



The Supreme Court of Texas

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June 16, 2003

Mr. Charles L. Babcock, Chairman
Supreme Court Advisory Committee
Jackson Walker
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Dear Chip:

As you know, the Seventy-Eighth Legislature has delegated to the Supreme Court the responsibility for drafting rules to implement House Bill 4. Three major assignments are:

- MDL rules: to adopt rules of practice and procedure for the judicial panel on multidistrict litigation created by chapter 74, subchapter H of the Government Code (HB 4, § 3.02);
- Offer-of-settlement rules: to promulgate rules implementing chapter 42 of the Civil Practice and Remedies Code providing for offers of settlement (HB 4, § 2.01); and
- Class action rules: to adopt rules to provide for the fair and efficient resolution of class actions, including rules that comply with the mandatory guidelines of chapter 26 of the Civil Practice and Remedies Code (HB 4, § 1.01).

HB 4 also directs that Rule 407(a) of the Texas Rules of Evidence be amended to conform to Rule 407 of the Federal Rules of Evidence (HB 4, § 5.03). In addition, other rules changes may be necessary or appropriate because of the enactment of HB 4 and other statutes this session. Chris Griesel, the Court's Rules Attorney, has compiled the attached list of possible changes, which you will see is quite lengthy. This is only a preliminary list.

The Supreme Court is of the view that the Legislature's delegation of rule-making responsibility to the Supreme Court to effectuate the Legislature's policy choices is in the best interests of the administration of justice and of the people of Texas. The Legislature's actions this year reconfirm the statement of the Forty-Sixth Legislature that "it is essential to place the rule-making power in civil actions in the Supreme Court, whose knowledge, experience, and intimate contact with the problems of judicial administration render that Court particularly qualified to mitigate and cure these evils [of unnecessary delay and expense to litigants]." Act of

May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 202 (enacting what is now Tex. Gov't Code § 22.004). The Supreme Court gladly accepts this responsibility and intends to comply fully with the Legislature's directives.

The Court relies heavily on the counsel of its Advisory Committee, as it has for sixty-four years. The members of the Committee should consider the Legislature's faith in the rule-making process a credit to their wisdom and experience and to the value of their work. I and my colleagues look forward to working with you on these new assignments.

The amendment to Rule 407(a) of the Texas Rules of Evidence is to be made "[a]s soon as practicable" after HB 4's effective date, September 1, 2003 (HB 4, § 5.03). The MDL rules also apply beginning that date. The class action rules are to be "adopted on or before December 31, 2003", and the offer-of-settlement rules "must be in effect on January 1, 2004." The Supreme Court is tentatively of the view that the deadlines specified in HB 4 take precedence over the requirements for publication and comment contained in sections 22.004 and 74.024 of the Government Code but that those requirements should be followed where possible. Therefore, the Court has adopted the following schedule:

- The Court will next meet to consider the Committee's recommendations and any other matters pertaining to rules changes the week of August 25, 2003.
- Effective September 1, 2003, the Court will amend Rule 407(a) of the Texas Rules of Evidence and adopt MDL rules, both to be disseminated to the bench and bar as widely as possible and published in the October issue of the *Texas Bar Journal* for formal comment. The changes may be revised following comments.
- The Court will also publish in the October issue of the *Texas Bar Journal* for comment an offer-of-settlement rule and a revised class action rule to comply with HB 4's mandatory guidelines, both rules to take effect January 1, 2004.
- In the October issue of the *Texas Bar Journal*, or as soon thereafter as possible, the Court will publish for comment any further changes in the class action rule, any rules changes adopted in accordance with pending recommendations by the Advisory Committee, and any rules changes to be made regarding ad litem fees and referral fees, as recommended by the Jamail Committee.

The Court believes that this schedule will comply with the mandates of HB 4, permit as much comment as possible, allow for reaction to that comment, complete related pending work before the Committee, and complete action on Committee recommendations already made. Other proposals before the Committee, and other changes that may be necessary or appropriate due to recent legislation, should be deferred until the proposed schedule has been completed.

I fully realize that this is an enormous amount of work for the Committee, but I believe the Committee is

entirely capable of assisting the Court in discharging its responsibility.

The following issues are of interest to the Court:

- Rule 407(a), Texas Rules of Evidence: What impediments are there to simply conforming the language to Rule 407 of the Federal Rules of Evidence?
- MDL rules: How should the judicial panel function? Where should it meet? When must issues be decided by a hearing before the panel and when by submission? May the panel confer and decide issues by telephone, by letter, or by email? Where will records be kept? Should policies for decision be stated in the rules or left entirely for the panel to set? Assuming that policies should be thoroughly stated in the rules, what should those policies be?
- Offer-of-settlement rule: Can the work already done by the Committee on this rule be modified to comply with the requirements of HB 4? What additional parameters should be included consistent with those requirements?
- Class action rule: In addition to changes required by HB 4's mandatory guidelines, should the rule require opt-in classes for certain claims? Assuming that it should, what should those claims be?

As always, Chip, the Supreme Court extends to you and all of the members of the Committee its deepest gratitude.

Sincerely,

Nathan L. Hecht
Justice

c: The Chief Justice and Justices of the Supreme Court of Texas
The Members of the Supreme Court Advisory Committee
The Members of the Jamail Committee
The Hon. Bill Ratliff
The Hon. Joe Nixon

SUMMARY OF RULES CHANGES TO EXAMINE

BILL (section or article affected)	NATURE OF LEGISLATIVE CHANGE	RULES TO EXAMINE
HB 4		
Sec 1.01	By 12/31/03, the “Supreme Court shall adopt rules to provide for fair and efficient resolution of class actions”. Bill lays out some guidelines for class fee recovery	TRCP 42. Consider the Committee’s previous work on the subject, including review of previous Jamail committee drafts, and make suggestions
Sec. 1.02	Amends cases that are appealable by interlocutory appeal to the Supreme Court and defines “conflicts jurisdiction”	Review TRAP rules, including Rule 53.2
Sec. 1.03	Amends list of cases that may be brought by interlocutory appeal; Allows certain classes of cases to be stayed pending appellate resolution; defines “conflicts jurisdiction”	Review TRAP rules, including comment to TRAP 29 and Rule 53.2
Sec. 1.05	The effective date of this bill is 9/01/03 and appeals to all appeals filed after that date	Does the Court need to take any “emergency” rules action before 9/01/03 ?
Sec. 2.01	By 12/31/03, the “Supreme Court shall promulgate rules implementing” the offer of settlement provisions of HB 4. The bill lays out more extensive guidelines for provisions of the rules but leaves the court with a number of issues to resolve.	Compare the committee’s existing work to the guidelines of HB 4 and make any additional suggestions
Sec. 3.01	<p>The Supreme Court may adopt “ rules relating to the transfer of related cases for consolidated or coordinated pretrial proceeding” (A similar, slightly narrower, grant of authority was also given the Court by HB 3386)</p> <p>The Legislature created a “judicial panel on multidistrict litigation”. The Chief Justice will appoint 5 active court of appeals or administrative judges to the panel. The rules must allow the panel to transfer related civil actions for consolidated or coordinated pretrial</p>	Determine changes needed to TRCP or Rules of Judicial Administration. Consider the operation of existing RJA 11 and federal MDL rules

	proceedings; allow for transfers and remands of actions; and provide for appellate relief of the panel's orders.	
Sec. 3.03	Plaintiffs added by joinder are required to independently meet venue provisions or face mandatory transfer to county of proper venue or face dismissal	Determine if joinder rules ,TRCP 39 et.seq, require amendment. Determine if interlocutory appeal provision, including stay provision, requires TRAP change or comment.
Sec. 4.01 et seq.	Changes made to proportionate responsibility submission and designation of responsible parties. Changes in some cases the method of reducing damages from dollar amount to percentage amount	Determine if these changes require amendment to TRCP, including rules affecting submission of charge
Sec. 4.12	Requires amendment of TRCP Rule 194.2, as soon as practicable, to include disclosure of responsible third parties	TRCP Rule 194.2
Sec. 5.01 et seq.	Makes changes to liability of defendants in certain products cases	Determine if these changes require amendment to TRCP
Sec. 5.03	Requires Supreme Court to amend TRE Rule 407(a) to conform with FRE Rule 407	TRE Rule 407(a)
Sec. 7.01 et seq.	Creates statutory changes to amount of appeals bonds. Applies to any judgment filed after 9/01/03	Determine changes needed to TRAP, including TRAP 24. Does the Court need to take any "emergency" rules action before 9/01/03 ?
Sec. 8.01	HB 4 repeals evidentiary bar on seat belt non-use.	Determine if this bar is mentioned in TRCP or TRE and suggest appropriate changes
Sec. 10.01 et seq.	Revision of methods for notice, evidence, and procedure of medical liability and medical malpractice actions	HB 4 creates an new system of notice and pleadings, submission of expert reports, and discovery for health care liability claims.

		<p>Determine what actions to take to modify existing TRCP, TRE, and TRAP rules relating to pleading and discovery rules to, at the minimum, place bench and bar on notice of the conflicting health care liability provisions.</p> <p>Consider the adoption of Section 74.002, Civil Practice and Remedies Code in Section 10.01 relating to conflicts between court rules and the statute. Also consider a method to advise bench and bar that "local rules" may not conflict with the statutory changes</p> <p>Change all 4590i references to Chapter 74, Civil Practice and Remedies Code.</p>
Sec 13.03	Statutory change requiring exemplary damage jury verdict be unanimous and a jury charge must contain a instruction alerting the jury to that fact	Determine changes needed to TRCP, including TRCP 292. Does the Court need to take any "emergency" rules action before 9/01/03 ?
Sec. 23.02	Various portions of HB 4 become effective on various dates and apply to differing classes of cases	Does the Court need to take any immediate action or make "emergency" rules action on any of the changes to the court rules?
ALL		Alert the court to any other rules changes required by HB 4

Family Code Issues		
<p>HB 821 Sec.1</p> <p>HB 518 Sec. 1</p> <p>HB 1815 (all)</p> <p>HB 883 (all)</p>	<p>This bill allows notice of an associate judge's report , including proposed order, to be given by fax and creates a rebuttable presumption of receipt.</p> <p>Creates new method of service by publication and new method for calculating the date notice is given</p> <p>Alters scope and duties of guardian ad litem and attorney ad litem in suits affecting parent child relationship</p> <p>The date an agreed order or a default order is signed by an associate family law judge is the controlling date for the purpose of an appeal to, or a request for other relief relating to the order from, a court of appeals or the supreme court.</p>	<p>Determine if these changes require amendment to TRCP</p>
Other Changes		
<p>HB 3306</p> <p>HB 3386</p>	<p>Objections to a visiting judge must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the case is submitted to the court, whichever date occurs earlier. Notice of an assignment may be given and an objection to an assignment may be filed by electronic mail.</p> <p>Allows the Supreme Court to adopt Rules of Judicial Administration to allow for the conducting of proceedings under Rule 11, Rules of Judicial Administration, by a district court outside the county in which the case is pending.</p>	<p>Determine if these changes require amendment to TRCP or RJA</p>
<p>SB 352</p>	<p>A judge commits an offense if the judge solicits or</p>	<p>Determine if this prohibition</p>

	accepts a gift or a referral fee in exchange for referring any kind of legal business to an attorney or law firm. This does not prohibit a judge from soliciting funds for appropriate campaign or officeholder expenses as permitted by Canon 4D, Code of Judicial Conduct or from accepting a gift in accordance with the provisions of Canon 4D, Code of Judicial Conduct.	needs to be included within recusal rule before court or is already covered
SB 1601	Before entering an order approving settlement or judgment, the court shall require all defendants to report to the court by a certain date the total amount of all funds paid to the class members. After the report is received, the court may amend the settlement or judgment to direct each defendant to pay the sum of any unpaid funds to the clerk of the court. The unpaid funds will be placed in a trust fund and may be spent only to programs approved by the supreme court that provide civil legal services to the indigent.	Determine if a change to TRCP, including Rule 42 is appropriate.