MEMORANDUM

To: Justice Nathan L. Hecht

From: William V. Dorsaneo, III

CC: All SCAC members and Jody Hughes, Rules Attorney

Date: December 12, 2005

Re: Proposed Changes to Appellate Rules 8.1, 10.1, 28, 29.5, 49.11, 52, 53 and Proposed Rule on Court of Appeals Transfers

1. *Proposed Rule 28.1, Civil Cases* -- [Accelerated] Appeals As of Right. Proposed rule 28.1 and an accompanying Comment was approved by the SCAC on May 7 and August 26, 2005. A copy of both the text of the proposed rule and the comment are attached as Exhibit A. Please note that the probable elimination of Proposed Rule 28.2 as described in the next section of this memorandum would be a basis for eliminating the subheading "28.1 Civil Cases – Appeal As of Right" as well as the parenthetical in the second line of 28.1 (a).

2. *Proposed Rule 28.2 Civil Cases* – [Accelerated] Appeal By Permission. Proposed Rule 28.2, which the SCAC has worked on for more than a year, was designed to provide a procedural mechanism for permissive appeals to the courts of appeals taken in accordance with C.P.R.C. § 51.014 (d)-(f). As a result of the repeal of § 51.014(f) by the Legislature in 2005, it is probable that the procedural machinery devised by the SCAC is unnecessary because it appears that the courts of appeals no longer have discretion to deny appellate review if the remaining statutory requirements are satisfied. Nonetheless, the SCAC completed its work on Proposed Rule 28.2 to provide the Court a draft repeal if C.P.R.C. § 51.014(f) did not make the proposed rule unnecessary. A finally seminared version of Rule 28.2 is attached as Exhibit A.

3. *Proposed Rule 8.1.* Appellate Rule 8.1, which deals with giving the courts of appeals notice of bankruptcy proceedings, was recommended to be amended by deleting paragraph (e) and moving the "and" that appears after paragraph (d) to the end of paragraph (c).

4. *Proposed Amendments to Appellate Rule 29.5.* As a result of 2003 legislative amendments to C.P.R.C. § 51.014 (b) concerning stays of proceedings during the pendency of appeals of interlocutory orders, the SCAC proposes the following amendment to Appellate Rule 29.5

> **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.
>
> (c) Comment to 2005 change. Rule 29.5 is amended to correspond with section 51.014(b) of the Texas Civil Practice and Remedies Code, as amended in 2003, staying all proceedings in the trial court pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees and grants or denials of pleas to the jurisdiction by governmental units.

5. *Proposed Amendments to Appellate Rules 52 and 53.* As a result of prior amendments to Appellate Rule 47, which makes all opinions in civil cases published, Appellate Rules 52 and 53 should be amended to delete the words "if available, or a statement that the opinion was unpublished" from Appellate Rules 52.3(d)(5)(D) and 53.2(d)(8).

6. *Proposed Amendments to Appellate Rules 10.1 and 49 Concerning Certificates of Conference on Motions for Rehearing.* The SCAC recommends that certificates of conference not be required for motions for rehearing.

Accordingly, the SCAC recommends the amendment of Appellate Rules 10.1 and 49.11 as follows:

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, 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, *other than a motion for rehearing, a further motion for rehearing or a motion for en banc reconsideration of a panel decision of a court of appeals.*

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.

At the August meeting the SCAC modified the subcommittee's proposal by adding the italicized language in Appellate Rule 10.1(a)5 to the end of (a)(5) rather than place the language after the words "in civil cases." Because that change does not work any better than the original proposed amendment, I recommend putting it back and rewording the language as follows.

(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, <u>except for motions for rehearing, further motions for rehearing and motions for en banc reconsideration of panel decisions,</u> contain or be accompanied by a certificate stating that the filing party conferred or made a reasonable attempt to confer with other parties about the merits of the motion and whether those parties oppose the

motion.

7. *Proposed rule -- Precedent in Transferred Cases.* After extensive if not excessive discussion at several meetings, a majority of the SCAC voted to recommend that the Texas Supreme Court adopt the following rule concerning the precedent to be followed by a transferee court of appeals in transferred cases. Although the SCAC did not consider where the proposed rule would be codified, I suggest tentatively that it be added as a new general rule at the end of the Section One, General Provisions (which are already too numerous) or perhaps to Appellate Rule 38, (Requisites of Briefs) as a new subdivision 38.10 (because that is the first place where it fits), or in Appellate Rule 41 (Panel and En Banc Decision), probably as Rule 41.3. Consideration should also be given to inclusion of the requirement embodied in the bracketed sentence in Appellate Rule 47 (Opinions, Etc.), if it is included in the adopted rule.

____. Precedent in Transferred Cases. In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis. [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.]

This final section of this memorandum is made with two caveats, First, I don't think that the bracketed second sentence was clearly voted on by the SCAC at the May or August meetings. Although inclusion of the sentence might facilitate the recognition of conflict jurisdiction by the Texas Supreme Court, it somewhat complicates the transferee court's decision making process and the preparation of its opinion. If such a sentence is adopted by the Court, I respectfully suggest that the sentence be changed by eliminating the words "or would not" and "or view of the law" from the sentence.

Second, the addition of a limiting adjective or a limiting phrase modifying the required use of the transferor court's precedent to precedent that conflicts with the transferee court's own precedent or another court of appeals' precedent should be considered to facilitate the task of the transferee court in crafting opinions in transferred cases. As pointed out by Justice Duncan on August 26, without some kind of limiting language the

transferee court may believe that the rule requires citation of the transferor court's opinions, even when there is no conflict in the precedents of the courts of appeals. The words "if there is a conflict between the transferor court's precedent and the transferee court's precedent or another court of appeals' precedent" could, for example, be added to the middle of the first sentence.

EXHIBIT A

Revised Draft of Proposed Appellate Rule 28
Based on Minutes of May 7 and August 26, 2005 Meetings

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

(b) **Perfection of Accelerated Appeal.** 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)-(e) 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 20th 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 district 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 agreed to the 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 10 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) In order to perfect an appeal, a party to the trial court proceeding must, within 10 days after the signing of the order granting permission to appeal:

(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) The provisions of Rule 26.3 apply to such a notice.

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

COMMENT: Subdivision 28.1 is amended to provide a uniform appellate timetable for all accelerated appeals. 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. Unless a statute expressly prohibits modification or extension of any statutory appellate deadline, Rule 28 is made expressly applicable to all such appeals. Subdivision 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)-(e), as amended in 2005.