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To: Members of the Texas Supreme Court Advisory Committee
cc: Chief Justice Nathan L. Hecht, Chip Babcock, Pam Baron, Justice Brett Busby, Blake Hawthorne, Martha Newton, Marti Walker
From: William V. Dorsaneo, III
Subject: Appellate Rule 49 (Item 1 of Chief Justice Hecht's Referral of Rules Issues letter to Mr. Charles L. "Chip" Babcock dated April 18, 2016)
Date: May 25, 2016

The Court has requested that the Committee draft amendments to clarify when a motion for en banc reconsideration may be filed. Currently, as amended in 2008, Rule 49.7 states that a motion for en banc reconsideration may be filed "within 15 days after the court of appeals' judgment or order, or *when permitted*, within 15 days after the court of appeals denial of the party's last timely filed motion for rehearing or en banc reconsideration." Chief Justice Hecht's letter states that "the 'when permitted' language has caused confusion among practitioners and courts."

The purpose of this memorandum is to explain the genesis of the troublesome "when permitted" language by reference to the recommendations made to the Texas Supreme Court in 2008 by the Appellate Rules Subcommittee and the Committee as a whole.

In Miscellaneous Docket No. 08-9017, which was published in 71 Tex. B.J. 286-297 (2008), the Advisory Committee's recommendations for rehearing and en banc reconsideration practice appears in Rule 19 (Plenary Power of the Courts of Appeals and Expiration of Term), Rule 49 (Motion for Rehearing and En Banc Reconsideration) and Rule 53 (Petition for Review). Excerpts from Miscellaneous Docket No. 08-9017 are attached to this memorandum.

Rule 19 was amended to make it clear that a motion for en banc reconsideration should not be considered as a type of motion for rehearing and to

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overrule the Court's opinion in City of San Antonio v. Hartman, 201 S.W.3d 667 (Tex. 2006) to that limited extent.

Rule 49 was redrafted, as reflected in the Comment to 2008 Changes "to include a specific subdivision (Rule 49.6) governing the filing of a motion for en banc reconsideration as distinguished from motions for (panel) rehearing. As recommended by the Committee and as initially ordered by the Court in the first sentence of proposed rule 49.6 of Misc. Docket No. 08-9017:

- A motion for en banc reconsideration can be filed "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." This is what happened in the *Hartman* case and it is the primary reason why the Court ruled that San Antonio's "Motion for Rehearing En Banc" was classified as a motion for rehearing, albeit one governed by special rules. Otherwise, the Court would have been required to dismiss San Antonio's appeal "because the City filed its petition for review too late." *See Id.*

  But in order to make the filing of San Antonio's petition for review timely, the Court developed another concept by holding as follows:

  > Unlike other motions for rehearing, en banc reconsideration may be requested at any time while the court of appeals retains plenary power.

  See Id. at 671.

While these somewhat contradictory holdings in *Hartman* are clever and salvaged San Antonio's appeal, they did not solve the overall practice problem of the relationship of rehearing practice to motions for en banc reconsideration. As shown in the next bullet point, the next sentence of proposed Appellate Rule 49.6 was designed to do so.

- "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."

- Thereafter, under Rule 53.7 (Time and Place of Filing) a petition for review is timely if "filed with the Supreme Court within 45 days after the following . . . (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."

  Under the approach recommended by the Committee, one normal sequence of events would be:

  - court of appeals judgment or order;

  - motion for panel rehearing within 15 days of signing judgment or order;

  - order overruling motion for panel rehearing;

  - motion for en banc reconsideration "no later than 15 days of the overruling of the same party's last timely filed motion for rehearing;

  - petition for review filed within 45 days after court of appeals last ruling on "all timely filed motions for rehearing and all timely filed motions for en banc reconsideration."

Obviously, someone perceived or identified a problem or problems with the Committee's recommended draft as set forth in Misc. Docket No. 08-9017. The 2008 addition of the "when permitted" language in current Appellate Rule 49.7 is probably not the solution. Copies of Misc. Docket Nos. 08-9115 and of Misc. Docket No. 08-9115a are also attached to this memorandum.

Query: Is it possible that the simple deletion of "when permitted" is a sufficient solution? Probably not.

Best regards,

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