The Supreme Court of Texas

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Chambers of
Justice Nathan L. Hecht

February 5, 2007

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Proposed Changes to Rules of Appellate Procedure
via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several potential changes to the Rules of Appellate Procedure, in addition to Justice Bland's proposal regarding oral-argument statements that was recently referred to the Committee. These additional potential amendments are summarized in the attached appendix. The first concerns whether the Appellate Rules should include a provision that requires parties in parental-rights-termination cases to identify minor children only by their initials, and that would allow courts to strike any appendices or exhibits containing minors' names. The second issue concerns the timing of filing a petition for review when a motion for rehearing or en banc reconsideration remains pending before the court of appeals. The third involves whether the rules should permit a longer page limit for mandamus replies filed in the court of appeals than in the Supreme Court (the default limit for both is eight pages).

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all on February 16th.

Sincerely,

Nathan L. Hecht
Justice

Rule: **none**

Current text: none

Summary of Issue:

It has been suggested that the Appellate Rules be amended to require litigants in parental-rights termination cases to refer to minor children only by their initials, for the protection of minors' privacy. Family Code §109.002(d) allows the appellate court, in an opinion in a SAPCR appeal, to identify the parties by their initials or by a fictitious name, but it appears to be discretionary and applies only to courts, not to parties. ("On the motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by their initials only."). If the Committee believes such a requirement is advisable, the Court would request that it also consider whether other changes are necessary to prohibit the inclusion of materials in exhibits or appendices identifying minors; and, if so, how to accommodate judgments, orders, and similar items that are required to be included with appellate briefs but may contain the names of minors. *See, e.g.*, Tex. R. App. P. 53.2(k)(1)(A) (requiring inclusion, in appendix to petition for review, of trial-court judgment); *id.* R. 38.1(j)(1)(A) (same requirement in appendix to appellant's brief in court of appeals).

Rule: **Tex. R. App. P. 53.7(b)**

Current text:

Premature filing. A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals. A petition filed before the last ruling on all timely filed motions for rehearing is treated as having been filed on the date of, but after, the last ruling on any such motion.

Summary of Issue:

On at least several occasions in recent memory, a petition for review has been filed while the same party's motion for rehearing was still pending in the court of appeals. Unless the clerk of the supreme court is notified that the motion remains pending below, this could lead to a situation in which the Court denies the petition before the court of appeals has ruled on the motion for rehearing.

The existing Appellate Rules address the simultaneous jurisdiction problem in several places. In addition to Rule 53.7(b) shown above, Rule 19.2 provides:

> *Plenary Power Continues After Petition Filed.* In a civil case, the court of appeals retains plenary power to vacate or modify its judgment during the periods prescribed in 19.1 even if a party has filed a petition for review in the Supreme Court.

While Rule 53.7(a) requires the petition to be filed within 45 days after the court of appeals either renders judgment or overrules the last of all timely motions for rehearing, it is perhaps not immediately clear that the rule prohibits a party from filing a petition before the court of appeals has ruled on all timely filed rehearing motions. A petition filed after a motion for rehearing is filed but while the motion for rehearing is still pending, while likely premature in the legal sense pursuant to Rule 53.7(a), is clearly premature in the practical sense that the supreme court presumably will prefer to delay ruling on the petition until after the court of appeals rules on the motion for rehearing. However, Rule 53.7(b) only prohibits a party from filing a motion for rehearing after filing a petition; it does not prohibit filing a petition while a rehearing motion remains pending. Also, while the rest of 53.7(b) likewise addresses the situation where a motion for rehearing is filed after the filing of the petition for review, the last sentence also applies to a petition filed after the motion for rehearing is filed but before the motion is ruled on, treating the petition as having been filed on the date of (but after) the motion for rehearing is ruled on.

Existing Rule 53.7(b) requires the petitioner to notify the Supreme Court of a pending motion for rehearing, but only when the petition was filed before the motion for rehearing was filed.

Although a petitioner in the petition-filed-while-motion for rehearing-pending situation might elect, on his own initiative, to keep the Court updated, Rule 53.7(b) doesn't require it as it does for petitions filed before rehearing motions. Thus, the last sentence of 53.7(b) creates the potential for a situation where a petition is denied before the date it is considered filed.

There appear to be at least two (and probably more) potential solutions to this problem:

1) Prohibit premature petition filing more clearly. Amend 53.7(a) to more clearly provide that, once a party has filed a motion for rehearing or en banc motion, it may not file a petition until after the court of appeals has disposed of the motion; or

2) Require Notice to Clerk's Office. Amend 53.7(b) to address the situation where the petition is filed while the motion for rehearing is pending by requiring such parties to notify the Court of the pending motion for rehearing when the petition is filed and of the court of appeals' subsequent ruling thereon.

Rule: 52.6

Current text:

Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 8 pages, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Summary of Issue:

Some practitioners have complained that the default page limit for a reply to a response to a mandamus petition filed in the court of appeals is too short, and that 8 pages, while commensurate with the 15-page default limit for a mandamus response in the Supreme Court, is too short for mandamus replies in the courts of appeals, where the default limit for both petitions and responses is 50 pages. One practitioner has suggested a 25-page limit for mandamus replies in the court of appeals, corresponding to the 25-page limit for replies in merits briefs under Rule 38.4, which also sets a 50-page default limit for opening briefs and responses.