

**Memorandum Concerning Impact of Amendments to
Civil Practice and Remedies Code Section 51.014**

To: Justice Nathan Hecht
Justice David Medina
Marisa Secco, Esquire (Rules Staff Attorney)
Members, Texas Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Date: August 16, 2011

Re: Memorandum Concerning Impact of Amendments to
Civil Practice and Remedies Code Section 51.014

With respect to Justice Hecht's letter of July 13, 2011 to Charles L "Chip" Babcock (Referral of Rules Issues), we have been assigned the responsibility of making recommendations about possible revisions to Appellate Rule 28 made necessary by amendments made to Civil Practice and Remedies Code § 51.014.

In 2003, the original version of Civil Practice and Remedies Code Section 51.014 (d)-(f) provided appellate courts the discretion to deny appellate review of interlocutory orders, even if the trial court made an order permitting appellate review. But the original version of Section 51.014 (d)-(f) did not provide a procedural mechanism for seeking permission to appeal from an appellate court. As a result, the Appellate Rules Subcommittee and the entire SCAC worked on a proposed rule designed to provide such a procedural mechanism for permissive appeals taken in accordance with the original version of Section 51.014(d)-(f). Then in 2005, the repeal of original version of subsection (f) eliminated the discretion of appellate courts to deny appellate review if the other statutory requirements were satisfied. As recently amended, however, newly enacted subsection (f) reinstates the ability of appellate courts to accept or to reject permissive appeals of interlocutory orders. *See* Tex. Civ. Prac. and Rem. Code § 51.014(f).

Like the original statute, the current statute also provides no procedural mechanism for making a request to the court of appeals for permission to appeal the trial court's orders, the same problem that we were working on in 2004 and 2005 before the repeal of the original version of subsection (f) of Section 51.014. At that time, I prepared several memoranda proposing revision of the Appellate

Rules by adding a new rule to request the appellate courts to consider the acceptance of such appeals. These proposals were based on Fed. R. App. P. 5 (Appeal by Permission).

The Appellate Rules Subcommittee recommended adoption of the first draft proposal sometime in 2004. I revised the draft based on the minutes of the May 7 and August 26, 2005 meetings. At the August 26, 2005 meeting, it was determined that the legislative repeal of the former version of Civil Practice and Remedies Code § 51.014(f) made the Committee's work and the proposed rule unnecessary. Ultimately, the Court adopted current Appellate Rule 28.2, which has been superseded by the new legislation, as far as it goes.

A modified version of the draft proposal, which takes into account all of the other statutory changes, can be substituted for current Appellate Rule 28.2. The modified proposal, which has already been carefully seminared by the SCAC in 2005 is attached as Attachment A.

Attachment “A”

Rule 28. Accelerated and Permissive Interlocutory Appeals in Civil Cases

Rule 28.1 Accelerated Appeals

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Rule 28.2 Permissive Appeals

(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 15th day after the date a trial court signs the order to be appealed. 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) 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;
 - (E) 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) In order to perfect an appeal, a party to the trial court proceeding must, within 15 days after the court of appeals signs the order accepting the 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 28.2 is completely rewritten 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 Section 51.014(d)-(f), as amended in 2011.