MEMORANDUM

To: Supreme Court Rules Advisory Committee

From: Bill Dorsaneo

cc: Jody Hughes

Date: April 25, 2007

Re: Nathan Hecht Letter 9/22/06

This is an updated version of the 1/8/2007 memo addressing the proposed revisions discussed and voted on at our October 2006 and February 2007 meetings. The proposed revisions to 20.1, 41, and 49 have been discussed by the subcommittee and are ready for discussion by the full Committee. The modifications to 20.1 are based on the changes discussed at the February meeting, along with some additional changes I believe are needed based on a comparison with TRCP 145. Rule 24 below incorporates Elaine's latest thoughts and notes based on the February meeting but requires further discussion by the subcommittee. Rule 41 suggests some new alternative language but does not undertake to substantively rewrite the rule. As to Rule 49, this version includes the recommended amendments previously approved by the full committee as well as a few new ones; on further reflection, I believe some additional amendments are needed for clarification, as shown and discussed below.

Rule 13. Court Reporters and Court Recorders

13.2 Additional Duties of Court Recorder. The official court recorder must also:

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(f) if requested by any party to the appeal, prepare and file a transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2).

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.

(b) 30 days after the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.7, and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under Rule 49.8.

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 contestible, 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.* [no change]

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

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.2 Amount of Bond, Deposit or Security

(c) *Determination of Net Worth*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. ~~The affidavit is prima facie evidence of the debtor's net worth.~~ A trial court clerk must receive and file a net worth affidavit tendered for filing by a judgment debtor. A net worth affidavit filed with the trial court clerk is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit or security required to suspend enforcement of the judgment.

Bill,

The proposed changes to (c)(1) have not been presented to the committee. Our subcommittee discussion focused upon the reality that clerks have struggled with the responsibility of determining the sufficiency of a net worth affidavit. [My conversation with the clerks revealed in some counties they don't even try and simply tell the parties to get a court

order. Other clerks I spoke with advised they don't have the financial acumen to assess the affidavit, so they always accept the affidavit (thereby suspending enforcement of the judgment) and leave it the judgment creditor to file a contest.] Thus, the subcommittee agreed the better practice is to relieve the trial court clerks of that responsibility and simply direct the clerks to accept the affidavit. The filed affidavit would operate to suspend judgment enforcement unless and until a contest is filed and sustained and the judgment debtor fails to provide the additional security ordered within 20 days of the order.
The trial court always has the authority pursuant to TRAP 24.2 (d) to enjoin the judgment debtor from dissipating or transferring assets outside the normal course of business. Further, TRAP 24.1(e) empowers the court to "make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause."
-Elaine

(2) ~~Contest; Discovery~~ ~~*Motion to Strike Insufficient Affidavit.* A judgment creditor may move to strike a net worth affidavit that does not [state the debtor's net worth or that does not state complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained] *or* [comply with Rule 24.2(c)(1)]. If the trial court determines that the affidavit is deficient, the court must inform the judgment debtor why the affidavit is deficient and afford the judgment debtor a reasonable opportunity to comply with Rule 24.2(c)(1). If an affidavit conforming with the trial court's order is not filed in accordance with the court's order, the trial court may order that enforcement of the judgment is no longer suspended as to that judgment debtor.~~

[Note: the SCAC voted 15-9, 2/16/07 at 15515, against a section providing for a motion to strike a deficient net worth affidavit. -jdh]

(2) Contest; Discovery; Hearing. A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

The trial court must hear a judgment creditor's contest of the claimed net worth of the judgment debtor promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for twenty days

after the trial court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

Bill- the discussion at the February SCAC meeting focused upon the requirement that the trial judge make a finding as to net worth in the situation where the proof is insufficient to allow such a finding. It was suggested that language be added after the word "determination" as follows to address this concern: "or why the proof of claimed net worth is insufficient to allow the court to make a net worth finding". The opponents to the suggestion opined that adding that language would emasculate the rule and flies in the face of legislative intent. I agree with the latter position and do not favor the proposed amendment. My experience at these net worth hearings is that the judgment creditor, having conducted discovery, puts on evidence of the judgment debtor's net worth as well. No formal vote was taken of (c)(2).

It is imperative that parties know whether judgment enforcement is suspended or not. The last two proposed sentences were included to provide a date certain for a judgment debtor to comply with a trial court order of additional security (following a net worth contest).

-Elaine

[note: the SCAC debated whether the trial court should be able to simply deny a judgment debtor's 50% net worth bond on the basis that the debtor had not sufficiently established his net worth; Carlson to work on new language? 2/16/07 at 15528. -jdh].

24.4 Appellate Review

(a) Motions; Review. On a party's motion to the appellate court, that court may review:

(1) ~~the trial court's ruling on a Rule 24.2(c)(2) motion to strike a net worth affidavit;~~ [originally proposed as added language; now shown as deleted to correspond with SCAC vote against including provision governing motions to strike, noted above]

(~~1~~2) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);

(~~2~~3) the sureties on any bond;

(~~3~~4) the type of security;

(~~4~~5) the determination whether to permit suspension of enforcement; and

(~~5~~6) the trial court's exercise of discretion under Rule 24.3(a).

(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) *Temporary Orders*. The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) *Appellate Court.* A motion filed under paragraph (a) should be filed in the court of appeals having appropriate appellate jurisdiction over the underlying judgment. The court of appeals ruling is subject to review on motion to the Texas Supreme Court.

[note: the Committee voted 22-2 to approve this language, substituting "appropriate" for the previously suggested "potential," 2/16/07 at 15574. jdh]

(~~d~~e) *Action by Appellate Court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(~~e~~f) *Effect of Ruling.* If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

[Note: Prof. Carlson will address at the April 2007 meeting whether the judgment is superseded if debtor fails to obtain a finding in line with the debtor's net worth affidavit, 2/16/07 at 15575. jdh]

Rule 34. Appellate Record

34.6 Reporter's Record

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(b) *Request for preparation.*

(1) Request to court reporter or court recorder. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the reporter's record. The request must designate the exhibits to be included. A request ~~to the court reporter but not the court recorder~~ must also designate the

portions of the proceedings to be included.

Rule 35. Time to File Record; Responsibility for Filing Record

35.3 Responsibility for Filing Record

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(b) *Reporter's record.* The official or deputy court reporter or court recorder is responsible for preparing, certifying and timely filing the reporter's record if:

(1) a notice of appeal has been filed;

(2) the appellant has requested the reporter's record be prepared; and

(3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's or the recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without paying the fee.

Rule 38. Requisites of Briefs

38.1 Appellant's Brief

The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel* [no change]

(b) *Table of Contents.* [no change]

(c) *Index of Authorities.* [no change]

(d) *Statement of the Case*

(e) *Request for Oral Argument.* The brief must state on its front cover whether oral argument is requested or waived. A statement explaining why oral argument should, or should not, be permitted may also be included in the brief. The statement should state how the court's decisional process would, or would not, be aided by oral argument. Any such statement shall not exceed one page.

OR

(e) *Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should, or should not, be permitted. The statement should address how the court's decisional process would, or would not, be aided

by oral argument. Any such statement must not exceed one page. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of its brief.

(~~e~~f) *Issues Presented.* [no change]

(~~f~~g) *Statement of Facts.* [no change]

(~~g~~h) *Summary of the Argument.* [no change]

(~~h~~i) *Argument.* [no change]

(~~i~~j) *Prayer.* [no change]

(~~j~~k) *Appendix in Civil Cases.* [no change]

38.4 Length of Briefs
An appellant's brief or appellee's brief must be no longer than 50 pages, exclusive of the pages containing the identity of parties and counsel, any statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix.

38.5 Appendix for cases recorded electronically.
In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

(1) In general. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. A transcription prepared and filed by the court recorder at the request of a party pursuant to Rules 13.2(f) and 34.6(b)(1) satisfies this requirement. Unless another party objects, the transcription will be presumed accurate.

Rule 39. Oral Argument; Decision Without Argument

Existing text:

39.1 Right to Oral Argument. Except as provided in 39.8, any party who has filed a brief and who has timely requested oral argument may argue the case to the court when the case is called for argument.

39.8 Cases Advanced Without Oral Argument. In its discretion, the court of appeals may decide a case without oral argument if argument would not

significantly aid the court in determining the legal and factual issues presented in the appeal.

Proposed to be replaced as follows:

39.1 Right to Oral Argument

(a) *In General.* Except as provided ~~in 39.8~~ in paragraph (b), any party who has filed a brief and who has timely requested oral argument may argue the case. ~~to the court when the case is called for argument.~~

(b) *Standards.* If requested by any party, oral argument must be allowed in the case unless a panel of three judges who have examined the briefs unanimously agrees that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided;

(3) the facts and legal arguments are adequately presented in the briefs and record; or

(4) the decisional process would not be significantly aided by oral argument.

~~**39.8 Cases Advanced Without Oral Argument.** In its discretion, the court of appeals may decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.~~

39.9~~8~~ Clerk's Notice. [no change]

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]

Rule 49. Motion and Further Motion for Rehearing and Motion for En Banc Reconsideration

49.1 Motion for Rehearing. A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing. After a motion for rehearing is decided, another ~~a further~~ motion for rehearing may be filed within 15 days of the court's action if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues an opinion in overruling a motion for rehearing.

49.2 Response. No response to a motion for rehearing need be filed unless the court so requests. A motion will not be granted unless a response has been filed or requested by the court. [no change]

49.3 **Decision on Motion.** A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument. [no change]

49.4 **Accelerated Appeals.** In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion. [no change]

~~**49.5 Further Motion for Rehearing.** After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:~~

~~**(a)** modifies its judgment;~~

~~**(b)** vacates its judgment and renders a new judgment; or~~

~~**(c)** issues an opinion in overruling a motion for rehearing.~~

49.6~~5~~ **Amendments.** A motion for rehearing or a motion for en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

[Note: the proposed changes to the title of Rule 49 and to 49.1, former 49.5, and proposed new 49.5 (currently 49.6, Amendments) above have not been considered by the full SCAC. The other changes to Rule 49 below generally remain in the same form as approved by the full SCAC at the 10/21/06 meeting, except (1) the reference to further motion for rehearing in renumbered 49.7 (extension of time) has been deleted for consistency with the proposed merging of 49.1 and 49.5, and (2) the highlighted portion of the second sentence of renumbered 49.6 below, which as approved by the full SCAC on 10/20/06 previously read "the same party's timely filed motion for rehearing or further motion for rehearing," has been rephrased. The changes to renumbered 49.6 are to clarify that an en banc motion may be filed within 15 days after denial of a properly filed second motion for rehearing, *i.e.*, the en banc motion need not be filed within 15 days after the denial of the initial panel motion, and (in both 49.6 and 49.7) to eliminate the now-redundant reference to "further" MFRs. Also, the subcommittee proposes adding a new Rule 49.10 to relocate portions of existing 53.7(b) addressing motions for rehearing; see the note below proposed new 49.10, below, and proposed new changes to 52.3 and 53.7(b), below. I have also included below the text of the unaltered provisions of Rule 49 for the convenience of viewing the whole rule as proposed to be amended. -jdh]

49.~~7~~6 **En Banc Reconsideration.** A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals' judgment or order is rendered. Alternatively a motion for en banc reconsideration may be filed by a

party no later than 15 days after the overruling of the same party's last timely filed motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision . . .

49.87 Extension of Time
A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing motion for en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.98 Not Required for Review. A motion for rehearing is not required to preserve error and is not a prerequisite to filing:
(a) a motion for en banc reconsideration as provided by Rule 49.6; ~~or~~
(b) a petition for review in the Supreme Court; or
(c) a petition for discretionary review in the court of Criminal Appeals. ~~nor is it required to preserve error.~~

49.~~10~~9 Length of Motion and Response. A motion or response must be no longer than 15 pages. [no change]

49.10 Relationship to Petition for Review. 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.

[Note: proposed new 49.10 consists of text moved verbatim from 53.7(b), except for the title, which is new. In its 4/18/07 conference, the subcommittee concluded that the portions of 53.7(b) addressing motions for rehearing in the court of appeals should be relocated to Rule 49. In response to Justice Hecht's letter of 2/5/07, the subcommittee proposes corresponding amendments to Rule 53.7 and additional changes to Rule 53.2, as shown below.]

Rule 52. Original Proceedings

52.3 Form and Content of Petition.
All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify to the matters stated . . .

[Note: the above language was initially approved by a 13-7 vote at the 10/21/06 meeting. At the same meeting, Justice Bland, Justice Duncan, Judge Christopher, and Pam Baron suggested the below changes to subsections (g) and (j) as an alternative to the above language. That alternative was approved by an 18-4 vote at the February 2007 meeting; however, the Committee subsequently voted 11-8 vote to keep Rule 52 as it is currently written. 2/16/07 at 15625-6. -jdh]

(g) *Statement of Facts*. The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in ~~The statement must be supported by references to~~ the appendix or record.

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(j) *Verification*. The person filing the petition must verify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(~~j~~)(k) *Appendix*. [no change]

Rule 53. Petition for Review

53.2 Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

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(d) *Statement of the Case*. The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

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(9) the disposition of the case by the court of appeals, including the court's disposition of any motions for rehearing or motions for en banc reconsideration. If any motions for rehearing or motions for en banc reconsideration are pending in the court of appeals at the time the petition for review is filed, that information also must be included in the statement of the case.

53.7 Time and Place of Filing.

(a) *Petition*. The petition must be filed with the Supreme Court within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

(b) *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 and motions for en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or motion for en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review, as required by Rule 53.2(d)(9).

[Note: The subcommittee proposes relocating the first three sentences from existing Rule 53.7(b) to new Rule 49.10, with the fourth sentence remaining largely unchanged, as reflected above. And as discussed in the newly added final sentence, changes to Rule 53.2(d)(9) are proposed to address the concerns raised in Justice Hecht's letter of February 5.]