SOUTHERN METHODIST UNIVERSITY

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

MEMORANDUM

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

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

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

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

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

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

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

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

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

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

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

Proposed Amendment to TRAP 49.

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

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

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

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

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

8/18/05 Revisions

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

Rule 28. Accelerated Appeals in Civil Cases

28.1 Civil Cases - Appeal As of Right

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

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

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

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

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

28.2 Civil Cases – Appeal By Permission

(a) Petition for permission to appeal.

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

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

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

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

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

(1) The petition must:

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

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

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

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

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

and attaching a copy of the order to the petition;

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

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

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

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

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

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

for rehearing may be filed.

(e) Grant of petition; prosecution of appeal

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

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

[Alternative (e)]

(e) Grant of petition; prosecution of appeal

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

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

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

(C) pay all required fees

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

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

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

Rule ___. Transfer of Court of Appeal Cases

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

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

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

__.4 Oral Argument.

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

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

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

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

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

__.5 Precedent in Transferred Cases

Alternative One

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

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

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

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

(c) deny or refuse the petition.

Alternative Two

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

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

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

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

(c) deny or refuse the petition.

H.B. No. 1294

AN ACT

relating to interlocutory appeals.

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

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

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

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

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

(3) the parties agree to the order.

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

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

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

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

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

President of the Senate

Speaker of the House

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

Chief Clerk of the House

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

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

79R4266 SGA-F

By: Rose

H.B. No. 1294

+

S.B. 494

A BILL TO BE ENTITLED

AN ACT

relating to permissive interlocutory appeals in civil actions.

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

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

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

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

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

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

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

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

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

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

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

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June 2, 2004

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

Dear Justice Hecht:

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

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

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

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

Sincerely,

Sherry Radack

Sherry Radack
Chief Justice

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

MEMORANDUM

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

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

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

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

(e) [~~an authenticated~~] ~~certified or verified~~ a7 copy of the page or pages of the bankruptcy petition, ~~Notice of Bankruptcy Case Filing, or other document filed with or~~ generated by the bankruptcy court showing when the petition was filed.

or a document

(e) evidence of the date of filing.

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

Rule _____, Tex. R. App. P.

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

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

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

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

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

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