MEMORANDUM

To: Appellate Subcommittee Members

From: Bill Dorsaneo

cc: Jody Hughes

Date: June 5, 2007

Re: Proposals regarding TRAP 9.8, 20.1, 41, and 52.6

This is an abbreviated version of the 1/8/2007 memo addressing the proposed revisions discussed and voted on at our October 2006 and February and April 2007 meetings. Proposed new 9.8 and amended 52.6 have not been discussed by the Committee. The proposed revisions to 20.1, and 41 were addressed by the Committee at the April meeting but may need further brief discussion to clarify the Committee's preference for either of the two alternatives versions presented for each rule. Any update regarding TRAP 24 will be circulated separately.

Rule 9. Papers Generally

9.8 Use of Minors' Initials in Parental-Rights Termination Cases.

(a) In Appellate Briefing. In appeals or original proceedings involving the termination of parental rights, the name of any minor child who was the subject of a termination proceeding should be identified in any brief filed with or received by an appellate court only by the initial letters of the minor's first, middle, and last name, unless the court orders otherwise. If multiple minors in the case share the same initials, numbers should be used in conjunction with the initials to distinguish between the minors, with lower numbers assigned to earlier-born children.

(b) In Copies of Appendix Items. To the extent any papers a party desires to include as necessary or optional items in an appendix to a brief or petition contain the name of a minor child who was the subject of a termination proceeding, the copies of any such papers to be included in the appendix must be redacted so that the minor is identified only by the initial letters of the minor's first, middle, and last name. Nothing in this rule authorizes alteration of the original appellate record except as specifically authorized by court order.

Status: Ready for SCAC discussion

Rule 20. When Party is Indigent

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 compliance with this rule.

(2) the claim of indigence is not contested, is not contestable, or if contested, the contest is not sustained by written order; and

(3) the party timely files a notice of appeal.

(b) *Contents of affidavit.* The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

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(12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

(c) *IOLTA Certificate.* If the appellant proceeded in the trial court without payment of fees pursuant to an IOLTA certificate, an additional IOLTA certificate may be filed in the appellate court 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.

~~(c)~~(d) *When and Where Affidavit Filed.*

(1) Appeals. Except as provided in paragraph (3), a~~A~~n 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 of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) 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.

(2) Other proceedings. [no change]

(3) Extension of time. The appellate court may extend the time to file an affidavit of indigence 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). But the appellate court may not dismiss the appeal on the ground that the appellant has failed to file [an affidavit or] [a sufficient affidavit] of indigence without providing the appellant a reasonable time to do so after notice from the court.

OR

(3) Extension of time. The appellate court may extend the time to file an affidavit of indigence 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). The appellate court must notify the

appellant of the appellant's failure to file a sufficient affidavit of indigence and must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit of indigence or a sufficient affidavit of indigence before dismissing the appeal or affirming the trial court's judgment due to the appellant's failure to comply with paragraph (1).

~~(d)~~(e) *Duty of Clerk.* [no change]

~~(e)~~(f) *Contest to affidavit.* The clerk, the court reporter, the court recorder, or any party may challenge ~~the claim of indigence~~ an affidavit that is not accompanied by an IOLTA certificate by filing—in the court in which the affidavit was filed—a contest to the affidavit of indigence.

~~(f)~~(g) *No contest filed.* [no change]

~~(g)~~(h) *Burden of proof.* [no change]

~~(h)~~(i) *Decision in appellate court.* [no change]

~~(i)~~(j) *Hearing and decision in the trial court.* [no change]

~~(j)~~(k) *Record to be prepared without payment.* [no change]

~~(k)~~(l) *Partial payment of costs.* [no change]

~~(l)~~(m) *Later ability to pay.* [no change]

~~(m)~~(n) *Costs defined.* As used in this rule, *costs* means:

(1) a filing fee relating to the case in which the affidavit of inability is filed; ~~and~~
(2) the charges for preparing the appellate record in that case; and
(3) in cases where the proceedings were electronically recorded, the actual expense of preparing the appendix or the amount prescribed for official reporters, as provided in Rule 38.5(f).

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

Status: approved 10/20/06 at 15022, 4/27/07 at 15799-803; **however, at the 4/27/07 meeting, the Committee did not express a preference between either of the 2 proposed alternatives.**

Rule 41. Panel and En Banc Decision

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, or a qualified 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.

OR

(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 retired or former appellate justice or appellate judge, or an active district court judge to sit on the panel to consider the case as provided in chapters 74 and 75 of the Government Code, 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, or a qualified active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

OR

(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, or an active district court judge to sit with the court of appeals to consider the case as provided in chapters 74 and 75 of the Government Code. 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, 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.

OR

(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, or an active district court judge to sit with the court of appeals to consider the case as provided in chapters 74 and 75 of the Government Code. The reconstituted court may order the case reargued.

[Note: the Appellate Subcommittee was invited to suggest new language if it believes a broad change is needed to the current procedure of requiring an initial assignment of three judges to hear cases submitted after oral argument. 2/16/07 at 15600. The above draft reflects two changes from previous drafts. First, the two alternatives are split into separate paragraphs, instead of brackets as previously shown. Also, the second alternative has been slightly revised to ensure that the language regarding Gov't Code chap. 74-75 clearly applies to assigned district-court judges as well. -jdh 3/28/07]

Status: the SCAC implicitly approved the proposal at the 4/27/07 meeting but did not express a preference for either of the two alternatives presented (15889).

Rule 52. Original Proceedings

52.6 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 15 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Status: Ready for SCAC discussion