David Jackson
Kim Piechowiak – Office of Court Administration

(b) October 29, 2019 Subcommittee Report on Protective Order Registry
(c) SB 325 Summary
(d) SB 325 Protective Order Registry Highlights
(e) Current Databases Storing Criminal or Firearms Information
(f) Sample Brady Checklist (from Nebraska)
(g) Existing DPS Form For Entry Of Protective Order Data Into TCIC – Form 2017

7. REGISTRATION OF IN-HOUSE COUNSEL

Robert Levy
Kimberly Phillips
Susan Henricks – Board of Law Examiners
Allan Cook – Board of Law Examiners

(h) October 30, 2019 Memorandum on Registration of Out of State In House Counsel
(i) Rule 23-Registration of In-House Counsel

8. PARENTAL LEAVE CONTINUANCE RULE

216-299a Sub-Committee Members:
Prof. Elaine Carlson – Chair
Thomas C. Riney – Vice Chair
Hon. David Peeples
Alistair B. Dawson
Robert Meadows
Hon. Kent Sullivan
Kennon Wooten

(j) October 23, 2018 Letter from State Bar - Parental Leave
(k) CRC Proposal re: Parental Leave Continuance
(l) ABA Resolution

9. MOTIONS FOR REHEARING IN THE COURTS OF APPEALS

Appellate Sub-Committee Members:
Pamela Baron – Chair
Professor William Dorsaneo – Vice Chair
Hon. Bill Boyce
Professor Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(m) September 2, 2019 Memo to SCAC re: TRAP 49.3-Motion for Rehearing

10. PROCEDURES TO COMPEL A RULING

Judicial Administration Sub-Committee Members:

Nina Cortell - Chair
Kennon Wooten – Vice Chair
Hon. David Peeples
Michael A. Hatchell
Prof. Lonny Hoffman
Hon. Tom Gray
Hon. Bill Boyce
Hon. David Newell

(n) October 28, 2019 Memo re: Mechanisms for Obtaining a Trial Court Ruling

Tab A

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **September 5, 2019**

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3 letter refer the following matter to the Appellate Rules Subcommittee:

> **Out-of-Time Appeals in Parental Rights Termination Cases.** A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:
>
> - a narrow late-appeal procedure;
> - an abate-and-remand procedure like the one proposed in the Phase II Report;
> - a habeas- or bill-of-review-style procedure; and
> - prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.
>
> **Suits Affecting the Parent-Child Relationship.** In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

The HB 7 Phase II Report recommends four changes that affect the appellate rules and also have some bearing on the out-of-time appeal assignment: (1) right to counsel, showing authority to appeal, and frivolous appeals; (2) a procedure in the court of appeals to consider ineffective-

assistance-of-counsel claims discovered by appellate counsel; (3) a rule standardizing the currently unwritten understanding on *Anders* briefs; and (4) opinion templates for use in parental termination cases.

II. Background

The subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

The subcommittee has not considered or discussed a similar procedure in the courts of appeals, nor has the subcommittee addressed a procedure for bringing late claims of ineffective assistance of counsel, *Anders* briefs, or frivolous appeals.

The Texas Supreme Court has indicated that it will consider the July 2017 proposals regarding late-filed petitions for review in conjunction with any additional recommendations on parental-termination topics identified in the May 31, 2019 referral letter.

III. Issues for Discussion

The subcommittee has broken down the referral topics into two stages to be addressed in the following order.

1. Stage One: Out-of-time appeals and related issues
    a. HB7 Phase II recommendations: indigent parent's right to counsel on appeal; notice of right to appeal; showing authority to appeal
    b. Assessing proposals for addressing untimely appeals and ineffective claims
        i. HB7 Phase II recommendation: abate and remand for evidentiary hearing in support of IAC claim
        ii. "narrow late-appeal procedure"
        iii. "habeas- or bill-of-review-style procedure" for a collateral attack
        iv. other possible procedures such as a requirement that counsel continue the representation until a notice of appeal has been filed.
2. Stage Two: Briefing and Opinions
    a. Frivolous appeals; *Anders* procedures in the courts of appeals as discussed by the HB7 task force; "Parental Termination Brief Checklist"
    b. Opinion templates as created by the HB7 task force

This memo focuses on Stage One, topic 1(a) with respect to the right to counsel on appeal, notice of right to appeal, and showing authority to appeal. The subcommittee will address Stage One, topic 1(b) and Stage Two in later meetings.

IV. Discussion

A. Notice of Right to Appeal and Right to Representation by Counsel

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an indigent parent is entitled to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code § 107.016(3).

The HB7 Task Force made the following recommendations regarding an indigent parent's notice of the right to appeal and the right to counsel on appeal.

> The HB7 Task Force proposes that a defendant in a parental-termination suit be notified in the citation about the right to counsel, including the right to counsel on appeal. This will provide an additional measure of notice in the event appointed counsel later declines to pursue an appeal due to abandonment of the case by the parent. The admonition could be added to the required notice and take the following form:
>
> > "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you."
> >
> > "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."
>
> To the extent the Supreme Court is currently considering a revision of Rule 99 to include standard form citations, the Task Force proposes the creation of a customized form citation, in English and Spanish (and with an internet citation to translations in other languages), to be used in parental termination cases. Such a citation could have language customized to address the availability of default judgments in parental-termination cases.

The subcommittee reviewed and discussed these HB7 Task Force recommendations.

The subcommittee recommends the following revision to the HB7 Task Force's proposed citation language.

> "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you." **at no cost to you."**
>
> "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."

The proposed revision clarifies the practical consequence of being "eligible for appointment of an attorney" and conforms the first paragraph to the second paragraph so they both provide the same information in parallel fashion.

The subcommittee also discussed use of the word "indigent" in the HB7 Task Force proposal. A question arose during the subcommittee's discussions concerning whether "indigent" would be understood by persons receiving this notice, and whether the term should be (1) defined, or (2) replaced with simpler wording such as "poor." The word "indigent" has a settled meaning for courts and lawyers, but this meaning may not be clear to non-lawyers who receive this notification. There was no consensus among the subcommittee members on whether to change or further define the word "indigent." The subcommittee notes that a discussion regarding potential use of the word "poor" occurred during the full advisory committee's June 2019 meeting in conjunction with deliberations regarding the contents of name change forms. Differing views were expressed during the full advisory committee's June 2019 meeting about whether the word "poor" carries pejorative connotations and whether "poor" is easier to understand than other terms describing lack of financial resources.

The HB7 Task Force proposal comports with an October 2017 report by the Rules 15-165a Subcommittee entitled, "Modernizing TRCP 99, Issuance and Form of Citation." The full advisory committee discussed this report at its October 2017 meeting, and the proposed revisions to TRCP 99 are pending before the Texas Supreme Court. Among other things, the October 2017 report recommends eliminating from TRCP 99 the description of a citation's mandatory contents and instead promulgating a form citation in plain language that clerks must follow. The Appellate Rules Subcommittee endorses the application of this approach to parental termination cases. The Appellate Rules Subcommittee solicits input from the full advisory committee about whether additional language addressing default judgments or other topics specific to parental termination cases should be considered for inclusion in a form citation for parental termination cases.

B. Showing Authority to Appeal

The HB7 Task Force made the following recommendations (footnotes omitted) with respect to requiring an attorney to show authority to pursue an appeal from a termination order.

> The filing of a notice of appeal starts the process of immediately preparing a record for which a court reporter might not be compensated. To avoid initiating the preparation of an appellate record in circumstances when a terminated parent may not actually be seeking to challenge a final order, the HB7 Task Force recommends an amendment to Rule 28.4(c) to require that a notice of appeal include an attorney certification that "the attorney consulted with the appellant and the appellant has directed the attorney to pursue to the appeal." *See Appendix C, Rule 28.4(c).* The Task Force further proposes a similar certification in a petition for review filed in the Supreme Court. *See Appendix D, Rule 53.2(l).* As an enforcement mechanism, the Task Force proposes borrowing from the procedure in Texas Rule of Civil Procedure 12 to challenge an attorney's authority but eliminating the requirement of a sworn motion.

The HB7 Task Force's proposed rule revisions read in part as follows.

> HB7 Task Force Proposed Texas Rule of Appellate Procedure 28.4(c):
>
> (c) *Certification by Appointed Counsel and Motion to Show Authority.* A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court's ruling. The court must rule on the motion to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.
>
> HB7 Task Force Proposed Texas Rule of Appellate Procedure 53.2(l):
>
> (l) *Certification by Appointed Counsel.* In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

The subcommittee reviewed and discussed these HB7 Task Force proposals.

The subcommittee endorses the recommendation to require a statement of authority to appeal or file a petition for review as reflected in proposed TRAP 53.2(l) and the first sentence of proposed TRAP 28.4(c) for the reasons spelled out in the HB7 Task Force's recommendation.

The subcommittee recommends a different approach regarding an enforcement mechanism in proposed TRAP 28.4(c). Questions arose among the subcommittee members regarding the necessity of creating a motion-to-show-authority procedure. If the full advisory committee concludes such a procedure is necessary, then the subcommittee recommends creating a simpler procedure. Grafting the procedure from TRCP 12 onto TRAP 28.4(c) makes for a lengthy and potentially cumbersome or redundant appellate rule. Instead of adding language to proposed TRAP 28.4(c) delineating the procedure for challenging authority to appeal, the subcommittee recommends (1) adding a second sentence to proposed TRAP 28.4(c) stating that a motion challenging an attorney's authority to pursue a parental-termination appeal will be handled in the trial court under TRCP 12, and (2) supplementing TRCP 12 as necessary to accommodate the accelerated timeframes applicable to parental-termination appeals.

C. Motions for Extension of Time and Conformity With Revisions to TRAP 4.7

Later subcommittee reports will address issues concerning extensions of time by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed counsel fails to timely pursue an appeal. At this juncture, the subcommittee recommends that any standards or procedures adopted for earlier appellate proceedings be compatible with those ultimately adopted with respect to petitions for review in the Texas Supreme Court.

As noted earlier, the subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

Memorandum

To: Texas Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: July 20, 2017

Re: Extension of Time to File Petition for Review in Parental Termination Cases

The referral on this topic is as follows:

> Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel.
>
> The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

During the June 2017 meeting of the full advisory committee, potential revisions to TRAP 4 were discussed to address this issue. Two versions of the rule revisions were proposed.

Version 1 allows a motion for extension of time to file a petition for review by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed

counsel fails to file the petition timely. This "no fault" version does not require allegations regarding any failure by appointed counsel to act on the parent's instructions or to inform the parent regarding the right to file a petition for review. The only required allegation is that appointed counsel failed to file the petition timely.

Version 2 also allows a motion for extension of time; in contrast to Version 1, however, this version requires a statement that appointed counsel failed to file the petition for review timely, and that either (1) the indigent parent instructed counsel to file it; or (2) counsel failed to inform the parent of the right to file a petition for review. Version 2 allows appointed counsel to file a response.

The full advisory committee voted 13 to 6 at the June 2017 meeting in favor of Version 1's approach, which omits a requirement to show fault on the part of appointed counsel.

With respect to Version 2, the full advisory committee voted 10-to-5 in favor of requiring verification if a showing of fault is required.

Justice Christopher suggested an alternative approach under which appointed counsel would be notified that counsel must file a petition for review unless an indigent parent consents in writing not to file the petition. This mandatory approach, it was suggested, could eliminate disputes over fault and the need to amend TRAP 4 to create a specific mechanism for extensions of time to file a petition for review in these circumstances. The full advisory committee voted 10-to-3 in favor of this alternative approach.

In light of the June 2017 discussion and votes, the appellate subcommittee has made minor changes to Versions 1 and 2 and has drafted new Version 3, all of which are attached to this memo. The three versions thus are: (1) a no-fault motion for extension mechanism (Version 1); (2) a motion for extension mechanism requiring verified allegations of fault on the part of appointed counsel, with an opportunity for counsel to respond (Version 2); and (3) a notice requirement under which the court of appeals' opinion and judgment must be accompanied by written notice to appointed counsel that a petition for review must be filed unless counsel obtains written consent from the indigent parent not to file the petition (Version 3).

The appellate subcommittee recommends adoption of Version 1 (no-fault motion) together with Version 3 (notice of appointed counsel's mandatory duty to file a petition for review unless indigent parent consents in writing not to file).

The subcommittee's view is that confusion and missed deadlines likely will be diminished under Version 3 if the rules require notice of appointed counsel's mandatory duty to file the petition for review. The subcommittee nonetheless concludes that some number of missed deadlines still are likely to occur even with explicit notice to appointed counsel of a

mandatory duty to file a petition for review on behalf of an indigent parent whose rights have been terminated. For this reason, an extension mechanism in the form of Version 1 should be included as a supplemental measure to allow an avenue for further review. No allegations regarding fault should be necessary to obtain an extension if the rules provide notice of appointed counsel's mandatory duty to file. There is no "fault" to be disputed if the duty to file is mandatory. The only showing necessary to obtain the extension in light of this mandatory duty should be a showing that the required petition for review was not filed timely.

July 18, 2017 CLEAN DRAFT OF VERSIONS 1, 2 AND 3

PROPOSED TRAP REVISIONS FOR MOTIONS FOR EXTENSION OF TIME TO FILE PFR IN PARENTAL TERMINATION CASES
(ADDING VERSION 3 WITH NOTICE REQUIREMENT BASED ON TRAP 25.2(D))

VERSION 1 (ELIMINATE ATTY FAULT REQUIREMENT)

4.7. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) *Additional Time to File Petition for Review.* An indigent parent with a statutory[1] right to appointed counsel in a parental-termination suit[2] may move for additional time to file a petition for review by filing a motion stating that the indigent parent's appointed counsel failed to file the petition timely.

(b) *Where and When to File.* A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days[3] after the following:

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[1] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[2] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

[3] This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

(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.[4]

(c) *Order of the Court*. The court must grant the motion if the motion for additional time was timely filed, and appointed counsel for the indigent parent did not timely file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

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[4] The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

VERSION 2 (KEEP ATTY FAULT REQUIREMENT; ALLOW ATTY RESPONSE)

4.7. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) *Additional Time to File Petition for Review.* An indigent parent with a statutory[5] right to appointed counsel in a parental-termination suit[6] may move for additional time to file a petition for review if the parent's appointed counsel failed to file the petition timely.

(b) *Contents of Motion.* The motion for additional time must **[be verified and]** state that appointed counsel failed to timely file a petition for review, and that either:

(1) the indigent parent instructed the appointed counsel to file a petition for review; or

(2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review.

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[5] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[6] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

(c) *Where and When to File*. A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days[7] 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.[8]

(d) *Response*. Appointed counsel may, voluntarily or at the court's request, file a response stating that the indigent parent was notified in writing of the right to file a petition for review and instructed counsel in writing not to file.

(e) *Order of the Court*. The court must grant the motion if the motion for additional time was timely filed, appointed counsel for the indigent parent did not timely file a petition for review, and either

> (1) the indigent parent instructed the appointed counsel to file a petition for review; or
>
> (2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

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[7] This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

[8] The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

VERSION 3 (NOTICE OF RIGHT TO FILE PFR)

48.___ *Notice of Right to File Petition for Review in the Supreme Court of Texas in Parental-Termination Cases Involving Indigent Parent with Statutory Right to Appointed Counsel.* If the parental rights of an indigent parent with a statutory[9] right to appointed counsel[10] have been terminated, the appellate clerk will send to appointed counsel a notice of the parent's right to file a petition for review in the Supreme Court of Texas with the opinion and judgment. The notice will include a statement that appointed counsel must file a petition for review in the Supreme Court of Texas unless the parent consents in writing not to have appointed counsel file a petition for review.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective

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[9] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[10] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

Tab B

October 29, 2019

RULE 16-165a SUBCOMMITTEE PRELIMINARY REPORT ON CREATION OF PROTECTIVE ORDER REGISTRY

1. Senate Bill 325, adopted by the Texas Legislature in 2019, called "Monica's Law," requires the Office of Court Administration (OCA) by June 2020 to (i) establish a protective order registry that allows case management systems to interface, restricted access authorized users (police, prosecutors, etc.) to access PO info and images, and (ii) establish and supervise training programs for all authorized users. The statute also mandates that starting 9-1-2020, the public will have limited public access to information on protective orders issued under Tex. Fam. Code Chapter 85, but only where the victim requests public access.

2. The OCA has started into action on this project, but work is at the discussion stage so far.

3. Attached to this Preliminary Report are five items: (1) a summary of SB 325; (2) highlights of the requirements for the protective order registry; (3) a memo on the four databases that need information pertaining to protective orders, which perhaps can be consolidated into one form; (4) a sample "Brady checklist" used in Nebraska to collect information for Federal firearms database; and (5) the present DPS TCIC Protective Order Data Entry Form presently being used to capture information about protective orders for entry into the Texas Crime Information Center Database.

4. A working relationship has been established between the Subcommittee and Kimberly A. F. Piechowiak, Domestic Violence Training Attorney with the Texas Office of Court Administration.

5. It too early to suggest specific edits to the Brady Checklist or the TCIC Protective Order Data Entry Form. At this point, it would be most helpful for Committee members to make high-level comments and suggestions about possible options.

Richard R. Orsinger
Subcommittee Chair

Tab C

SB 325 Summary
(Protective Order Registry)

Chapter 72, Government Code, Subchapter F

Sec. 72.151 Definitions

Authorized user: person to whom the office has given permission and the means to submit records to or modify or remove records in the registry.

Peace officer: meaning assigned by Article 2.12, Code of Criminal Procedure.

Protective order: an order issued by a court in this state to prevent family violence, as defined by Section 71.004, Family Code. Qualifying orders are issued pursuant to

- Chapters 83 or 85, Family Code; or
- Article 17.292, Code of Criminal Procedure, with respect to a person who is arrested for an offense involving family violence.

Protective order registry or registry: protective order registry established under Section 72.153.

Race or ethnicity: a particular descent, including Caucasian, African, Hispanic, Asian, or Native American descent.

Sec. 72.152. Applicability

- Applications for a protective order filed under:
  - Chapter 82, Family Code; or
  - Article 17.292, Code of Criminal Procedure, with respect to a person who is arrested for an offense involving family violence; and
- Protective orders issued under:
  - Chapter 83 or 85, Family Code; or
  - Article 17.292, Code of Criminal Procedure, with respect to a person who is arrested for an offense involving family violence.

Sec. 72.153. Protective Order Registry.

OCA must consult with DPS and the courts to establish and maintain a centralized Internet-based registry for applications for protective orders filed in this state and protective orders issued in this state and allows municipal and county case management systems to easily interface with the registry.

Sec. 72.154. Public Access to Protective Order Registry (limited access)

(a) Subject to Subsections (c) and (d) and Section 72.158, the registry must allow a member of the public to electronically search for and receive publicly accessible

information contained in the registry regarding each protective order issued in this state.

The registry must be:

- Free of charge, and
- Searchable by:
    - Issuing county
    - Name of respondent
    - Birth year of respondent

(b) and (c) publicly accessible information must include **ONLY** the following:

- Issuing court;
- Case number;
- Respondent's information
    - full name
    - county of residence
    - birth year, and
    - race or ethnicity;
- Date issued
- Date served;
- Date the order was vacated, if applicable; and
- Date of expiration.

(c) No public access to any information regarding the following types of orders will be allowed:

- Magistrate's Orders of Emergency Protection (Art. 17.292 CCP)
- Temporary Ex Parte Orders (Chp. 83, FC)

Sec. 72.155. Restricted Access to Protective Order Registry.

(a) The registry must include:

- a copy of each application for a protective order filed in this state, and;
- a copy of each protective order issued in this state, including a vacated or expired order.

(b) and (c) Only the following persons may access that information under the registry, and be able to search for and receive a copy of a filed application or issued protective order through the registry's website:

- an authorized user,
- the attorney general,
- a district attorney,
- a criminal district attorney,
- a county attorney,
- a municipal attorney,
- or a peace officer.

Sec. 72.156. Entry of Applications

(a) The clerk shall enter a copy of the application into the registry as soon as possible but not later than 24 hours after an application for a protective order is filed.
(b) A clerk may delay entering information into the registry only to the extent that the clerk lacks the specific information required to be entered.
(c) The public is not allowed access through the registry's Internet website the application or any information related to the application entered into the registry.

Sec. 72.157. Entry of Orders

(a) After the time a court issues an original or modified protective order, or extends the duration of a protective order, the clerk shall enter into the registry:
- a copy of the order and, if applicable, a notation regarding any modification or extension of the order;
- Issuing court;
- Case number;
- Respondent's information
  - full name
  - county of residence
  - birth year, and
  - race or ethnicity;
- Date issued
- Date served;
- Date the order was vacated, if applicable; and
- Date of expiration.

(b) For a protective order that is vacated or that has expired, the clerk of the applicable court shall modify the record of the order in the registry to reflect the order's status as vacated or expired.
(c) A clerk may delay entering information into the registry only to the extent that the clerk lacks the specific information required to be entered.

Sec. 72.158. Request for Grant or Removal of Public Access.

(a) OCA shall ensure that the public may access information about protective orders issued pursuant to Chapter 85, Family Code only if:
- a protected person requests that the office grant the public the ability to access the information, and
- OCA approves the request.

(b) After the request is approved, the protected person may later request to remove the public's ability to access the information pertaining to the order. OCA then shall

remove the ability of the public to access the information not later than the third business day after the office receives the removal request.

(c) The Supreme Court of Texas:
- Shall prescribe a form for use by the protected person to grant or remove of public access to the protective order; and
- May prescribe procedures for requesting a grant or removal of public access.

Timelines

- By **June 1, 2020,** OCA shall:
  - Establish the Protective Order Registry. This deadline may be delayed by up to 90 days if authorized by resolution of the Texas Judicial Council.
  - Establish and supervise a training program for magistrates, court personnel, and peace officers on the use of the protective order registry and make all materials for use in the training program available to trainees.
- OCA shall not allow public access until **September 1, 2020.**
- Registry only applies to applications and orders issued on or after **September 1, 2020.**

Tab D

SB 325 Protective Order Registry
Highlights

A. SB 325, AKA “Monica’s Law”, named in honor of Monica Deming who was killed by her ex-boyfriend in Odessa in 2015. The ex-boyfriend had prior protective orders against him, but Monica was not aware of this. After her murder, Monica’s family approached Rep. Landgraf to author legislation to create a statewide searchable data base that allow the public to look up domestic violence protective orders filed by Texas courts.
B. By June 2020, the Office of Court Administration must:
    a. Establish protective order registry that allows case management systems to interface, and restricted access authorized users (police, prosecutors, etc.) to access PO info and images.
    b. Establish and supervise training program for all authorized users.
    c. Beginning September 1, 2020, <u>limited</u> public access to information for protective orders issued pursuant to TFC Chapter 85 will be allowed only if victim requests such access.
    d. Deadline may be delayed by up to 90 days if authorized by resolution of the Texas Judicial Council.
C. Information available to the public with permission from the applicant:
    a. Issuing court;
    b. Case number;
    c. Respondent’s information
        i. full name
        ii. county of residence
        iii. birth year, and
        iv. race or ethnicity;
    d. Date issued
    e. Date served;
    f. Date the order was vacated, if applicable; and
    g. Date of expiration.
D. The following participants will have restricted access to protective order applications and protective orders issued pursuant to TFC Chapter 83 (ex parte protective orders), Chapter 85 (protective orders), and Article 17.292, CCP (magistrates’ orders of emergency protection) for persons arrested for an offense involving family violence:
    a. an authorized user,
    b. the attorney general,
    c. a district attorney,
    d. a criminal district attorney,
    e. a county attorney,
    f. a municipal attorney, or

g. a peace officer.
h. Required forms to be prescribed by the Supreme Court:
    i. Petitioner's request to grant public access (should also be part of PO kit), and
    ii. Petitioner's request to remove public access.

Important Considerations:

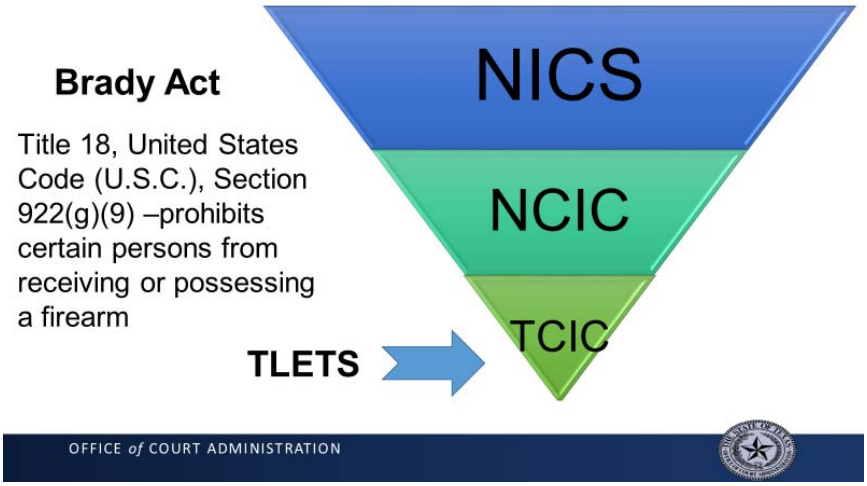
A. The Protective Order Registry will not replace the current requirements for entry of protective orders into the Texas Crime Information Center (TCIC), but will rather expand access and complement currently available information.
B. SB 325 also provides that a copy of the protective orders will be uploaded to the database for access by authorized users, and other justice personnel. The public will not be able to access these images.
C. An information form, though not required under SB 325, would facilitate timely and accurate entry of information into both the registry and TCIC. Existing resources to create to create such a document include:
    a. TCIC Protective Order Data Entry Form (2017), created by the Texas Department of Public Safety, and
    b. A sample checklist to determine if the order disqualifies the respondent from possessing a firearm under the Brady Act and/or Texas law.

Tab E

Current databases

Protective orders are received by law enforcement, which enters the order into:

- TCIC—Texas Crime Information Center, which feeds into
- NCIC—National Crime Information Center, which feeds into
- NICS—National Instant Criminal Background Check System



National Instant Criminal Background Check System (NICS)

Brady Act: (1993) provided for the development of NICS

- computerized system established to provide information on whether a prospective gun purchaser is eligible to receive or possess gun
- Searches criminal, mental health, protective order, and other records (i.e. "Brady disqualifiers")
- FBI makes follow-up requests (if needed) to police, prosecutors, or courts for additional information demonstrating whether or not the person is prohibited from buying a gun

NICS Act Record Improvement Program (NARIP)

Requires states to report all Brady disqualifiers (from purchasing or receiving a firearm) to the federal criminal databases.

Per 18 U.S.C. § 922(g)(1-9), disqualifiers include:

- Felony convictions
- Misdemeanor convictions of domestic violence
- Mental health commitments
- Protective orders against intimate partner or his/her child

According to the Government Accountability Office, of the 20,738 Texas protective orders in the National Crime Information Center Protection Order File in 2015, only 2,169 protective orders had a Brady indicator.

Note: New Protective Order Registry will not replace the above process.

Tab F

Brady Indicator Worksheet

Check only one box for each question below.

1) Finding of Credible Threat OR Explicitly Prohibits Use of Force a. Respondent is found to be a credible threat to the physical safety of the Petitioner. OR b. Respondent is explicitly prohibited from the use, attempted use, or threatened use of physical force that would place the Petitioner in reasonable fear of bodily injury.	☐YES ☐NO ☐UNKNOWN
2) Restrains from Harassing, Stalking, or Threatening Conduct Respondent is restrained from harassing, stalking, or threatening or otherwise engaging in other conduct that would place the Petitioner in reasonable fear of bodily injury. *Example: Respondent is enjoined and prohibited from threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner.*	☐YES ☐NO ☐UNKNOWN
3) Due Process has been provided Respondent received actual notice of a hearing and had an opportunity to participate in the hearing. Generally, due process is provided the day of a scheduled hearing of an original order. *Note: Emergency or temporary orders issued ex parte are an exception to the Constitutional right to Due Process.*	☐YES ☐NO ☐UNKNOWN
4) Petitioner/Protected Party's relationship to Respondent /Restricted Party: a) ☐Spouse (Current or Former) b) ☐Cohabiting Intimate Partner[1] (Current or Former) c) ☐Person with a Child in Common[2] d) ☐Child of an Intimate Partner[3] e) ☐None of the Above f) ☐UNKNOWN	

If **ANY** questions are answered "NO" **OR** the relationship in question 4 is identified as category e, then Brady Indicator = NO (BRD/N)

If **ANY** questions are answered "UNKNOWN" then Brady Indicator = UNKNOWN (BRD/U)

If **ALL** of questions 1, 2, & 3 are answered "YES" **AND** the relationship in question 4 is identified as categories a, b, c, or d, then Brady Indicator = **YES (BRD/Y)**

[1] Cohabiting Intimate Partner – Requires a live-in relationship between two individuals (can be same sex) which is a sexual/romantic one, NOT merely a roommate.

[2] Person with a Child in Common – Does NOT require cohabitation to have occurred at any time.

[3] 3Child of an Intimate Partner – Includes biological, step, and adoptive children of current or former spouses and/or current or former cohabiting intimate partners.

Example: step-son/daughter, child of a live-in boyfriend/girlfriend, etc.

Tab G

TCIC Protective Order Data Entry Form

To be completed by the Criminal Justice/Law Enforcement Official and released to authorized agencies only.

ORI:	Choose One: Protective Order Emergency Protective Order	
OCA:	Protective Order Number:	Court Identifier:
Issue Date:	Date of Expiration:	Date Signed: Date Rescinded:

ALL fields should be completed to ensure timely entry into TCIC. Missing pertinent information will delay entry and will require the entering agency to contact the court to provide the necessary information.

Respondent Name**:**				Sex: Male Female
Race: (circle one): Indian Asian Black White Unknown				Ethnicity: (circle one) Hispanic Non-Hispanic Unknown
Place of Birth:	Citizenship:	Date of Birth:	Height:	Weight:

Skin: (circle one):
Albino Black Dark Dk Brown Fair Light Lt Brown Medium Med Brown Olive Ruddy Sallow Yellow

Eye Color: (circle one):
Black Blue Brown Gray Green Hazel Maroon Pink Multi-Colored Unknown

Hair Color: (circle one)
Black Blond Brown Gray Red White Sandy Bald Blue Green Orange Pink Purple Unknown

Scars, Marks and/or Tattoos: (please describe in detail)

AKA's:

Caution and Medical Conditions: (circle all that apply)

00 – Armed and Dangerous	05—Violent Tendencies	10—Martial Arts Expert	15—Explosive Expertise	40-Int'l Flight Risk 55—Alcoholic
20—Known to Abuse Drugs	25—Escape Risk	30—Sexually Violent Predator	50—Heart Condition	
80—Medication Required	60—Allergies	65—Epilepsy	70—Suicidal	
	85—Hemophiliac	90—Diabetic	01--Other	

Protection Order Conditions (PCO): (circle all that apply)

01 Respondent is restrained from assaulting, threatening, abusing, harassing, following, interfering with or stalking the protected person and/or child of the protected person
02 Respondent may not threaten a member of the protected person's family/household
03 The protected person is granted exclusive possession of the residence/household
04 Respondent is required to stay away from the residence, property, school or place of employment of the protected person or other family or household member
05 Respondent is restrained from making any communication with the protected person including, but not limited to, personal, written, or phone contact, or their employers, employees or fellow workers, or others whom the communication would be likely to cause annoyance or alarm
06 Respondent is awarded temporary custody of the children named
07 Respondent is prohibited from possessing and/or purchasing a firearm or other weapon
08 See miscellaneous field for comments regarding terms and conditions of the protection order (add all prohibitions ordered not already assigned a code, e.g. pets, utilities, mutually owned property, distance, bond conditions, visitation details and/or other special prohibitions).
09 The protected person is awarded temporary exclusive custody of the child(ren) named

Brady Record Indicator (BRD): SVC:(circle one) served/not served/unknown
N—Respondent is NOT disqualified Y—Respondent is disqualified U—Unknown SVD:

Relationship To Protected Person: (Not the additional PPNS)

Please include the following numeric identifiers, if available:

Driver License:	DL State:	DL Expiration:
Texas ID:	Misc ID:	Social Security:

Respondent Address:			
City:	County:	State:	Zip:

Protective Order Data Entry Form – Page 2

Respondent Name:

Respondent Vehicle Data:

License Plate:	LP State:	LP Year:	LP Type:
Vehicle ID:	Year:	Color:	
Make:	Model:	Style:	

Protected Person Data

Protected Person Name:		Sex: Male Female
Race: (circle one): Indian Asian Black White Unknown		Ethnicity: (circle one) Hispanic Non-Hispanic Unknown
Date of Birth:	Social Security:	
Protected Person Address:		
City:	County:	State: Zip:

Protected Person Employer Data

Protected Person Employer Name:	Address:	
City:	State:	Zip:
Protected Person Employer Name:	Address:	
City:	State:	Zip:

Protected Child Data (Use additional pages if necessary)

Protected Child Name:		Sex: Male Female
Race: (circle one): Indian Asian Black White Unknown		Ethnicity: (circle one) Hispanic Non-Hispanic Unknown
Date of Birth:	School/Child Care Name and Address:	
Home Address:	City:	State: Zip:
Protected Child Name:		Sex: Male Female
Race: (circle one): Indian Asian Black White Unknown		Ethnicity: (circle one) Hispanic Non-Hispanic Unknown
Date of Birth:	School/Child Care Name and Address:	
Home Address:	City:	State: Zip:

To be completed by Criminal Justice/Law Enforcement Official:

SID:	FBI #:	FPC:	MNU:

Notes:
Use of Pseudonyms; Code of Criminal Procedures: Art. 57B.02. (Confidentiality of files and records)
Extension of PO if Respondent is confined or Imprisoned; Family Code: Sec. 85.025 (Duration of Protective Order)
PCO-07-Posession of a firearm; Family Code: Sec. 85.0222 (Requirements of order applying to person who committed family violence).
SB 1242-Chapter 82-FC sect 82.011-3(b)-2(b) the court shall order the clerk to maintain a confidential record of the information for use only by: (A) the court; or (B) a law enforcement agency for purposes of entering the information required by Section 411.042 (b) (6), Govt. Code into the statewide law enforcement information system maintained by the Department of Public Safety. (Eff. 9/1/17)

Tab H

MEMORANDUM

TO: TEXAS SUPREME COURT ADVISORY COMMITTEE

FROM: AD HOC COMMITTEE ON REGISTRATION OF OUT-OF-STATE IN-HOUSE-COUNSEL – ROBERT LEVY AND KIM PHILLIPS

SUBJECT: PROPOSED RULE ON REGISTRATION OF OUT OF STATE IN-HOUSE COUNSEL

DATE: 10/30/2019

CC: SUSAN HENRICKS, ALLAN COOK; BOARD OF LAW EXAMINERS

We have reviewed the proposed new Rule 23 to the Rules Governing Admission to the State Bar of Texas providing for registration of out-of-state in house counsel and have consulted with Susan Henricks, Executive Director of the Texas Board of Law Examiners (BLE) and Allan Cook, General Counsel of the BLE. We offer the following comments and questions. (The BLE is amenable to considering changes in the proposed rule and will submit an updated draft following input from the TSCAC.)

The Texas Board of Law Examiners submitted the proposed rule to the Texas Supreme Court to establish a process to permit in-house attorneys not licensed in Texas to register with the State Bar of Texas. Currently the only procedures for Out of State attorneys to formally practice law in Texas are as follows:

- The Texas Rules Governing Admission to the Texas Bar Rule 13 requires out of state attorneys must meet all the fitness to practice requirements for Texas attorneys and either:
    - sit for the Texas Bar or
    - waive into the bar (requiring at least 5 of 7 years of continuous practice).[i]
- The Texas Government Code Section 82.0361 and Texas Rules Governing Admission to the Texas Bar Rule 19 specifies the procedures and fees for out of state attorneys to appear *pro hac vice* in a Texas court.
- Foreign attorneys may become certified in Texas as a Foreign Legal Consultant.

Notably, this proposed rule does not mandate that lawyers licensed in other jurisdictions must register in Texas as a condition to working in Texas as In-House-Counsel: to explicitly require registration would likely require amending either the Texas Bar Act or the Texas Disciplinary Rules of Professional Conduct. The preamble to the draft Rule states: "Registered In-House Counsel are permitted to lawfully provide legal services to Business Organizations in Texas without becoming a member of the State Bar of Texas." The proposed Rule at §4(a) provides that attorneys seeking registration as In-House-Counsel may file with the Board, but its language does not mandate that out of state attorneys follow this process in order to be employed as In-House-Counsel for a corporation (or other business entity) in Texas.

Texas Ethics Opinions have addressed the issue of whether in house counsel performing legal work for their employers constitutes the unauthorized practice of law. (See e.g. Texas Ethics Opinion 407, Texas Ethics Opinion 516 and Texas Ethics Opinion 531) This arguably suggests that unregistered attorneys are not authorized to practice law in Texas courts, but this conclusion is not clear in applicable rules. The proposed rule does not include an enforcement mechanism; there is no sanction for failing to register other than termination of the registration (See §6).

This proposed rule will align Texas with a majority of states that have procedures for registration of out of state attorneys working in-house for corporations with offices or activities in other states. See 2017 ABA List of In House Corporate Registration Rules. The California, Florida, New Jersey, New York and Pennsylvania rules were used as a model as was the 2016 ABA Model Rule for Registration of In House Counsel.

The proposed Texas rule will apply to attorneys licensed in other states and arguably in other foreign jurisdictions (the current version of the rule does not clearly apply in all respects to counsel licensed in other countries). Therefore, attorneys licensed as attorneys in other countries can use this registration procedure. This could create concerns because the licensing requirements in some countries are materially different than those in the states; for example, many attorneys in Holland are classified as *juristen* or *advocaten*. Juristen do not have to specifically qualify for the legal bar in Holland. Advocaten study law and article with firms before qualifying and registering with the bar.

The Rule does not clearly require The Registration is intended to become effective when the registrant files their registration papers with the Board, even if the approval process is delayed. Attorneys who register under this rule will be able to apply for admission to the Texas Bar after 3 of 5 years of continuous registration (versus the current 5 out of 7 years for attorneys licensed in other states).

The following are additional questions and issues with the proposed rule:

1. The lack of an enforcement mechanism will create uncertainty as to whether registration is required or voluntary.
2. The rule should expressly state that it applies to lawyers licensed in other states and foreign jurisdictions. The current draft does not clearly reference both categories of lawyers in §1 (a).
3. Should the rule apply to out of state attorneys who are contractors (versus employees) of Texas sited corporations?
4. The proposal specifies certain legal activities that registered out of state attorneys may not perform. This carve-out is based on Texas Government Code Section 83.001 which provides that only licensed attorneys may receive compensation for preparation of a legal instrument affecting title to real property, including deeds, deeds of trust, notes, mortgages, and transfers or release of lien. The current proposed rule requires Registered Out of State Attorneys to meet Texas CLE requirements even if their home state CLE requirements are less than Texas' requirements.
5. In §3, the Disclosure Rule, Registered Attorneys are required to state *in every communication outside of their employing company* that they are not licensed to practice law in Texas. This requirement arguable obligates the attorney to give the notification in any communication, including face to face discussions, telephone conversations, texts and emails to third parties (including communications to opposing counsel and to governmental agencies). This would be onerous and raises the question of the consequence of failure to properly disclose.

6. Section 5(a)(4) provides that the registration lapses after the individual relocates outside of the state for 180 days or more. This should be clarified to indicate consecutive days or 180 days within a 12 month period to avoid issues where in house counsel are working abroad on multiple short term assignments yet their residence continues to be in Texas.
7. The Rule does not provide a specific requirement for when attorneys must seek registration. In §1(a)(3), a Registered In-House-Counsel is a lawyer who either resides in Texas or will reside within six months of application. The rule arguably enables an In-House-Counsel to defer registration.
8. Section 2(a)(4) permits registered attorneys to participate in *pro bono* representation in Texas; the language should be clarified to be consistent with the recently passed New Opportunities Volunteer Attorney program (NOVA) under Article XIII of the State Bar Rules.

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[i] In 2017, The Texas Supreme Court permitted temporary authorization for out of state attorneys to practice in Texas if related to Hurricane Harvey relocations.
http://www.txcourts.gov/media/1438805/179099.pdf

Tab I

Texas Board of Law Examiners
Rules Governing Admission to the Bar of Texas

Rule 23
Registration of In-House Counsel

Pursuant to Texas Government Code Section 81.102(b)(1), this Rule requires attorneys licensed to practice in States other than Texas, who reside in Texas and provide legal services for compensation to Business Organizations in Texas, to register as In-House Counsel. Registered In-House Counsel are permitted to lawfully provide legal services to Business Organizations in Texas without becoming a member of the State Bar of Texas.

§1. Definitions

(a) "Registered In-House Counsel." A "Registered In-House Counsel" is a lawyer who:

(1) is authorized to practice law in a State other than Texas;

(2) is exclusively employed by a Business Organization, as herein defined, and receives or will receive compensation for legal services or representation on behalf of that Business Organization;

(3) is residing in Texas or is relocating to Texas for purposes of employment within six months of application for registration;

(4) has completed registration as In-House Counsel as required by this Rule and has paid all fees; and

(5) has been approved as Registered In-House Counsel by the Supreme Court of Texas.

(b) "Business Organization." A "Business Organization" is a corporation, company, partnership, association, or other legal entity, including its respective parents, subsidiaries, and affiliates, that is doing business in Texas, that is not engaged in the practice of law or the provision of legal services outside of the organization, and does not charge or collect a fee for legal representation or advice other than to entities comprising that organization for services of the Registered In-House Counsel.

§2. Activities

(a) Authorized Activities. Registered In-House Counsel may provide legal services in Texas to a single Business Organization. Registered In-House Counsel are authorized to engage in the following activities:

(1) giving legal advice to the directors, officers, employees, and agents of the employing Business Organization regarding its business affairs;

(2) negotiating and documenting all matters for the employing Business Organization;

(3) representing the employing Business Organization in its dealings with any governmental or administrative agency or commission if authorized by the rules of the agency or commission; and

(4) participating in the provision of *pro bono* services offered under the auspices of organized legal aid societies or state/local bar association projects or provided under the supervision of an attorney licensed to practice law in Texas who is also working on the *pro bono* representation.

(b) Unauthorized Activities. Except as provided by subsection (a), Registered In-House Counsel are not authorized to engage in the following activities:

(1) appearing for the Business Organization in Texas courts, either in person or by signing pleadings;

(2) interpreting Texas law or giving any advice concerning Texas law for anyone other than the Business Organization;

(3) participating in the Texas representation of any client other than the Business Organization, in any manner;

(4) preparing any legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, or transfer or release of lien, as proscribed by Texas Government Code Section 83.001; or

(5) rendering to anyone except the Business Organization any service requiring the use of legal skill or knowledge or performing any other act constituting the practice of law under Texas Government Code Section 81.101.

§3. Disclosure

Registered In-House counsel shall not represent themselves as members of the State Bar of Texas or that they are licensed to practice law in Texas. In any communication with individuals or organizations other than the employing Business Organization, Registered In-House Counsel must disclose that they are not licensed to practice law in the state of Texas. If the communication is in writing, Registered In-House Counsel must disclose the name of the employing Business Organization, their title or function within the organization, and that they are not licensed to practice law in Texas.

§4. Registration

(a) Lawyers seeking registration as In-House Counsel in Texas shall file the following with the Board:

(1) a certificate or other documentation from each State or foreign jurisdiction in which the lawyer is authorized to practice law proving that the lawyer is authorized to practice law and is active and in good standing; and, for any jurisdiction in which the lawyer has an inactive status as an attorney, documentation or certification certifying that the lawyer is voluntarily inactive and was not involuntarily placed on inactive status;

(2) a statement executed by the lawyer under penalty of perjury that he or she:

(A) has read and is familiar with the *Texas Disciplinary Rules of Professional Conduct* and will follow its provisions;

(B) submits to the jurisdiction of the Supreme Court of Texas for all purposes as defined in *Texas Disciplinary Rules of Professional Conduct*, the *Rules Governing Admission to the Bar of Texas*;

(C) is not subject to a disciplinary proceeding or outstanding order of reprimand, censure, or disbarment, permanent or temporary, for professional misconduct by the bar or courts or duly constituted organization overseeing the profession or granting authority to practice law of any jurisdiction and has not been permanently denied admission to practice law in any jurisdiction based on the lawyer's character or fitness; and

(D) authorizes notification to the State Bar of Texas of any disciplinary or other adverse action taken against the lawyer before the disciplinary authority overseeing the legal profession in all States and foreign jurisdictions in which the lawyer is licensed or otherwise authorized to practice law.

(3) a certificate or other documentation from the employing Business Organization certifying that it meets the definition of a Business Organization as defined in this Rule, that it is aware that the lawyer is not licensed to practice in Texas;

(4) an application to register as In-House Counsel as promulgated by the executive director of the Board; and

(5) payment of all required fees.

(b) Review by the Board. The Board will review applications for compliance with this Rule. Application for registration as In-House Counsel constitutes authorization for the Board to conduct an investigation and make a determination of good moral character and fitness pursuant to Rule 10 of the *Rules Governing Admission to the Bar of Texas*.

(c) Registration with Supreme Court. The Board will submit the name and address of all lawyers meeting the requirements of this Rule to the clerk of the Supreme Court of Texas with a request that the lawyer be registered as In-House Counsel. Authorization to perform services under this Rule is effective on the date the clerk of the Supreme Court of Texas approves the request for registration. If the registrant is relocating to Texas, the authorization becomes effective on the date of employment in Texas, but in no case later than six months after the date of the application.

(d) Annual Renewal. The Registered In-House Counsel shall pay a non-refundable annual fee to the State Bar of Texas equal to the current fee paid by active members of the State Bar of Texas and shall provide any updated or amended information the bar requires.

(e) Duty to Report Change in Status. Registered In-House Counsel shall report any change in status or authority to practice in another State or foreign jurisdiction within 30 days of the effective date of the change in status. If a lawyer registered as In-House Counsel elects inactive status in any State or foreign jurisdiction after registration, the Registered In-House Counsel must provide documentation

as required by subsection (a)(1) of this Section. Failure to provide such notice or documentation by the Registered In-House Counsel constitutes a basis for discipline pursuant to the *Texas Disciplinary Rules of Professional Conduct.*

§5. Duration and Termination of Registration

(a) Authorization to perform legal services as In-House Counsel under this Rule terminates on the earliest of the following events:

(1) admission of the Registered In-House Counsel to the general practice of law in Texas;

(2) the In-House Counsel ceases to be employed by the Business Organization listed on his or her then-current registration under this Rule; if such Registered In-House Counsel, within 60 days of ceasing to be so employed, becomes employed by another Business Organization and such employment meets all requirements of this Rule, his or her registration shall remain in effect, if within said 60-day period, the In-House Counsel files with the Board:

(A) written notification by the lawyer stating the date on which the prior employment terminated, identification of the new employer and the date on which the new employment commenced;

(B) certification by the former Business Organization that the termination of the employment was not based on misconduct or lack of fitness or failure to comply with this Rule; and

(C) the certification specified in subsection (a)(3) of Section 4, duly executed by the new employer. If the employment of the In-House Counsel ceases with no subsequent employment within 60 days thereafter, the lawyer shall promptly notify the Board in writing of the date of termination of the employment and shall not represent any Business Organization, company, partnership, association, or other non-governmental business entity authorized to transact business in Texas;

(3) a request by the Business Organization or the Registered In-House Counsel that the registration be withdrawn;

(4) relocation of a Registered In-House Counsel outside of Texas for more than 180 days;

(5) suspension, other than administrative suspension, or disbarment from the practice of law in any jurisdiction or any court or agency before which the lawyer is admitted; or

(6) failure of Registered In-House Counsel to fully comply with any provision of this Rule.

(b) Notice to the State Bar of Texas by the Registered In-house Counsel. Registered In-House Counsel must file notice of certification as In-House Counsel or issuance of new certification as provided in this Rule with the State Bar of Texas within 60 days of certification.

(c) Termination of Authorization. The Board will request that the clerk of the Supreme Court of Texas terminate the authorization to perform legal services under this Rule after the Board has received the notice required by subsection (a)(2) of this Section. The Board will mail notice of the termination to the Registered In-House Counsel and to the Business Organization of record employing the Registered In-House Counsel.

(d) Reapplication. A lawyer previously registered as In-House Counsel may reapply for registration as long as the requirements of this Rule are met.

(e) Re-registration. Lawyers whose Registered In-House Counsel status was terminated for failure to pay annual fees or to complete continuing legal education requirements may be recertified in the same manner that administratively suspended members of the State Bar of Texas are reinstated.

§6. Discipline

(a) Termination of Registration by Court. The Supreme Court of Texas may temporarily or permanently terminate a Registered In-House Counsel's registration for cause at any time, in addition to any other proceeding or discipline that may be imposed by the Supreme Court of Texas.

(b) Notification to Other States and National Lawyer Regulatory Data Bank. The Board is authorized to notify each state or foreign jurisdiction in which the Registered In-House Counsel is licensed to practice law of any disciplinary action

against the Registered In-House Counsel, and is further authorized to notify the National Lawyer Regulatory Data Bank.

§7. Continuing Legal Education Requirement

In-House Counsel shall comply with all continuing legal education requirements applicable to members of the Bar unless otherwise exempt.

§8. Admission Without Examination

The requirements of active and substantial engagement in the lawful practice of law as required for exemption from taking the Texas Bar Examination, as provided in Rule 13 of the *Rules Governing Admission to the Bar of Texas*, may be met by continuous registration as In-House Counsel in Texas for a period of three of the last five years immediately preceding the filing of an application for admission without examination.

§9. Effective Date

(a) This Rule requiring registration or licensure of In-House Counsel becomes effective on January 1, 2021.

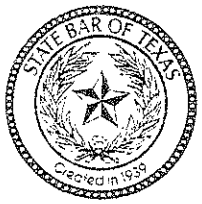
(b) Any application for registration as In-House Counsel shall authorize the lawyer to be employed by a Texas Business Organization and shall be effective as of the date of filing with the Board.

(c) The Board will accept applications for registration as In-House Counsel beginning December 1, 2019.

Tab J

STATE BAR OF TEXAS

RANDALL O. SORRELS
2019-20 PRESIDENT



Direct Correspondence to:
ABRAHAM, WATKINS, NICHOLS,
SORRELS, AGOSTO & AZIZ
800 Commerce St., Houston 77002
(713) 222-7211
rsorrels@abrahamwatkins.com

October 23, 2018

Jaclyn Daumerie
Supreme Court of Texas
201 W. 14th St.
Austin, TX 78711

Dear Ms. Daumerie:

I am writing concerning the consideration of implementing a statewide policy pertaining to maternity and adoption issues that arise in a litigation setting. I have asked the Court Rules Committee of the State Bar to look into developing and drafting a policy that will address some of the issues parents face in an upcoming birth or adoption of a child. Giana Ortiz is the current chair of this committee and she has agreed to put this topic on her committee's next agenda. I am hopeful the committee will develop a policy that works for most Texas lawyers who are would be parents, and if so, we will be seeking the Court's guidance on the next step. At this time, we also both felt it prudent to communicate with the Court to share what is being considered. I have spoken with Justice Guzman about the issue and she too suggested I contact the Court in writing to relay this information.

As always, we look to the Court's direction and guidance on how to approach this issue. If the Court wishes for the Court Rules Committee to stand down on examining the issue, and/or has any other guidance or direction it wishes us to follow, please let us know.

Thanks in advance for your help with this important issue.

Very truly yours,

Randall O. Sorrels

cc: Justice Eva Guzman
Supreme Court of Texas
PO Box 12248
Austin, TX 78711

Giana Ortiz
1304 W. Abram St., Suite 100
Arlington, TX 76013-1752

Trey Apffel, III
PO Box 12487
Austin, TX 78711

Laura Gibson
Denton's
1221 McKinney, Suite 1900
Houston, TX 77010

Joe Longley
Attorney at Law
3305 Northland Dr., Suite 500
Austin, TX 78731

Tab K

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
PROPOSAL TO CHANGE EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

. **Exact wording of existing Rule:**

RULE 253. ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

. **Proposed Rule:**

RULE 253. PARENTAL LEAVE OR ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE OF TRIAL

(a) For purposes of this rule, "parental leave continuance" means a continuance of a trial setting in connection with the birth or adoption of a child by an applicant, regardless of the applicant's gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to cases arising under Chapters 54 or 262 of the Family Code.

(1) Any application made under this rule must be filed within a reasonable time after the later of:

(A) the applicant learning of the basis for the continuance; or

(b) the applicant learning the setting of the proceeding for which the continuance is sought.

(2) Application by Lead Attorney. Except where the attorney was employed within ten days of the date the suit is set for trial, an application for parental leave continuance based on the parental leave of a lead attorney in a case must be granted. In cases where an attorney was employed within ten days of the date the suit is set for trial, the right to continuance based on the parental leave of a lead attorney in a case shall be discretionary.

[Continued on Next]

(3) Application by Attorney Other than Lead Attorney. The court in its discretion may grant an application for parental leave continuance based on the parental leave of an attorney other than the lead attorney in a case if such application is made in accordance with this rule. If the application for parental leave continuance by an attorney other than the lead attorney is challenged by another party that makes a prima facie demonstration of substantial prejudice, the burden shifts to the applicant to demonstrate that the prejudice caused by denying the continuance exceeds the burden that would be caused to the objecting party if the continuance were to be granted. The court must enter a written order setting forth its ruling on the application for parental leave continuance and, if the court denies the requested continuance, the specific grounds for denial shall be set forth in the order.

(b) Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it may be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

. **Brief statement of reasons for requested changes and advantages to be served by the proposed new Rule:**

The Committee is committed to the concept of parental leave for men and women alike and to minimizing dispute and uncertainty surrounding applications for continuance based on the birth or adoption of a child. Under this rule, an application for parental leave continuance of a trial date would be mandatory for lead attorneys on the case, so long as the attorney is employed more than ten days of the trial setting. Further, applications for continuance made by an attorney other than the lead attorney on a case would be discretionary, and may be denied in the sound discretion of the court when, for example, there would be substantial prejudice to another party, when an emergency or time-sensitive matter would be unreasonably delayed as a result of the continuance, when a significant number of continuances have already been granted, or when the substantial rights of the parties may otherwise be adversely affected.

Attorneys would continue to have the ability to request continuances of settings other than trial settings under the existing Rules.

Shortly after the Committee's unanimous approval of this proposed amendment, the ABA House of Delegates approved Resolution 101B, encouraging all states to promulgate a parental leave rule.

Tab L

101B

AMERICAN BAR ASSOCIATION

YOUNG LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

REPORT

I. Why Do We Need This Rule?

This Resolution addresses the absence of a rule of practice providing for a rebuttable presumption that a continuance should be granted in a matter where the primary or secondary attorney is on parental leave following the birth or adoption of a new child at home. Parental leave,[1] which refers to time away from work for the specific and significant purpose of providing care to a newly-arrived child, is undeniably important to the health of new and growing families. For both mothers and fathers, "time at home during the first precious months after birth or adoption is critical to getting to know their babies." [2] Parental leave provides long-term benefits that improve a child's brain development, social development, and overall well-being.[3] It "results in better prenatal and postnatal care and more intense parental bonding over a child's life." [4] And it "improves the chance that a child will be immunized; as a result, it is associated with lower death rates for infants."[5]

New parents therefore often find themselves in a situation where they are left to choose between caring for their new child and doing their job. The fairly recent case of a young female attorney from Georgia serves as an illustration. As an expectant new mother, a young litigator moved for a continuance of an immigration hearing one month before it was scheduled to occur on the basis of her pregnancy and the fact that the hearing fell within the six-week leave that her treating physician had recommended she take off from work following her due date.[6] She was a solo practitioner and did not have anyone in her office who could assist her, so her request was seemingly reasonable.[7] One week before the hearing—after her child had already been born—the judge denied her motion, specifically finding "[n]o good cause. Hearing set prior to counsel accepting representation."[8]

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[1] Parental leave is a type of family leave, which is leave from work used to care for a family member. It includes both maternity and paternity leave.

[2] "Expecting Better: A State-by-State Analysis of Parental Leave Programs," Jodi Grant, Taylor Hatcher & Nirali Patel, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, at 3 (2005), at https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=29512&fileDownloadName=0330ab266_ParentalLeaveReportMay05.pdf (last visited Oct. 29, 2018).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Staci Zaretsky, *Judge Refuses To Postpone Hearing Because Maternity Leave Isn't A Good Enough Excuse*, ABOVE THE LAW Blog (Oct. 15, 2014), at https://abovethelaw.com/2014/10/judge-refuses-to-postpone-hearing-because-maternity-leave-isnt-a-good-enough-excuse/?rf=1 (last visited Oct. 29, 2018).

[7] She filed her motion less than one week before her due date and indicated that she would only be taking six weeks off before returning to work, both feats that deserve recognition in and of themselves.

[8] See Zaretsky, *supra* note 11 (quoting the court's decision).

Left with the choice of either abandoning her client or abandoning her child, the attorney made the only reasonable decision she could think of: she attended the hearing with her newborn baby.[9] After that hearing, the attorney filed a formal complaint against the judge, noting that when he saw her with her child in court:

> He was outraged. He scolded [her] for being inappropriate for bringing [the baby]. He questioned the fact that day care centers do not accept infants less than 6 weeks of age. He then questioned [her] mothering skills as he commented how [her] pediatrician must be appalled that [she is] exposing [her] daughter to so many germs in court. He humiliated [her] in open court.[10]

What happened to this attorney is unfortunately not uncommon. Less than a month after giving birth, this attorney was still physically recovering from the traumatic experience of giving birth, and she was taking care of a newborn baby with around-the-clock needs.[11] She was a solo practitioner without family nearby to care for her child for her.[12] Yet she was forced to attend the hearing because the judge found that the birth of her child did not constitute good cause for continuing the hearing date.

Put simply, it is not reasonable to expect parents—including new mothers—to stop practicing law when they become pregnant or give birth. A rule that protects new parents from having to make the choice between caring for their new child or practicing law is imperative. Where a parent who is lead counsel, or is otherwise integrally involved in a matter moves to continue a court date or deadline on the basis of her or his parental leave, there should be a presumption in her or his favor that the continuance will be granted. It is only where substantial prejudice to the opposing party, or where a client's speedy trial rights—if any—are prejudiced that this presumption should be rebutted.[13]

The proposed resolution recognizes that continuances may be necessary not only for a lead attorney's parental leave, but also for the leave of another attorney who is integrally involved in the matter. This recognizes that many new parents may be young partners who do not quality for leave under the FMLA,[14] junior associates, or other young lawyers who are neither first-chairing a trial nor primarily responsible for the matter but who nevertheless are necessary to the successful representation of the client. For example, where a partner serves as the lead trial counsel in a complex matter but a junior associate is the repository of the facts concerning the case, the junior associate would need to be present to assist at trial. Absent this extension of the rule, an attorney in this position could face unnecessary and overwhelming internal pressure to continue working

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[9] See Zaretsky, *supra* note 11.

[10] See Zaretsky, *supra* note 11 (quoting the subject complaint).

[11] The U.S. Department of Health & Human Services advises that it takes approximately six weeks for a woman's body to recover physically after giving birth vaginally. See *Recovering From Birth*, OFFICE OF WOMEN'S HEALTH, U.S. DEPT. OF HEALTH & HUMAN SERVICES (June 6, 2018), at https://www.womenshealth.gov/pregnancy/childbirth-and-beyond/recovering-birth (last visited Oct. 29, 2018).

[12] See Zaretsky, *supra* note 12.

[13] Allowing such a rebuttal permits consideration by the court of the reasonable expectation that litigation can move forward in a timely manner, and that justice will be efficiently served.

[14] See *supra* note 6.

despite the need for parental leave simply because a continuance under this rule would not be available. This result is contradictory to the resolution's purpose.

The absence of a parental leave rule affects both men and women, but women are disproportionately affected. One of the reasons for the disparate effect on women is that women are more likely to take parental leave than men.[15] Hence, there is a higher likelihood that not having a rule allowing for a parental leave continuance will affect women. In addition to being more likely to take leave, women also take more time on leave.[16] This is because the leave that men are offered is typically more limited than it is for women.[17] A 2007 study reveals that 89% of U.S. fathers in opposite sex two-parent households took some parental leave after the birth or adoption of a new child.[18] A 2014 survey of "highly paid professional U.S. fathers" revealed that only about 5% took no paternity leave, but over 80% took two weeks of leave or less.[19] Additionally, women who give birth must recover from the physical stresses put on their bodies during pregnancy and delivery, and time off from work allows them to do so. Moreover, the lack of such a rule adds to the list of obstacles that women lawyers face. These include unequal pay, low-quality work assignments, lack of access to mentoring and networking opportunities, and harassment.[20] The lack of a parental leave rule can exacerbate the negative ramifications women lawyers already face in the legal workplace.

Despite the profound effects the absence of a parental leave rule has on women, men also are negatively affected. Parental leave for men is of critical importance to fathers. There are social, familial, and health benefits to having parental leave for fathers, which include improved cognitive and mental health outcomes for the children.[21] Moreover, the taking of paternity leave by men increases the female labor force participation and wages. Parental leave for men helps allow parents are working professionals, and need to split the time away from work in a manner that maximizes time with family and minimizes impact on work and career.[22]

The enactment of this type of rule is consistent with Goal III of the Association, which is to "[p]romote full and equal participation in the association, our profession, and

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[15] Jacob Alex Klerma, et al. 2012. *Family and Medical Leave in 2012: Technical Report.* (Prepared for U.S. Department of Labor.) Cambridge: Abt Associates, at https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf.

[16] See generally *Paternity Leave: Why Parental Leave For Fathers Is So Important For Working Families*, DOL Policy Brief, U.S. DEPT. OF LABOR, at https://www.dol.gov/asp/policy-development/paternitybrief.pdf (last visited Oct. 30, 2018).

[17] See *id.*

[18] *Id.* at 5 n.3.

[19] *Id.* at 5 n.3.

[20] See Joan C. Williams *et al., You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (Am. Bar Ass'n Commission on Women & Minority Corp. Counsel Ass'n, 2018), at http://www.abajournal.com/files/Bias_interrupters_report-compressed.pdf.

[21] See *supra* note 21.

[22] Brad Harrington, et al., *The New Dad: Take Your Leave*, Boston College Ctr. for Work & Family, at http://www.thenewdad.org/yahoo_site_admin/assets/docs/BCCWF_The_New_Dad_2014_FINAL.157170735.pdf

the justice system by all persons."[23] The risk of having to threat of having to hand off a case after months or even years of preparation may discourage attorneys from seeking parental leave at all, or discourage female attorneys from working on significant cases.[24]

Parental leave in the United States is, as noted above, neither widely protected nor widely offered. The enactment of this type of rule will help ensure that at the very least, when it is offered, it remains widely used—by *all* new parents, regardless of their gender, regardless of the type of law that they practice, and regardless of the length of parental leave that they take. Urging the enactment of a rule that facilitates the equal participation in the legal profession of *all* new parents after the birth or adoption of a new child at home, regardless of how long those parents take leave, falls precisely within the scope of Goal III's directive. The support of the Association for this rule is thus both timely and critical.

II. Current Legal Framework

There is anecdotal evidence from across the country concerning incidents where continuances are denied for pregnancy or birth-related issues.[25] This is likely because most, if not all, rules of practice regarding continuances are generally left to the court's broad discretion with no direction to the court to expressly consider as a factor in exercising that discretion the pregnancy, adoption, or parental leave of the involved attorneys.[26] No jurisdiction in the country has yet to adopt a rule such as the one proposed in this resolution—which in and of itself demonstrates the need for one. At the forefront of this issue is Florida, where such a rule is currently under consideration by their Supreme Court. The Florida Bar Board of Governors and its Young Lawyers Division counterpart have been shepherding through the approval process a new Rule of Judicial Administration codifying a model parental leave rule.[27] That rule will be considered by the

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[23] See ABA Mission and Goals, AMERICAN BAR ASSOCIATION, at https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Oct. 30, 2018).

[24] Barbara Busharis. *The Rules of the Game*, 36 No. 1 Trial Advoc. Q. 4 (Winter 2017).

[25] This is in addition to the circumstances described above. See, e.g., *Survey Results: Parental Leave Continuance Rule*, Anonymous, NEW HAMPSHIRE WOMEN'S BAR ASSOCIATION (Sept. 11, 2018), at https://nhwba.org/page-8689/6664848 (last visited Oct. 31, 2018) (noting experiences of women lawyers in New Hampshire).

[26] Most state rules regarding continuances provide that the trial court may grant one upon motion and for good cause shown or as justice may require. See, e.g., ARK. R. CIV. P. 40 (Arkansas); KANS. STAT. § 60-240 (b) (Kansas); MD. R. CIV. PROC. 2-508 (a) (Maryland); MASS. R. CIV. PROC. 40 (Massachusetts); MO. R. CIV. PROC. 9.1 (c) (Missouri); N.M. R. MUN. CT. PROC. 8-506 (2) (New Mexico); OR. R. CIV. P. 52 (Oregon). The same is true for federal court, although the language is typically a bit stronger. See, e.g., D. CONN. R. 16 ("A trial ready date will not be postponed at the request of a party except to prevent manifest injustice.").

[27] See *In re Amendments to the Florida Rules of Judicial Administration—Parental Leave*, Case No. SC 18-1554, Docket available at http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=1554&CaseYear=2018 (last visited Oct. 31, 2018). The docket contains links to the subject petition for amendment to the rules, as well as the official comments submitted to the Court for consideration.

Florida Supreme Court in late 2018 or early 2019.[28] The Florida Bar is presently in the process of soliciting comments from all interested persons on the subject of the proposed parental-leave rule.[29] The proposed rule, Rule 2.570, provides:

> Unless substantial prejudice is demonstrated by another party, a motion for continuance based on the parental leave of a lead attorney in a case must be granted if made within a reasonable time after the later of:
>
> a. the movant learning of the basis for the continuance; or
>
> b. the setting of the proceeding for which the continuance is sought.
>
> Three months is the presumptive maximum length of a parental leave continuance absent a showing of good cause that a longer time is appropriate. If the motion for continuance is challenged by another party that makes a prima facie demonstration of substantial prejudice, the burden shifts to the movant to demonstrate that the prejudice caused by denying the continuance exceeds the burden that would be caused to the objecting party if the continuance were to be granted. The court shall enter a written order setting forth its ruling on the motion and, if the court denies the requested continuance, the specific grounds for denial shall be set forth in the order.

Again, this proposed rule has not yet been adopted, although it is clearly leading the way for similar rules elsewhere.

This is no more apparent than in the adoption of a standing order by Judge Ravi K. Sandill of the 127th Civil District Court in Harris County, Texas, who was directly inspired to issue such an order after learning of Florida's proposed parental-leave rule.[30] Judge Sandill's *Standing Order on Continuances Based on the Birth or Adoption of a Child* provides:

> The Court recognizes the value and importance of working parents spending time with their families, particularly following the birth or adoption of a child.
>
> Thus, any lead counsel who has been actively engaged in the litigation of a matter may seek an automatic continuance of a trial setting for up to 120 days for the birth or adoption of a child.[31]

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[28] See *id.*

[29] *Proposed Parental-Leave Continuance Rule*, The Florida Bar News, FLORIDA BAR (Oct. 15, 2018), at https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2Ff2885d1289ecc2d885258314004af6de (last visited Oct. 31, 2018).

[30] *Trial Date v. Due Date: Courts Make Rule For Parental Leave*, Bloomberg Law (July 31, 2018), at https://news.bloomberglaw.com/daily-labor-report/trial-date-v-due-date-courts-make-room-for-parental-leave (last visited Oct. 31, 2018).

[31] *See* Standing Order on Continuances Based on the Birth or Adoption of a Child, https://www.justex.net/JustexDocuments/7/STANDING%20ORDER%20ON%20CONTINUANCE%20BASED%20ON%20THE%20BIRTH%20OR%20ADOPTION%20OF%20A%20CHILD.pdf (July 26, 2018).

Unless and until the proposed Florida rule is adopted, this standing order is the only authority the drafters are aware of nation-wide concerning this issue.[32]

None of the federal district courts have a local rule specifically addressing continuances based on parental leave. However, many federal courts have loval rules that allow continuances for "good cause," with certain conditions, such as having the motion for continuance filed as soon as counsel learns that a continuance will be needed, filing an accompanying affidavit with the motion that sets forth the facts on which the continuance request is based, or that the motion for a continuance be supported by a medical certificate.

The instances of attorneys being denied continuances based on the need for parental leave following the birth or adoption of a child shows that the ABA's voice and opinion is necessary to lead the way on this matter. Here, the proposed rule both protects clients' unfettered rights to counsel of their choice[33] and helps give effect to the FMLA and the policies behind parental leave. It also balances courts' and litigants' shared interest in the efficient resolution of legal matters. There is no reason why these considerations need to be mutually exclusive.

III. Conclusion

This resolution, if adopted, will remind stakeholders of the importance of accommodating parental leave needs, and erase the stigma associated with asking for a continuance because of such circumstances.

Respectfully submitted,

Tommy D. Preston, Jr.
Chair, Young Lawyers Division
January 2019

[32] For the reasons laid out in Section I, the FMLA does not provide the necessary protections that the rule proposed by this Resolution does.

[33] See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) ("Deprivation of the [Sixth Amendment] right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.").

GENERAL INFORMATION FORM

1. Summary of Resolution

This Resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

2. Approval by Submitting Body

The ABA Young Lawyers Division ("YLD") Council approved this resolution unanimously on November 9, 2018.

3. Has this or a similar Resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In 1988, the ABA passed Resolution 88A121, which recognized the barriers that exist that deny women the opportunity to achieve full integration and equal participation in the legal profession, affirmed the principle that there is no place in this profession for those barriers, and called upon members of the profession to eliminate those barriers. This Resolution is a natural extension of the policy adopted in 88A121.

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation (if applicable).

N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this Resolution

8. Cost to the Association (both indirect and direct costs).

None.

9. Disclosure of Interest.

None.

10. Referrals

Conference of Chief Justices
Center on Children and the Law
Criminal Justice Section
Government and Public Sector Lawyers Division
Judicial Division
Law Student Division
Section of Civil Rights and Social Justice
Section of Family Law
Section of Litigation
Standing Committee on Gun Violence
Tort, Trial, and Insurance Practice Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Stefan M. Palys
ABA YLD Representative to the ABA House of Delegates
Stinson Leonard Street LLP
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Phoenix, AZ 85004-4584
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stefan.palys@stinson.com

Dana M. Hrelic
ABA YLD Representative to the ABA House of Delegates
ABA YLD Immediate Past Chair
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Lacy L. Durham
ABA YLD Representative to the ABA House of Delegates
ABA YLD Past Chair
Deloitte Tax LLP
2200 Ross Ave, Suite 1600
Dallas, TX 75201-6703
(214) 840-1926
lacydurhamlaw@yahoo.com

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?

Lacy L. Durham
ABA YLD Representative to the ABA House of Delegates
ABA YLD Past Chair
Deloitte Tax LLP
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(214) 840-1926
lacydurhamlaw@yahoo.com

101B

EXECUTIVE SUMMARY

1. **Summary of Resolution.**

This Resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

2. **Summary of the Issue which the Resolution addresses.**

This Resolution addresses the absence of a rule of practice providing for a rebuttable presumption that a continuance should be granted in a matter where the primary or secondary attorney is on parental leave following the birth or adoption of a new child at home.

3. **An explanation of how the proposed policy position will address the issue.**

The policy will encourage the bodies charged with regulating the legal profession to enact a rule providing that a motion for continuance based on parental leave of the primary or secondary attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance with limited exceptions.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.

Tab M

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: September 2, 2019

Re: TRAP 49.3, Motion for Rehearing

I. Matter referred to subcommittee

The Court's May 31, 2019 referral letter and Chairman Babcock's June 3 letter referred the following matter to the Appellate Rules Subcommittee:

> **Motions for Rehearing in the Courts of Appeals.** Justice Christopher and the State Bar Court Rules Committee have each proposed amendments to Rule of Appellate Procedure 49.3, which are attached. The Committee should consider both and make recommendations.

The two proposals are attached to this memo (App. A, B).

II. Background

TRAP 49.3 currently provides that a panel rehearing "may be granted by a majority of justices who participated in the decision. Otherwise, it must be denied."

In the November 2018 election, there was significant turnover in some of the appellate courts. As a result, for many opinions issued in late 2018, there was no longer "a majority of the justices who participated in the decision of the case" at the panel rehearing stage. Under TRAP 49.3, the appellate courts were required to automatically deny panel rehearing; and at least one court of appeals refused to grant an extension to file a panel rehearing because panel rehearing could not be granted under any circumstance (App. C).

The only relief available to the litigants in these cases was to seek en banc consideration. Under TRAP 41.2, en banc consideration is "not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." This is a much higher standard to meet than for panel rehearing. As Justice Christopher's memo notes, because of this higher standard, most of the en banc motions were denied.

As Justice Christopher explains, there were instances when the one remaining justice who participated in the panel decision found a rehearing motion meritorious but was unable to make any

correction because a majority of the original panel was no longer sitting. Short of convincing a majority of the en banc court that the correction met the high standard for en banc consideration, there was no avenue available to the remaining justice for altering the opinion and judgment.

As Justice Christopher notes in her memo, the events of November 2018 are capable of repetition: "Because of the uneven way that some justices on the courts of appeals are elected (i.e. 5 of 9 justices on both the First and Fourteenth court are elected at one time, and 8 of 13 were recently elected on the Fifth court) this problem can re-occur." As she also notes, panel rehearing is a valuable tool: "According to a Westlaw search, in the past three years, the Fourteenth Court has withdrawn an opinion and issued a new opinion on panel rehearing approximately 28 times. The First Court has done this approximately 47 times and the Fifth Court has done this 12 times."

Both Justice Christopher and the Court Rules Committee of the State Bar have proposed changes to TRAP 49.3. The proposals differ in significant ways and each is set out below.

III. Justice Christopher Proposal

Justice Christopher proposes the following change to TRAP 49.3:

> 49.3 Decision on Motion
>
> A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise it must be denied. <u>In the event that a majority of the justices who participated in the decision of the case are no longer on the court and a remaining justice, who authored or joined the majority opinion, believes that the opinion should be revised in light of the motion, then that justice can ask for two new justices to review the motion. The new panel can then decide the motion and revise the opinion if needed.</u> If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The key elements of Justice Christopher's proposal are:

> (1) there must be only one remaining justice who joined the majority opinion of the original panel;
> (2) that justice must request that additional justices be assigned to the panel to consider a motion for panel rehearing;
> (3) the procedure for selecting the justices to be added is left to the appellate court's internal procedures (although use of the word "new" suggests the additional justices must be new to the court by election or appointment);
> (4) if two members of the original panel remain, those two justices will determine the panel rehearing; and
> (4) if no member of the original panel remains, the motion for panel rehearing must be denied and the complaining party must seek en banc consideration.

IV. State Bar Court Rules Committee Proposal

The State Bar Court Rules Committee has endorsed the following amendment to TRAP 49.3:

49.3. Decision on Motion for Rehearing

> A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. However, if one or more of the justices on the original panel cannot participate in the motion for rehearing, the chief justice will ensure that sufficient additional justices are assigned to the case so that three justices participate in the decision on the motion for rehearing. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The key elements of the Court Rules Committee's proposal are:

> (1) there must be two or fewer justices remaining from the original panel (i.e., the rule applies anytime there are fewer than three justices remaining on the panel);
> (2) the court must ensure that three justices participate in all panel rehearings; and
> (3) the chief justice will determine the assignment of additional justices to the panel.

V. Issues for discussion

The subcommittee has identified and discussed the following issues raised by the proposals:

1. Should TRAP 49.3 be revised to address situations when one or more members of the original panel are no longer sitting at the panel rehearing stage?
2. Under what circumstances should extra justices be assigned to a panel rehearing: (a) in all cases where one or more of the original panel are not sitting; (b) in all cases where two or more of the original panel are not sitting; or (c) in only those cases where the sole remaining justice requests participation of additional justices on panel rehearing and, if so, must that justice have joined the original majority opinion?
3. If additional panel members are provided, should the rule direct how that is to be accomplished, such as providing for the departing justice's successor to be appointed to the panel or random draw, or should it be left to the court's internal operating procedures or to the chief justice?

These issues all appear to be simple, but they become quite complicated on longer reflection. As one subcommittee member observed, whatever change is made is "politically fraught." That label applies to two important questions: the dignity to be afforded the original panel opinion and the method of selecting additional justices:

> *Weight of original opinion*. The current panel rehearing rule favors the original panel opinion by providing for no panel rehearing if the panel is short two or more members at

the time rehearing is considered; it permits only en banc consideration by the full court. Justice Christopher's proposal maintains that approach, allowing panel rehearing only when a justice who joined the original majority remains on the court and thinks the panel rehearing motion has merit. The Court Rules proposal takes the opposite approach and leaves open the possibility of alteration or even a flipped judgment on all panel rehearings.

Method of selecting additional panel members. The current panel rehearing rule does not provide for additional members so there is no method of selection provided. The current rules do not provide a method for selecting the original panel either – that is left to the court's internal operating procedures. Some courts of appeals assign panels randomly; some do not. TRAP 41.1(b) provides three methods when the original panel is deadlocked: the court picks another member to sit, the court asks the Chief Justice of the Texas Supreme Court to temporarily assign an eligible justice, or the court may take the matter en banc. Justice Christopher's proposal leaves the selection to the court's internal procedures (although use of the word "new" suggests the additional justices must be new to the court by election or appointment). The Court Rules proposal provides that the chief justice of the court of appeals will select additional panel members. The subcommittee unanimously agreed that any method of selecting additional members for a panel rehearing must be politically neutral, and generally favored a random system.

The subcommittee seeks input from the full committee on these issues before drafting any proposed change to the panel rehearing rule.

App. A. Justice Christopher Proposal

Memorandum

To: Chief Justice Nathan Hecht

From: Justice Tracy Christopher

Date: March 29, 2019

Re: Proposed revision to TRAP 49.3

I am asking that the Supreme Court consider an amendment to TRAP 49.3. This request is made on my own behalf and not on behalf of the Fourteenth Court of Appeals.

History: In November 2018, a number of appellate courts across the state lost many of its incumbent justices. As a result, for many of the opinions issued in December of 2018, there was no longer "a majority of the justices who participated in the decision of the case," at the time a motion for rehearing was filed. Appellate courts then automatically denied the motion pursuant to rule 49.3. Litigants were then forced to try to get relief via an en banc motion. Because the standards for en banc relief are high, most of these motions were rightfully denied.

However, on some occasions, a remaining member of the panel who decided the case might think that the opinion should be revised because of the arguments in the rehearing motion. The only current way to revise the opinion is to ask for en banc review. This puts a burden on the en banc court that could be avoided by a rule change. My proposed rule change would allow a remaining justice—who was in the majority—to rehear the case with two new justices.

Because of the uneven way that some justices on the courts of appeals are elected (i.e. 5 of 9 justices on both the First and Fourteenth court are elected at one time, and 8 of 13 were recently elected on the Fifth court) this problem can re-occur.

According to a Westlaw search, in the past three years, the Fourteenth Court has withdrawn an opinion and issued a new opinion on panel rehearing approximately 28 times. The First Court has done this approximately 47 times and the Fifth Court

has done this 12 times. While this rule change may not affect many cases, I still believe that it is a useful one that the parties and lawyers would support.

Proposed additions to the rule are underlined.

Proposed rule change:

49.3 Decision on Motion

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise it must be denied.

In the event that a majority of the justices who participated in the decision of the case are no longer on the court and a remaining justice, who authored or joined the majority opinion, believes that the opinion should be revised in light of the motion, then that justice can ask for two new justices to review the motion. The new panel can then decide the motion and revise the opinion if needed.

If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

App. B. Court Rules Committee of the State Bar Proposal

49.3. Decision on Motion **for Rehearing**

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. **However, if one or more of the justices on the original panel cannot participate in the motion for rehearing, the chief justice will ensure that sufficient additional justices are assigned to the case so that three justices participate in the decision on the motion for rehearing.** If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

App. C

Order entered January 11, 2019

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00855-CV

APEX FINANCIAL CORPORATION, Appellant

V.

LOAN CARE, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-05921

ORDER

Before the Court is appellant's Unopposed Motion to Extend Time to File Motion for Rehearing. Texas Rule of Appellate Procedure 49.3 provides, "A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied." Following the departures of two of the three justices who participated in this case, there remains no majority of justices who participated in the decision. As a result, the Court must deny a motion for rehearing filed in this proceeding. In the interest of justice, we **DENY** the unopposed motion to extend time to file a motion for rehearing.

/s/ BILL WHITEHILL
JUSTICE

Tab N

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Judicial Administration Subcommittee**

RE: **Mechanisms for Obtaining a Trial Court Ruling**

DATE: **October 28, 2019**

I. Matter Referred

Chief Justice Hecht's September 4, 2019 referral letter and Chairman Babcock's September 6, 2019 letter to the Judicial Administration Subcommittee address the following matter:

> **Procedures to Compel a Ruling.** In the attached letter, Chief Justice Gray points out that litigants, particularly self-represented inmates, are often unable to get trial courts to timely rule on pending motions and proposes rule changes to address the issue. The Committee should consider Chief Justice Gray's proposals and other potential solutions.

II. Background

As requested in the referral, the Judicial Administration Subcommittee has discussed issues related to the difficulty that incarcerated pro se litigants encounter in obtaining rulings on motions. As a practical matter, the inability of incarcerated pro se litigants to communicate with courts and court staff by means other than the United States Postal Service leaves few options if a court fails to act on motions and requests for rulings on previously filed motions.

These circumstances lead to pro se mandamus proceedings seeking to compel a ruling. In turn, these mandamus petitions frequently are denied due to (1) procedural deficiencies; or (2) the relator's inability to demonstrate that the motion at issue was brought to the trial court's attention but the trial court nonetheless failed to act on it.

The Supreme Court's referral and the subcommittee's discussion arose from Chief Justice Tom Gray's observations earlier this year in *In re Jerry Rangel*, 570 S.W.3d 968 (Tex. App.—Waco 2019, orig. proceeding).

Jerry Rangel was convicted of aggravated sexual assault, and the court of appeals confirmed his conviction in 2009. While incarcerated, Rangel filed a petition for post-conviction DNA testing under Code of Criminal Procedure Chapter 64. He later filed a petition for writ of mandamus seeking to compel the trial judge to rule on his petition for DNA testing.

The court of appeals denied Rangel's petition for writ of mandamus on grounds that "[t]here is no record showing that Rangel has brought his petition to the attention of the trial judge and that the trial judge has then failed or refused to rule within a reasonable time." *Id.* at 969.

In a concurring opinion, Chief Justice Gray notes that Chapter 64 "requires the trial court and the State to take action, prior to any hearing, upon receipt of the motion." *Id.* at 970 (Gray, C.J., concurring). "The State, as the real party in interest in this proceeding, and the Court, fault Rangel for not bringing forth any evidence that his motion for post-conviction DNA testing was actually brought to the attention of the trial court." *Id.* "Technically, that is correct." *Id.* "But then ask yourself; how exactly is an inmate supposed to do that?" *Id.* "It is not like he can take a copy to the trial court's office, courtroom, or home to 'serve' the trial court with a copy of the motion." *Id.* at 970-71. "And no matter how many letters the inmate writes, in all likelihood those letters are going straight to a file in the clerk's office." *Id.* at 971. The concurring opinion also asks this question: "[H]ow is the inmate supposed to get any evidence that the trial court was actually made aware of the motion?" *Id.*

The concurring opinion continues as follows: "At some point, the sworn allegation that the moving has filed the motion and suggested a ruling should be enough." *Id.* "I am disappointed that there is no procedure in the statute or the rules, or even within the county's (district clerk's) filing system, to cause the filing of motions pursuant to Chapter 64 to trigger the action by the trial court and the State that the statute requires." *Id.*

The concurring opinion concludes with these observations: "A ruling, any ruling, would avoid interminable delay and unnecessary consumption of judicial resources caused they the pursuit of a mandamus." *Id.* "And a mandamus seems to be an extraordinarily inefficient way to create the evidence necessary for a successive mandamus in which the inmate can show that the trial court has been made aware of the Chapter 64 motion that has been filed."

Although the prompt for this referral arose in the Chapter 64 context, discussion among members of the subcommittee identified other circumstances in which a failure to rule turns into a mandamus proceeding. The concern exists in civil cases as well as criminal cases.

III. Discussion

The subcommittee identified two threshold questions on which the full committee's input is solicited to provide direction for the subcommittee's further deliberations.

The first question is whether the discussion should focus solely on the specific circumstances discussed in *In re Rangel* involving pro se inmate litigants, or instead should encompass the full range of situations in which a failure to rule may prompt mandamus proceedings.

The second question focuses on the optimal approach to use in addressing failures to rule. Multiple potential approaches were identified based on discussions within the subcommittee and informal polling of the chief justices of the intermediate appellate courts.

- Create a universal request-for-a-ruling form, which would start the clock running for purposes of a deemed ruling denying the motion by operation of law occurring a certain number of days after the request is submitted.

- Require the trial court clerk to present a report of all ruling requests to the judge at least once monthly to create a presumption that the trial court had been informed of the motion and request. A litigant could rely upon this presumption in mandamus proceedings to establish that the trial judge had been made aware of the motion or request at issue.

- Reliance on a default rule under which a motion is denied by operation of law a certain number of days after filing. This approach already is used in a number of specific circumstances. *See, e.g.,* Tex. R. Civ. P. 329b(c) (motion for new trial overruled by operation of law 75 days after filing in absence of an express order); Tex. R. App. P. 21.8(c) (motion for new trial in a criminal case is deemed denied 75 days after imposing or suspending sentence in open court); Tex. Civ. Prac. & Rem. Code § 27.008(a) (TCPA motion to dismiss overruled by operation of law if trial court does not rule by 30th day following the date on which the hearing on the motion concludes).

- All Texas judges are under a duty to analyze their dockets and take action to bring overdue or pending matters to a conclusion pursuant to the Rules of Judicial Administration and the Code of Judicial Conduct. In conjunction with these existing duties, judges could be required to provide quarterly reports to the presiding judge of their administrative judicial region (or to the Office of Court Administration) identifying matters submitted for more than a threshold number of days and still awaiting a decision. Presiding judges would bear responsibility to determine the reasons for a failure to rule and appropriate follow up steps, perhaps including appointment of visiting judges to address a backlog. Reliance on this administrative approach would avoid concerns that may arise due to the reluctance of litigants to "remind" judges about long-pending but unresolved motions out of concern for provoking an adverse response.

Other approaches also may warrant consideration. The subcommittee would benefit from discussion by the full committee regarding the scope of this issue and potential approaches for addressing it as a guide to the subcommittee's further deliberations.

TENTH COURT OF APPEALS

McLennan County Courthouse
501 Washington Avenue, Rm. 415
Waco, Texas 76701-1373
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Chief Justice
Tom Gray

Justices
Rex D. Davis
John E. Neill

Clerk
Sharri Roessler

July 15, 2019

Honorable Jeffrey S. Boyd
Supreme Court
P.O. Box 12248
Austin, TX 78711-2248

Dear Justice Boyd:

We recently had a conversation about issues this Court spends an inordinate amount of time on that could potentially be remedied if the issue was addressed in an opinion or rule. I promised to provide specific examples. I enclose my first example.

The following is a frequently recurring problem. A motion is filed in the trial court. The motion sits for weeks, months, sometimes years, without being ruled upon. The party, frequently pro se, or an inmate, or both, tries to get a ruling but is unable to do so and is also unable to determine why. So, the person then files a mandamus with a court of appeals.

In addition to procedural problems due to the failure to comply with the rules, there is virtually no way an inmate is going to have the "necessary evidence" to show the court of appeals that either the motion or request for ruling has been brought to the attention of the trial court. The mandamus will be denied summarily or sometimes with a curt explanation of an insufficient record.

As I note in the enclosed concurring opinion in *In re Rangel*, what is an inmate going to do? I also enclose a letter I received from an inmate that discusses my comments in *Rangel*.

We spend a lot of time on this type proceeding all because the trial court does not timely rule. I am convinced the trial court does not rule because the trial court is simply unaware of the motion. We sometimes request a response to the petition for writ of mandamus in hopes that the district attorney or maybe a court coordinator or assistant attorney general will bring the pending motion to the attention of the trial court. If this happens, the trial court frequently then denies the motion and the mandamus is dismissed as moot. This process will allow the person to move on with their case, sometimes to an immediate appeal of the trial court's denial. But we spend a lot of time and effort to get there just because initially there is no ruling by the trial court.

Can this time-consuming problem be fixed?

One option would be a universal request for a ruling form. If such a form is used, it could start a clock when filed. If the pending motion that is the subject of the request for a ruling is not ruled on in some defined period of time, say 60 days, the motion to which it relates would be denied by operation of law. There would have to be some carve-outs from such a rule.

As an alternative "fix," maybe it is easier to require that the trial court clerk present a report of all such ruling requests to the judge at least once monthly. This would create a presumption the trial court had been informed of the motion and request for a ruling and either failed or refused to rule. Such a presumption or the reports would then provide the evidentiary support for a mandamus to compel a ruling, particularly if the rule also set a presumptive time in which a ruling was to be made.

Obviously, there may be a number of other ways to remedy the problem and I will be happy to discuss these or any other proposals with you.

Sincerely,

Tom

Thomas W. Gray
Chief Justice

Enclosure

Jeff
Before I could get this out the door to you we have had at least one more!
T

570 S.W.3d 968
Court of Appeals of Texas, **Waco**.
IN RE Jerry **RANGEL**
No. 10-19-00014-CR
|
Opinion delivered and filed March 13, 2019

Synopsis
Background: Relator, who was previously convicted of aggravated sexual assault, filed a motion with the trial court, No. 10-19-00014-CR, Steven Lee Smith, J., for post-conviction **DNA** testing. Relator petitioned for **mandamus** relief to compel trial court to rule on post-conviction motion.

[Holding:] The Court of Appeals, Rex D. Davis, J., held that relator was not entitled to writ of **mandamus**.

Petition denied.

Tom Gray, C.J., filed a concurring opinion.

Procedural Posture(s): Petition for Writ of **Mandamus**.

West Headnotes (6)

[1] **Mandamus**
Remedy at Law
Mandamus
Nature of acts to be commanded

A court with **mandamus** authority will grant **mandamus** relief if relator can demonstrate that the act sought to be compelled is purely ministerial and that relator has no other adequate legal remedy.

[2] **Mandamus**
Motions and orders in general

Consideration of a motion properly filed and before the trial court is ministerial, such that **mandamus** may issue to compel trial court's performance.

[3] **Motions**
Determination

A trial court has a reasonable time to perform the ministerial duty of considering and ruling on a motion properly filed and before the judge.

[4] **Mandamus**
Motions and orders in general
Motions
Determination

The ministerial duty of considering and ruling on a motion generally does not arise until the movant has brought the motion to the trial judge's attention, and **mandamus** will not lie unless the movant makes such a showing and the trial judge then fails or refuses to rule within a reasonable time.

[5] **Mandamus**
Scope of inquiry and powers of court

A relator bears the burden of providing an appellate court with a sufficient record to establish his or her right to **mandamus** relief.

[6] **Mandamus**
Criminal prosecutions

Relator, who was previously convicted of aggravated sexual assault, was not entitled to writ of **mandamus** to require trial court to rule on his motion for post-conviction **DNA** testing; there was no record showing that relator brought his motion to the attention of the trial court and that the trial court failed or refused to rule within a reasonable time, and State submitted exhibits that reflected that the motion was forwarded to the Court of Criminal Appeals the date it was received.

1 Cases that cite this headnote

***969 Original Proceeding, Hon. Steven Lee Smith, Judge**

Attorneys and Law Firms

Attorney(s) for Appellant/Relator: Jerry **Rangel**, Pro se, Abilene, TX.

Attorney(s) for Appellees/Respondents: Jarvis Parsons, District Attorney, Douglas Howell, III, Assistant District Attorney, Bryan, TX.

Before Chief Justice Gray,* Justice Davis and Justice Neill

OPINION

REX D. DAVIS, Justice

In this original proceeding,[1] Relator Jerry **Rangel** seeks **mandamus** relief in the form of compelling the Respondent trial judge to rule on **Rangel**'s motion for post-conviction **DNA** testing under Code of Criminal Procedure Chapter 64.[2] We requested a response to Relator's petition, which the State has now filed. Having reviewed Relator's petition and the State's response, we deny Relator's petition.

[1] [2] [3] [4]"A court with **mandamus** authority 'will grant **mandamus** relief if relator can demonstrate that the act sought to be compelled is purely 'ministerial' and that relator has no other adequate legal remedy.' " *In re Piper*, 105 S.W.3d 107, 109 (Tex. App.—**Waco** 2003, orig. proceeding) (quoting *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 197–99 (Tex. Crim. App. 2003) (orig. proceeding)). Consideration of a motion properly filed and before the court is ministerial. *State ex rel. Hill v. Ct. of Apps. for the 5th Dist.*, 34 S.W.3d 924, 927 (Tex. Crim. App. 2001) (orig. proceeding). A trial judge has a reasonable time to perform the ministerial duty of considering and ruling on a motion properly filed and before the judge. *In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding). But that duty generally does not arise until the movant has brought the motion to the trial judge's attention, and **mandamus** will not lie unless the movant makes such a showing and the trial judge then fails or refuses to rule within a reasonable time. *See id.*

[5] [6]**Rangel** bears the burden of providing this Court with a sufficient record to establish his right to **mandamus** relief. *See In re Mullins*, 10–09–00143–CV, 2009 WL 2959716, at *1, n. 1 (Tex. App.—**Waco** Sept. 16, 2009, orig. proceeding) (mem. op.); *In re Blakeney*, 254 S.W.3d 659, 661 (Tex. App.—Texarkana 2008, orig. proceeding). There is no record showing that **Rangel** has brought his petition to the attention of the trial judge and that the trial judge has then failed or refused to rule within a reasonable time. In its response to **Rangel**'s petition, the State provides exhibits that reflect that the petition was forwarded to the Court of Criminal Appeals the date it was received. Accordingly, we deny the petition for writ of **mandamus**.

*(Chief Justice Gray concurring)

TOM GRAY, Chief Justice, Concurring

***970** Over a year ago, the defendant filed a motion for post-conviction **DNA** testing under Chapter 64 of the Texas Code of Criminal Procedure. It has not been ruled upon. It appears that even after this Court requested a response to the petition for writ of **mandamus**, it nevertheless still has not been ruled upon. So now we must address the merits of a petition for writ of **mandamus**.

The State goes to great efforts in its response to show that the motion was forwarded to the Court of Criminal Appeals. Why? The Court notes that the motion was

promptly forwarded to the Court of Criminal Appeals. Why? Both are good questions not addressed by the Court. It was forwarded to the Court of Criminal Appeals apparently because **Rangel** put the letter "A" after the cause number on the Chapter 64 **DNA** testing motion (he contends in his response that the Clerk did it). The cause number plus the letter "A" is apparently the number assigned to his post-conviction application for an 11.07 writ. We have been repeatedly told that we should determine what a document is by the content, not the title, of the document. Here, both the content and the title confirm that the document is a Chapter 64 post-conviction motion for **DNA** testing.

It is unfortunate that the number applied to the motion matched the docket number for the post-conviction 11.07 application. If nothing had happened to cause this oversight to come to the attention of the clerk and the State, and if the response to the petition had been more in the nature of: "We see what happened. We'll get right on that Chapter 64 **DNA** motion so that you do not have to spend your time addressing the petition for a writ of **mandamus**," I would be okay with what we do here, now, in this proceeding. But, after more than 30 days had passed after the motion was filed, **Rangel** moved for findings and conclusions on his **DNA** motion; doing what he could to bring attention to the motion he had previously filed. It seems that no one did anything in response to this motion. No, "Ooops, we forwarded that motion to the Court of Criminal Appeals as part of the 11.07 writ, which it clearly was not intended to be part of." Nothing was done. So finally, **Rangel** files a petition for a writ of **mandamus**. Maybe his better course of action was to write the clerk, and the court coordinator, and the trial court judge asking about the status and possibly requesting a hearing on his motion. But a "hearing" or even a request for a hearing would have been premature. It is important to notice that the statute requires the trial court and the State to take action, prior to any hearing, upon receipt of the motion. TEX. CODE CRIM. PROC. ANN. art. 64.02 (West 2018).[1]

The State, as the real party in interest in this proceeding, and the Court, fault **Rangel** for not bringing forth any evidence that his motion for post-conviction **DNA** testing was actually brought to the attention of the trial court. Technically that is correct. But then ask yourself; how exactly is an inmate supposed to do that? It is not ***971** like he can take a copy to the trial court's office, courtroom, or home to "serve" the trial court with a copy of the motion. And no matter how many letters the inmate writes, in all likelihood those letters are going straight to a file in the clerk's office. Although those letters may possibly get as far as the court coordinator, they do not necessarily make it to the trial court, even if addressed for delivery only to the trial court judge. But even then, how is the inmate supposed to get any evidence that the trial court was actually made aware of the motion? This Court requested a response from the parties. The trial court is a party, the respondent. We could infer from that procedure the trial court is now aware of the motion. Maybe **Rangel** can now use this proceeding and that inference to compel a ruling if one is not timely received after this Court's opinion and judgment issue.

Since we will have ruled on the **mandamus**, and as part of that we will send a copy of the opinion and judgment to the trial court, will that be "evidence" that the trial court has "received" the motion? Not really. It is only evidence that he might be aware of it.

At some point, the sworn allegation that the movant has filed the motion and requested a ruling should be enough. I am disappointed that there is no procedure in the statute or the rules, or even within the county's (district clerk's) filing system, to cause the filing of motions pursuant to Chapter 64 to trigger the action by the trial court and the State that the statute requires. *Id.* 64.02(a). But the trial court's requirement to start the process by providing a copy to the "attorney representing the state" and the requirement for that attorney to take one of several alternative actions, begins only when "the convicting court" is in "receipt" of the motion. *Id.* So we are back to where we started. How can the inmate prove when the convicting trial court received the motion?

It would avoid the waste of a lot of resources if the trial court would simply take the required action on the motion. Now that it is over a year after the motion was filed, and the State and, we must infer, the trial court are aware of the filing of the motion, it is not unreasonable to expect action as required by the statute forthwith, including, if appropriate, the appointment of counsel. A ruling, any ruling, would avoid the interminable delay and unnecessary consumption of judicial resources caused by the pursuit of a **mandamus**. And a **mandamus** seems to be an extraordinarily inefficient way to create the evidence necessary for a successive **mandamus** in which the inmate can show that the trial court has been made aware of the Chapter 64 motion that has been filed.

While I think the better course of action would be to conditionally issue the writ to compel the trial court's compliance with the statute regarding the procedure for post-conviction **DNA** testing pursuant to Texas Code of Criminal Procedure Chapter 64, I concur in the Court's judgment but not its opinion.

All Citations 570 S.W.3d 968

Footnotes

1 **Rangel's** petition for writ of **mandamus** has several procedural deficiencies. It does not include the certification required by Rule of Appellate Procedure 52.3(j). *See* TEX. R. APP. P. 52.3(j). The appendix, which apparently serves as **Rangel's** record, is not certified or sworn to, as required by Rules 52.3(k) and 52.7(a)(1). *See id.* 52.3(k), 52.7(a)(1). The petition also lacks proof of service on the Respondent trial judge. *See id.* 9.5, 52.2. Because of our disposition and to expedite it, we will implement Rule 2 and suspend these rules. *Id.* 2.

2 We affirmed **Rangel**'s aggravated sexual assault conviction in 2009. ***Rangel*** *v. State*, No. 10-07-00247-CR, 2009 WL 540780 (Tex. App.—**Waco** Mar. 4, 2009, pet. ref'd) (mem. op., not designated for publication).

1 Article 64.02(a) provides:

(a) On receipt of the motion, the convicting court shall:

(1) provide the attorney representing the state with a copy of the motion; and

(2) require the attorney representing the state to take one of the following actions in response to the motion not later than the 60th day after the date the motion is served on the attorney representing the state:

(A) deliver the evidence to the court, along with a description of the condition of the evidence; or

(B) explain in writing to the court why the state cannot deliver the evidence to the court.

End of Document

06-09-19

Chief Judge Tom Gray
McLennan County Courthouse
501 Washington Ave
Waco Tx. 76701

RE: PERSONAL LETTER

Dear Judge Gray

Recently, I read your opinion in the case of "In re Jerry Rangel" where you decried a problem I have been faced with for years. The problem of how to get the attention of the Judge of a court. I have tried "restricted access" sending pleadings directly to a Judge certified paying the extra fee for restricted access. This "in theory" would limit the U.S. post office's delivery to only that person to which the mail is addressed. I have tried, having the court called asking the Judge to return the call to the person making the call. I have tried writing to the Administrative Judges or even filing pleadings in the Admin. Courts. I have asked people to e-mail the Judges or even text them if they could. NONE, I repeat none of these things worked.

Why? I think the answer is simple. The fact is that inmates have filed so much bogus crap over the years those who really have tried to file serious well thought out pleadings are given short shift.

Moreso, there are times this has a serious impact on the lives of the correctional officers in the system. How, well as the Supreme Court of the U.S. explained courts are the alternative to violence. One individual kept stealing property from this specific inmate who lived on the dorms and had lived in prison many years. The inmate eventually filed a tort claim against the officer. This was in the 259th Judicial District Court, Judge Hagler. The action languished without resolution, so the inmate "took matters to hand" so to speak and caused the officer to be injuried. Not seriously, but... It seems to me it is time the state system swung the other way a bit and started to pay at least minimal attention to inmate litigation.

Sinc.

Jm DeMoss

James De Moss
#894554
French M. Robertson
12071 F.M. 3522
Abilene Tx. 79601

P.S. I wonder if you will get this?

TENTH COURT OF APPEALS

McLennan County Courthouse
501 Washington Avenue, Rm. 415
Waco, Texas 76701-1373
Phone: (254) 757-5200 Fax: (254) 757-2822

July 1, 2019

James De Moss
French M. Robertson Unit, #894554
12071 FM 3522
Abilene, TX 79601

Re: 10-19-00014-CR; *In re Jerry Rangel*

Dear Mr. De Moss:

This is in response to your June 9, 2019 letter, a copy of which is enclosed for reference purposes. Thank you for taking the time to write. Your letter confirms the challenges of an inmate trying diligently to work within the system to get a hearing on a filed motion. It is my hope that a rule or statute change will help; but until then, please continue to be patient and respectful and we will try to be respectful and quick.

Sincerely,

Thomas W. Gray

Thomas W. Gray
Chief Justice

Enclosure

cc: Jerry Rangel
Jarvis J. Parsons

yes, I did receive your letter.
Tom

Memorandum

To: SCAC subcommittee

From: Tracy Christopher

Date: October 28, 2019

Re: Obtaining rulings

I recently chatted with J. Peeples and I thought I would pass along my thoughts to your subcommittee on this. Feel free to distribute this with your report if you think it is useful. As always, these are my thoughts and I do not represent the Fourteenth Court of Appeals.

As an intermediate appellate court judge, we see a lot of mandamuses for failure to rule—mostly from the self-represented, mostly criminal but some civil. However this year the 1st and 14th courts of appeal have had a problem with one judge who just wasn't ruling. I believe that the Courts (Supreme Court and Court of Criminal Appeals) need to address this in multiple ways.

1. Require all trial judges to create a mechanism for reviewing motions without an oral hearing, based on best practices developed by other courts that already have this procedure. [This allows someone in jail to present a motion to the court and it will also eliminate the "presentment issue" in connection with motions for new trial in a criminal matter.] These rules need to be available on the court's website, but also need to be made available to someone in jail who does not have internet access. Require trial clerks to send the rules to parties who incorrectly ask for a submission hearing.

2. Understand the no- hybrid representation issue and incorporate that into the criminal court rules. Perhaps a deemed denial of motions filed by those who already have a lawyer, except for the motions for new counsel or to self-represent.

3. Educate trial judges and clerks as to what motions a judge has jurisdiction to rule on after a final judgment. If a judge has no jurisdiction to rule on the motion, that should be the ruling—not a denial and not ignoring the motion.

4. Provide for a reminder mechanism that a party can send to the judge, if there is no ruling. Provide a copy of the reminder to the Presiding Judge. Educate clerks as to what to do with the reminders.

5. Provide for a deemed denial after a designated period of time, for certain dispositive motions for which there is an interlocutory appeal.

6. Consider the idea that a judge should file a response to a failure to rule mandamus—asking the real party in interest to respond is often meaningless. Some judges do that now—sorry I have been in a big trial, sorry I have been out sick, I will get it done.

7. Thinking outside the box, require the public defender's office in large counties to do a "limited representation" as to the post-conviction motions. The public defender's office would be the initial screening point for the motions and tell the inmate that the court has no jurisdiction to rule on this motion or could tell the court that the motion should be ruled on.

8. Consider specific guidelines for the presiding judge or for the appellate court to follow to report a judge to the judicial conduct commission for repeated failures to rule.