

MEMORANDUM

To: SCAC Members
From: Bill Dorsaneo
cc: Jody Hughes
Date: January 8, 2007
Re: Nathan Hecht Letter 9/22/06

Here are the proposed revisions discussed and voted on at our October meeting with the exception of proposed revisions to 24.2 and 41.2, which are new. The version of 24.2 contained in this draft contains my proposed revisions to Elaine Carlson's earlier draft. In addition, proposed revisions to 20.1 and 41.1 need additional discussion. The modifications to 20.1 are based on suggestions made by Stephen Yelenosky to improve the draft contained in the 12/6/06 memorandum. Proposed changes to 41.1 and 41.2 come primarily from Jody Hughes and from me. More remedial work may be needed on 41. In my view, 41.1(a) is a particularly poor effort. Proposed revisions to 52.3, including the alternative version previously emailed to all SCAC members, will need to be revisited.

13.2 Additional Duties of Court Recorder. The official court recorder must also:

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) if requested by any party to the appeal, prepare and file a transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2).

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

- (a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.
- (b) 30 days after the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.7, and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under Rule 49.8.

20.1 Civil Cases

(a) *Establishing indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

- (1) the party files an affidavit of indigence in a compliance with this rule.
- (2) the claim of indigence is not contested, may not be contested, or if contested, the contest is not sustained by written order.

(b) *Contents of affidavit.*

(c) IOLTA Certificate. If the party was represented by an attorney in the trial court who provided free legal services, without contingency, because of the party's indigency and the attorney provided services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program and the attorney filed an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines, the attorney may file an additional IOLTA certificate confirming that the IOLTA-funded program rescreened the party for income eligibility under the IOLTA income guidelines after entry of the trial court's judgment.

OR

(c) IOLTA Certificate. If the appellant proceeded in the trial court without payment of fees pursuant to an IOLTA certificate, the attorney who filed the certificate may file an additional IOLTA certificate confirming that the IOLTA funded program rescreened the party for income eligibility under IOLTA income

guidelines after entry of the trial court's judgment.

A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

(e)(d) When and Where Affidavit Filed.

- (1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Civil Procedure Rule 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost. . . must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.
- (3) Extension of time. The appellate court ~~may extend the time to file and affidavit if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b)~~ must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit of indigence or the appellant's failure to file a sufficient affidavit of indigence before dismissing the appeal or affirming or reversing the trial court's judgment, as provided in Rule 44.3.

See Higgins v. Randall County Sheriff's Office 193 S.W.3d 898 (Tex. 2006).

24.2 Amount of Bond, Deposit or Security

(c) Determination of Net Worth

- (1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. ~~The affidavit is prima facie evidence of the debtor's net worth.~~ A trial court clerk must receive and file a net worth affidavit tendered for filing by a judgment debtor. A net worth affidavit filed with the trial court clerk is prima facie evidence of the debtor's net worth for the

purpose of establishing the amount of the bond, deposit or security required to suspend enforcement of the judgment.

- (2) ~~Contest; Discovery~~ *Motion to Strike Insufficient Affidavit.* A judgment creditor may move to strike a net worth affidavit that does not [state the debtor's net worth or that does not state complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained] or [comply with Rule 24.2(c)(1)]. If the trial court determines that the affidavit is deficient, the court must inform the judgment debtor why the affidavit is deficient and afford the judgment debtor a reasonable opportunity to comply with Rule 24.2(c)(1). If an affidavit conforming with the trial court's order is not filed in accordance with the court's order, the trial court may order that enforcement of the judgment is no longer suspended as to that judgment debtor.
- (3) ~~Contest; Discovery; Hearing.~~ A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

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

24.4 Appellate Review

(a) Motions; Review. On a party's motion to the appellate court, that court may review:

- (1) the trial court's ruling on a Rule 24.2(c)(2) motion to strike a net worth affidavit;
- (+2) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);

- (23) the sureties on any bond;
- (34) the type of security;
- (45) the determination whether to permit suspension of enforcement;
and
- (56) the trial court's exercise of discretion under Rule 24.3(a).

(b) *Grounds of Review*. Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) *Temporary Orders*. The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) Appellate Court. A motion filed under paragraph (a) should be filed in the court of appeals having potential appellate jurisdiction over the underlying judgment. The court of appeals ruling is subject to review on motion to the Texas Supreme Court.

(de) *Action by Appellate Court*. The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(ef) *Effect of Ruling*. If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

34.6 Reporter's Record.

(1)

(a) *Contents*

(1) Stenographic recording.

...

(2) Electronic recording.

...

(b) *Request for preparation.*

- (1) Request to court reporter or court recorder. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the reporter's record. The request must designate the exhibits to be included. A request ~~to the court reporter but not the court recorder~~ must also designate the portions of the proceedings to be included.

35.3 Responsibility for Filing Record

(b) *Reporter's record.* The official or deputy court reporter or court recorder is responsible for preparing, certifying and timely filing the reporter's record if:

- (1) a notice of appeal has been filed;
- (2) the appellant has requested the reporter's record be prepared; and
- (3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's or the recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without paying the fee.

38.5 Appendix for cases recorded electronically. In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

- (1) In general. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. A transcription prepared and filed by the court recorder at the request of a party pursuant to Rules 13.2(f) and 34.6(b)(1) satisfies this requirement. Unless another party objects, the transcription will be presumed accurate.

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the temporary assignment by the Chief Justice of the Supreme Court of an active court of appeals justice from another court of appeals, a [qualified] retired or former appellate justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a [qualified] retired or former appellate justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.2 Decision by En Banc Court

(a) [No change]

(b) *When en banc court cannot agree on judgment.* If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a [qualified] retired or former [appellate] justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals judgment or order is rendered. Alternatively a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's timely filed motion for rehearing or further motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision . . .

49.8 Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing or a motion for en banc reconsideration if a party

files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.9 Not Required for Review. A motion for rehearing is not a prerequisite to filing a motion for en banc reconsideration as provided by Rule 49.7 or a petition for review in the Supreme Court or a petition for discretionary review in the court of Criminal Appeals nor is it required to preserve error.

52.3 Original Proceedings; Form and Content of Petition. All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify to the matters stated. . .

53.7 Time and Place of Filing.

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

- (1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or
- (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.