# The Supreme Court of Texas



201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365



January 31, 2005

Hon. Joe Nixon, Chairman
House Civil Practices Committee
Texas House of Representatives
Austin TX 78768-2910

Re: Interlocutory appeals by party agreement and court permission — Texas Government Code § 51.014(d)-(f)

Dear Chairman Nixon:

The 77th Legislature passed HB 978, sponsored by Representative Eiland, which amended section 51.014 of the Texas Government Code regarding interlocutory appeals, to provide for appeals from interlocutory orders by agreement of the parties and with the permission of the trial court and the court of appeals. Those provisions, subsections (d)-(f), state:

> (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:
>
> (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;
>
> (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
>
> (3) the parties agree to the order.
>
> (e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.
>
> (f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory

order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

There are no rules in the Texas Rules of Appellate Procedure governing such appeals, and the courts of appeals have begun to identify issues regarding the proper procedures for such appeals.[1] For example: does subsection (f) require a formal application to the court of appeals? if so, what must (or should) it contain? how long can it be? can any party file it, or must all parties file it jointly (since they have agreed to the appeal), or only the person aggrieved by the order? can a party respond (because, e.g., he disagrees with the other party's reason for agreeing to the appeal and has his own)? is a separate notice of appeal also required? can the 10-day period be extended as in other appeals? what considerations should guide a court of appeals in determining whether to permit such an interlocutory appeal? must (or should) the appeal be expedited?

The Supreme Court Advisory Committee has undertaken consideration of these and other issues. I anticipate that in the next few months the Committee will recommend to the Court clear, workable procedural that will further the statutory purpose.

In the course of its deliberations thus far, the Committee has identified the following three issues which would benefit from legislative clarification by statutory amendment:

1. Section 51.014(d)-(f) appears to allow appeal only from orders of the district court, not the county court. By contrast, section 51.014(a) allows appeal "from an interlocutory order of a district court, county court at law, or county court". The provisions do not themselves indicate why the appeal allowed in subsections (d)-(f) should be restricted to district court orders. As you know, statutory county courts have concurrent jurisdiction with the district court in many areas of the State, and in El Paso County, cases are randomly assigned among the county and district courts. It is difficult to see why parties' appellate rights should depend on the initial assignment of a case between two courts with concurrent jurisdiction.

2. The 10-day period for applying to the court of appeals is extremely short and may be overlooked by parties. If it cannot be extended, as other periods for perfecting appeal can be, parties cannot be relieved of mistakenly missed deadlines, and the usefulness of the procedure will be impaired. There is also the possibility that the trial court might be persuaded to reissue the order to allow the parties to appeal again, which if effective, would simply be a waste of energy. If the statute provided instead that appeals would be treated as accelerated under the Texas Rules of Appellate Procedure, the period would become 20 days and would be subject to extension. In addition, other procedures already in place for accelerated appeals, such as briefing schedules and calendaring for oral argument, would apply as well, consistent with the purpose of the statute.

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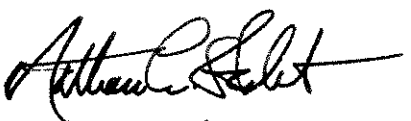
[1] *See, e.g., Diamond Prods. Int'l, Inc. v. Handsel*, 142 S.W.3d 491 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *id.* at 494-496 (Frost, J., concurring); *Stolte v. County of Guadalupe*, 139 S.W.3d 406 (Tex. App.—San Antonio 2004, no pet.); *In re D.B.*, 80 S.W.3d 698 (Tex. App.—Dallas 2002, no pet.).

3. The 10-day period runs from the date the interlocutory order is "entered". For at least two decades, much effort has been spent to set a single date for appellate timetables — the date the order or judgment appealed from is signed. Not only is a uniform standard crucial to protecting parties from unexpected procedural traps, the date of signing avoids ambiguities that have grown up over the years around the concept of "entering" an order.

These issues do not appear to be controversial, and legislative resolution of them would spare parties and courts unnecessary arguments over them.

I respectfully commend these matters to you for your consideration during this Session.

Sincerely,



Nathan L. Hecht
Justice

c: Hon. Craig Eiland
Texas State Representative

Justices of the Supreme Court of Texas

Mr. Charles L. "Chip" Babcock
Chairman, Supreme Court Advisory Committee