To: Appellate Rules Subcommittee, Texas Supreme Court Advisory Committee
From: Bill Dorsaneo
Date: October 14, 2011
Re: Draft Proposed Appellate Rule 65A

As promised, enclosed please find a draft proposed Appellate Rule 65a, which does not fit neatly into the Appellate Rules because it deals with an original action. (*see* Attachment A) I suggest that the Court may want to consider adding a new SECTION 4A. ORIGINAL PROCEEDINGS IN THE SUPREME COURT and changing the title of current section four by adding the word APPELLATE so that the section becomes SECTION FOUR. APPELLATE PROCEEDINGS IN THE SUPREME COURT. I don't think that this proposed rule fits in section three, which deals with "original appellate proceeding[s] seeking extraordinary relief."

This proposed rule could be drafted in a number of ways and could be very detailed. Instead of "reinventing" the wheel, I followed (more or less) the approach taken in Supreme Court Rule 17 (see attachment B).

Both Government Code § 660.2035 and my proposed rule raise a number of questions, including whether the provisions of the Texas Constitution concerning the right to jury trial apply to these types of proceedings. I am attaching a single page from the Hart and Wechsler's Federal Court's casebook ("The Federal Courts and the Federal System") that includes a NOTE ON PROCEDURE IN ORIGINAL ACTIONS.

I want to have a conference call on Tuesday if possible at 4:00 p.m. to discuss what we should do at the next meeting. We will be on the agenda.

ATTACHMENT A

Rule 65A. Original Actions

(a) *Application of Rule.* This rule applies to an action invoking the Supreme Court's exclusive, original mandamus jurisdiction under Government Code § 660.2035.

(b) *Application of Texas Rules of Civil Procedure.* The rules for pleadings prescribed by the Texas Rules of Civil Procedure apply to original actions, except the party seeking relief is the relator and opposing parties are the respondents. In other respects, the Court may use the Texas Rules of Civil Procedure and the Texas Rules of Evidence as guides in resolving the dispute.

(c) *Commencement and Trial of Original Actions.* An original action in the Supreme Court is commenced by the filing of a petition. Service of citation, issued by the clerk of the Supreme Court in the manner prescribed by the Texas Rules of Civil Procedure, is required to obtain jurisdiction over the defendant or defendants named in the petition. If the defendant or defendants respond to the original petition, the Court will decide the issues raised by the pleadings or require that other proceedings be conducted. If a defendant does not respond to the citation, the plaintiff may proceed ex parte. The Court may appoint a special master to take such evidence as may be necessary and to make findings of fact and conclusions of law and to report the master's

findings and conclusions to the Court. [The Court may confirm, modify, correct, reject, reverse or recommit the master's report in resolving the dispute.]

OR

(c) *Commencement and Trial of Original Action.* An original action in the Supreme Court is commenced by the filing of [a motion for leave to file] a petition for mandamus review [and an original petition.] At or before filing the [motion and] petition with the clerk of the Supreme Court, the relator must serve a copy of the [motion and] petition on all parties to the proceeding in accordance with Appellate Rule 9.5. No more than ____ days after the filing of the [motion and] petition, the respondent or respondents may file a response to the petition but it is not mandatory. If no response is timely filed, or if a party files a waiver of response the court will consider the petition without a response. [The Court may not grant the petition before a response has been filed or requested by the court]. The Court thereafter may grant or deny the petition, set it for oral argument, direct the filing of additional documents, or require that other proceedings be conducted. The Court may appoint a special master to take such evidence as may be necessary, to make findings of fact and conclusions of law and to report the master's findings and

conclusions to the Court. [The Court may confirm, modify, correct, reject, reverse or recommit the master's report in resolving the dispute].

that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

PART IV. OTHER JURISDICTION

Rule 17. Procedure in an Original Action

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed, with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

to Law and Fact, with such Exceptions * * * as the Congress shall make." Does that language suggest that Congress may transfer cases from the appellate to the original jurisdiction? Or only that it may exclude them from the appellate jurisdiction in favor of other federal (or state) courts? Notwithstanding the dictum in Marbury and in Ex parte Bollman, 8 U.S. (4 Cranch) 75, 100–01 (1807), that the original and the appellate jurisdictions are mutually exclusive, Chief Justice Marshall's opinion for the Court in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 392–403 (1821), held in the alternative that Congress may grant appellate jurisdiction over cases falling within the original jurisdiction. Why can it not do the reverse?

NOTE ON PROCEDURE IN ORIGINAL ACTIONS

Supreme Court Rule 17.2 provides that in an original action, the "form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides." (Supreme Court Rule 20 governs procedure in applications for extraordinary writs. See pp. 315–16, *infra*.)

Rule 17.3 states that the "initial pleading shall be preceded by a motion for leave to file." The adverse party has 60 days to file a brief in opposition to the motion (Rule 17.5). The Court often disposes of major jurisdictional issues when ruling on the motion for leave to file. Although four votes suffice to grant a writ of certiorari, a majority seems to be needed to grant a motion for leave to file. Oklahoma ex rel. Williamson v. Woodring, 309 U.S. 623 (1940)(motion denied by evenly divided Court); see also pp. 316–18 & note 3, *infra*. During the period 1961–93, 50 of the 102 motions for leave to file were denied, generally without opinion. See McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L.Rev. 185, 188–90 (1993).

Although the Seventh Amendment applies to trials at common law in the Supreme Court (as 28 U.S.C. § 1872 recognizes), no jury trial seems to have been held since the eighteenth century,[1] as original cases have usually been equitable in character. Invariably the Court appoints a special master to take evidence and to prepare findings of fact, which, though in theory only advisory, the Court regularly accepts. See United States v. Raddatz, 447 U.S. 667, 683 n. 11 (1980); but *cf.* Maryland v. Louisiana, 451 U.S. 725, 765 (1981)(Rehnquist, J., dissenting)(referring to the "appellate-type review which this Court necessarily gives to [the special master's] findings and recommendations"). No statute or rule explicitly authorizes this procedure.[2]

See generally Stern, Gressman, Shapiro & Geller, Supreme Court Practice ch. 10 (8th ed.2002).

---

1. See Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794). See also 1 Carson, History of the Supreme Court of the United States 169 n. 1 (1902), describing two unreported jury trials in 1795 and 1797. *Cf.* United States v. Louisiana, 339 U.S. 699, 706 (1950), denying Louisiana's motion for a jury trial.

2. Compare Fed.R.Civ.Proc. 53, which empowers the *district* courts to appoint masters, states that such references "shall be the exception and not the rule", and requires judges in nonjury cases to accept the master's fact-findings unless clearly erroneous.