

**STATE BAR OF TEXAS  
TASK FORCE ON ADDITIONAL RESOURCES  
FOR COMPLEX CASES**

**FINAL REPORT AND PROPOSED RULES**

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## **PREFACE**

The Task Force on Additional Resources for Complex Cases (Task Force) was appointed by Robert Black, President, State Bar of Texas, on July 26, 2011. The Task Force was created to make recommendations to the Texas Supreme Court “regarding the rules for determining whether civil cases pending in trial courts require additional resources for efficient judicial management...” Article VII, Subchapter J, Additional Resource for Certain Cases, Section 7.05(a) of H.B. 79, 82<sup>nd</sup> Legislature-1<sup>st</sup> Called Session.

The Task Force includes 14 members, all of whom are members of the State Bar of Texas. The membership includes lawyers of large defense and plaintiff firms, corporate in-house counsel, attorney mediators, small firm practitioners, current judges of trial courts and retired members of Courts of Appeals.

A number of individuals provided valuable assistance to the Task Force in developing the proposed rules. Several of these individuals were involved in the legislative process which resulted in the passage of H.B. 79 while others actively participated in providing resources to courts needing additional judicial resources. These individuals include Cory Pomeroy, General Counsel to Sen. Robert Duncan, R-Lubbock; Ryan Fisher, Chief of Staff to Sen. Jim Jackson, R-Carrollton; Bobby Janecka, Legislative Aide to Rep. Tryon Lewis, R-Odessa; Kari King, General Counsel to House Committee on Judiciary and Civil Jurisprudence; Marisa Secco, Rules Attorney, Texas Supreme Court; and Carl Reynolds, Administrative Director, Office of Court Administration and his staff.

Section 7.05(a) of H.B. 79 requires that the Task Force provide its recommendations on the rules to the Supreme Court not later than March 1, 2012. Subsection (b) further provides that the Texas Supreme Court shall adopt rules not later than May 1, 2012. The Task Force’s deadline for submitting its recommendations was accelerated to November 1, 2011 to give the Supreme Court sufficient time to review the recommendations of the Task Force and to develop final rules, through their internal processes.

The Task Force met telephonically and in person on several occasions. Drafts of the proposed rules were also published on the State Bar of Texas

Website on October 1, 2011. On October 13, 2011 the Task Force held a public meeting in Austin, Texas, and members of the public and the State Bar were invited to appear in person or by video conferencing and to comment on the proposed rules.<sup>1</sup> On October 25, 2011 the Task Force submitted this report and proposed rules to the Executive Committee of the State Bar of Texas.

## I. Legislation Regarding Complex Litigation in Texas 2007-2011

During the 80<sup>th</sup> Legislative Session (2007), Sen. Robert Duncan, R-Lubbock, introduced S.B. 1204, which sought to address a number of structural problems within Texas Courts as well as other issues, one of which included establishing a judicial panel on complex cases that would determine whether a case was “complex” and, if so, would appoint a judge to hear the case. Rep. Dan Gattis, R-Georgetown, subsequently filed a companion bill. The proposed establishment of specialized courts proved to be extremely controversial. As a result of discussions with representatives from various associations and sections of the State Bar, Sen. Duncan filed, the committee substitute, C.S.S.B. 1204, which deleted the establishment of specialized courts and instead proposed the creation of a judicial committee comprised of the Presiding Judges from the Administrative Judicial Regions to provide additional resources for trial courts handling complex cases. C.S.S.B. 1204 passed the Senate but failed to pass the House.

In the fall of 2007, State Bar President Gib Walton appointed the Court Administration Task Force (CATF) to study the issues raised in S.B. 1204 and specifically, the issue related to specialized courts and the need for additional resources in certain civil cases. The CATF issued its Report (the “CATF Final Report”) in October 2008, which, among other things, concluded that there was no need for specialized courts, and that the legislature should provide additional resources for cases requiring special judicial attention and additional funding for legal and judicial personnel to support the trial judges who must handle these cases. A more detailed discussion of this issue is included in Section III of the CATF Final Report, pp. 40-47.

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<sup>1</sup> Video links with the SBOT offices in Dallas, Houston and San Antonio were established so that members of the State Bar and public might comment on the proposed rules. The State Bar also arranged for members to join the meeting by logging on to the Bar’s Webinar.

In 2009 during the 81<sup>st</sup> Legislative Session, Sen. Duncan worked with members of the CATF in drafting comprehensive legislation to address the issues identified in the CATF Final Report. S.B. 992 once again included the need for additional resources by trial courts that must handle complex litigation. H.B. 3763, which contained similar provisions, was filed by Rep. Gattis, in the House. Neither bill passed that session.

During the 82<sup>nd</sup> Legislative Session (2011), Sen. Duncan and Rep. Jim Jackson, R-Carrollton, filed S.B.1717 and H.B. 3445, respectively. These bills included most of the CATF recommendations, the most notable exception being a deletion of the provision that converted to district courts all county courts at law that elected to keep their maximum jurisdictional amount in controversy in excess of \$200,000. S.B. 1717 passed the Senate and House with differing language and was referred to a conference committee. The conference committee was able to resolve matters in disagreement and issued its report. The conference committee report was not adopted. During the 82<sup>nd</sup> Legislature-1<sup>st</sup> Called Session, Rep. Tryon Lewis, R-Odessa, changed the caption of H.B. 79 so that it was germane to the call and this bill passed on the last day of the special session and was signed into law on July 19, 2011 by Governor Perry.

## II. The Task Force's Responsibilities

In proposing rules for managing complex cases as mandated in H.B. 79, the Task Force has not undertaken an independent study of alternative processes that might address this issue. In 2007, there was extensive discussion between Sen. Duncan and members of the trial bar, judges and tort reform groups regarding a number of alternative proposals. The CATF considered several proposals, and the legislative committee that the bills were assigned heard untold hours of testimony regarding various approaches that might be considered. In the end, the legislature and CATF concluded that the appropriate remedy was to provide additional resources to trial courts that must handle these cases. As such, the Task Force has focused its attention on developing rules that are consistent with H.B. 79. Some legislation simply mandates adoption of new rules and provides little guidance other than identifying the issue to be addressed. *See* H.B. 274, 82<sup>nd</sup> Legislative Session, "The Supreme Court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence...." H.B. 274, Sec. 1.01. H.B. 79 is quite specific and instructive in regard to considerations for determining when a case is in need of

additional resources and the process that should be followed in making this determination. Most of this text came from S.B. 1204 and the CATF Final Report. The Task Force concluded that this language should be incorporated whenever possible and has often proposed using specific text from the bill.

### III. Issues Regarding the Proposed Rules

While H.B. 79 provided significant guidance regarding rules necessary to the implementation of the JCAR, there are several issues for which little or no guidance was provided and the Task Force had to decide the appropriate action to be taken. These issues and the basis for the Task Force's decision are discussed below.

- a. Texas Rules of Judicial Administration. H.B. 79 does not state the rules within which these proceedings are to be addressed. The Task Force recommends that the Texas Rules of Judicial Administration be amended by adding Article 16, Rules for Additional Resources for Complex Cases. The proposed rules are consistent with the format used in the Texas Rules of Judicial Administration.
- b. Flexibility. The Task Force determined that the rules should not be overly formal or prescriptive but should allow greater flexibility to the individual Presiding Judge and the Judicial Committee for Additional Resources (JCAR) to determine the process to be followed in a given case. The rules do not proscribe formal motion practice such as that used in Multidistrict Litigation (see Rule 13, Rules of Judicial Administration), rather they depict an informal process that simply states needs and resources requested and the response to those requests.
- c. JCAR Clerk. Because we decided that the process should be an informal one, the Task Force came to a decision that filing should not be with the Supreme Court Clerk; instead, requests should be filed with OCA with a copy to the Presiding Judge of the region. This should expedite the process and is consistent with our informal process. It is also consistent with the ongoing support that OCA provides to the Presiding Judges, as well as the use of the OCA director as the focal point for appeals of the denial of judicial records under Rule 12, Rules of Judicial Administration.

- d. Operating rules. The rule does not include formal meeting requirements for the JCAR such as a quorum requirement or deadlines for ruling. The Presiding Judges already operate as a committee and have existing operating procedures, and therefore the Task Force saw no need to micro-manage that process.
- e. Gatekeeping Function of Presiding Judge. The proposed rules seek to reflect and not disrupt the Presiding Judge's existing role as gatekeeper, using state resources to address individualized solutions, typically through the assignment of a visiting judge. This is consistent with language in the legislation and the fact that this judge has a greater understanding of needs within a region and of the specific court.
- f. JCAR Role in Disasters. The Task Force considered expanding the considerations for determining when a case requires additional resources to include cases affected by disasters. During the last decade Texas has experienced two catastrophic hurricanes, in which the day-to-day operations in courthouses throughout the Gulf Coast were disrupted for periods of time. However, it does not appear that the legislature considered disasters and the impact that such events might have on hundreds of cases in this legislation. The legislature has authorized the Supreme Court to modify or suspend procedures for the conducting of court proceedings during the existence of a disaster. See Government Code §22.2035. The Task Force believes that formal procedures and rules should be developed to ensure that needed judicial resources are made available in a timely manner in the event of disasters.
- g. Legislature's Failure to Fund JCAR. The legislature failed to appropriate funds for JCAR during the 2012-2013 biennium. Additionally, H.B. 74.254(f) states, "The judicial committee for additional resources may not provide additional resources under this subchapter in an amount that is more than the amount appropriated for this purpose." The Task Force is concerned that this might be interpreted so as to preclude JCAR from finding that a case requires additional resources and preclude OCA from utilizing funds from other sources that are appropriated for such purposes. As an example, in the FLDS case OCA was able to provide additional resources through funds from a number of sources that were not

originally budgeted for this case including the use of outside grants. The fact that the legislature has not appropriated funds for this project should not preclude OCA, the Presiding Regional Judge and JCAR from seeking to assist a trial court in need of additional resources. Rule 16.11(b) is intended to address this issue.

- h. Final Report. Rule 16.12 requires that OCA prepare a final report at the conclusion of a case that receives additional resources from JCAR. The report must identify the resources provided and their estimated cost. This will assist OCA in seeking appropriations from the legislature in future sessions.

#### IV. Recommendations

The Task Force recommends that

- a. pursuant to Section 31(a) of Article V of the Texas Constitution and Section 74.024 of the Texas Government Code, the Texas Rules of Judicial Administration be amended to include Rule 16, Additional Resources for Certain Cases, a copy of which is attached hereto as Appendix A; and
- b. the legislature adequately fund this program.

Approved October 13, 2011.



Richard C. Hile, Chair  
Task Force

# **APPENDIX A**



# **RULES OF JUDICIAL ADMINISTRATION**

## **Rule 16. Additional Resources for Certain Cases**

### **16.1 Authority and Applicability.**

- (a) Authority. This rule is promulgated under Sections 74.251-74.257 of the Texas Government Code.
- (b) Applicability. This rule applies to civil actions pending on or after May 1, 2012 in a constitutional county court, county court at law, probate court, or district court and that may require additional judicial resources.
- (c) Other Cases. This rule does not apply to:
  - (1) criminal matters;
  - (2) grants for local court improvement under Section 72.029, Texas Government Code;
  - (3) cases in which judicial review is sought under Subchapter G, Chapter 2001; or
  - (4) cases that have been transferred by the judicial panel on multidistrict litigation to a district court for consolidated or coordinated pretrial proceedings under Chapter 74, Government Code, Subchapter H.

### **16.2 Definitions.**

As used in this rule:

- (a) *Judicial Committee for Additional Resources (JCAR)* means the judicial committee designated pursuant to Section 74.254 of the Texas Government Code, including the chief justice of the supreme court and the presiding judges of the administrative judicial regions.
- (b) *JCAR Clerk* means the Administrative Director of the Office of Court Administration.
- (c) *Presiding Officer* means the chief justice of the supreme court.

(d) *Presiding Judge of the Administrative Judicial Region* means the judge appointed pursuant to Section 74.005 of the Texas Government Code.

(e) *Trial Court* means the judge of the court in which a case is filed or assigned.

### **16.3 Duties of the Office of Court Administration.**

(a) The Office of Court Administration (OCA) will assist the JCAR in carrying out its duties under this rule by:

- (1) providing support staff and meeting facilities or technology to the JCAR;
- (2) requesting appropriations for additional judicial resources from the legislature; and
- (3) providing additional resources approved by the JCAR to the trial court.

(b) The JCAR Clerk shall file requests for additional resources and any orders or reports relating to additional resources provided to a trial court pursuant to this rule.

### **16.4 Considerations for Determining Whether a Case Requires Additional Resources.**

(a) In determining whether a case requires additional judicial resources the trial court, the presiding judge of the administrative judicial region and the JCAR may consider whether a case involves or is likely to involve:

- (1) a large number of parties who are separately represented by counsel;
- (2) coordination with related actions pending in one or more courts in other counties of this state or in one or more United States district courts;
- (3) numerous pretrial motions that present difficult or novel legal issues that will be time-consuming to resolve;

- (4) a large number of witnesses or substantial documentary evidence;
- (5) substantial post-judgment supervision;
- (6) a trial that will last more than four weeks; or
- (7) a substantial additional burden on the trial court's docket and the resources available to the trial court to hear the case.

**16.5 Additional Resources.** The presiding judge of the administrative judicial region and the JCAR may find that one or more of the following resources should be made available:

- (a) the assignment of an active or retired judge, subject to the consent of the trial court;
- (b) additional legal, administrative, or clerical personnel;
- (c) information and communication technology, including case management software, video teleconferencing, and specially designed courtroom presentation hardware or software to facilitate presentation of the evidence to the trier of fact;
- (d) specialized continuing legal education;
- (e) an associate judge;
- (f) special accommodations or furnishings for the parties;
- (g) other services or items determined necessary to try the case; and
- (h) any other resources the committee considers appropriate.

**16.6 Procedure for Requesting Additional Resources.**

- (a) Motion for Additional Resources: A party in a case may move for the case to be designated as a case requiring additional resources to ensure efficient judicial management. The motion must be in writing and must state
  - (1) considerations that the case involves or is likely to involve that justify additional judicial resources;
  - (2) additional judicial resources that will promote the just and efficient conduct of the case;
  - (3) the time by which the additional resources should be provided; and
  - (4) whether all parties in the case agree to the motion.

- (b) Request by Trial Court. A trial court may request that a case be designated as requiring additional resources to ensure efficient judicial management.
- (c) Determination by Trial Court. Upon the motion of a party in a case, or on the trial court's own motion, the trial court shall determine whether the case will require additional resources to ensure efficient judicial management. The trial court may in its discretion conduct an evidentiary hearing for the purpose of making a determination or may direct the attorneys for the parties and the parties to appear before it for a conference to consider whether a case should be designated as requiring additional resources.
- (d) Order Requesting Additional Judicial Resources. If the trial court determines that a case requires additional resources it must:
  - (1) enter an order describing the nature of the case, identifying the conditions that justify the additional resources and specific additional resources that are needed; and
  - (2) forward the order to the JCAR Clerk at the mailing address or email address listed on the "Contact Information" page of OCA's website, currently located at <http://www.courts.state.tx.us/contact.asp>; and
  - (3) submit a copy of the order to the presiding judge of the administrative region in which the case is filed
- (e) Notification of Order Requesting Additional Resources. Upon receiving an order requesting additional resources, the JCAR clerk must submit the order to the JCAR. Within 15 days of receiving the order, the JCAR Clerk or the presiding judge of the affected administrative judicial region shall provide notice to the trial court of any action on the request, even if to report the inability to take action.

## **16.7 Review of Order Requesting Additional Resources.**

- (a) Review by Presiding Judge of Administrative Judicial Region. Upon receipt of the trial court's order requesting additional resources, if the presiding judge of the administrative judicial region in which the case is filed agrees with the trial court's

determination that a case will require additional resources to ensure efficient judicial management, the presiding judge shall:

- (1) use resources previously allotted to the presiding judge, if the resources are permitted to be used for the purpose requested; or
  - (2) submit a request for specific additional resources to the JCAR.
- (b) Review by the JCAR. If the additional resources requested by the trial court include resources not previously allotted to the presiding judge of the administrative judicial region, the JCAR shall determine whether additional resources are required.
- (c) Determination of Order Requesting Additional Resources. The presiding judge of the administrative judicial region in which the case is filed or the JCAR shall file an order approving or denying a trial court's request for additional resources with the JCAR Clerk. Upon receipt of the order, the JCAR Clerk shall transmit a copy of the order to the affected trial court.

## **16.8 Implementation of Order for Additional Resources.**

The presiding judge of the administrative judicial region in which the case is filed and the Office of Court Administration shall cooperate with the trial court or its designee in providing the approved additional resources.

## **16.9 Effect on the Trial Court of the Motion for Additional Resources.**

- (a) Jurisdiction. The filing of a motion under this rule does not deprive the trial court of jurisdiction or suspend proceedings or orders in that court.
- (b) No Stay or Continuance of Proceedings. The filing of a motion under this rule is not grounds for a stay or continuance of the proceedings during the period the motion or request is being considered.

#### **16.10 Review of Orders by the Trial Court, Presiding Judge or JCAR.**

An order of the trial court, the presiding judge of the administrative region, or the JCAR granting or denying a request or motion for additional resources is not appealable or subject to review by mandamus.

#### **16.11 Provisions for Additional Resources.**

- (a) Costs of Additional Resources.** The costs for additional resources provided under this rule shall be paid by the state and may not be taxed against any party in the case for which the resources are provided or against the county in which the case is pending.
- (b) Appropriation for Additional Resources.** Additional resources are subject to the availability of appropriations made by the legislature or as provided through budget execution authority or other budget adjustment method, or from funds made available by grants or donations.

#### **16.12 Final Report**

At the conclusion of a case found to require additional resources, OCA shall prepare and file a report stating the additional resources provided to a court and their estimated costs. This report shall be filed with the JCAR Clerk.