

PROPOSED TEXAS RULE OF CIVIL PROCEDURE
PATTERNED AFTER FEDERAL RULE 5.1

Texas Rule of Civil Procedure __. Notice of Constitutional Question.

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a ~~Texas~~ statute must promptly:

Deleted: federal or state

(1) file a notice of constitutional question ~~identifying the statute~~, stating the question and identifying the paper that raises it, if the ~~attorney general is not already participating in the litigation as either a party or counsel~~; and

Deleted: : ¶

¶
(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or ¶
¶
(B) a state statute is questioned and

(2) serve the notice and paper on the ~~attorney general either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.~~

(b) Certification by the Court. ~~In the event that a constitutional question is raised sua sponte by a court, the court must certify to the attorney general that a statute has been questioned, identifying the statute, stating the question and identifying any paper that raises it, if the attorney general is not already participating in the litigation as either a party or counsel.~~

Deleted: parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity

Deleted: A

Deleted: G

Deleted: of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--

Deleted: T

Deleted: , under 28 U.S.C. § 2403,

Deleted: appropriate

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

INTERPRETIVE COMMENTARY

1. Federal Rule of Civil Procedure 5.1—on which Texas Rule of Civil Procedure __ is modeled—is premised on certain fundamental principles. To begin with, our legal system is founded upon the understanding that adversarial process is an essential component of the fair and just resolution of disputes. And when it comes to disputes concerning the constitutionality of a state statute, adversarial process may include participation by state attorneys general. Accordingly, Federal Rule of Civil Procedure 5.1 specifies that state attorneys general have the right to notice and intervention to defend state statutes against constitutional attack in federal court. Likewise, the Texas Legislature has enacted Texas Civil Practice & Remedies Code § 37.006, to provide a similar right within the specific context of declaratory judgment actions in state court. The Advisory Committee recognizes that constitutional challenges to state statutes frequently occur in state court outside the context of declaratory judgments. Accordingly, the Advisory Committee believes that it is appropriate to adopt a rule of Texas civil procedure that mirrors the purpose and effect of Federal Rule of Civil Procedure 5.1.

2. The values served by Federal Rule of Civil Procedure 5.1 must be balanced against the interest in avoiding unnecessary burdens on private litigants. Towards that end, Federal Rule of Civil Procedure 5.1(a) expressly contemplates the possibility of electronic notification. The Office of the Attorney General has stated its intention to establish a method of electronic notification in order to facilitate compliance with these rules. The Advisory Committee believes that the availability of electronic notification should be sufficient to avoid the imposition of any unnecessary burden on litigants. Sufficient notice could be accomplished simply by sending a short letter, or a short message to an electronic address designated by the Office of the Attorney General for this purpose, stating the following: “In Smith v. Jones, No. ____ (____ District Court), Plaintiffs/Defendants argue that Texas ____ Code Section ____ violates the Texas/U.S. Constitution,” along with any relevant motions or briefing attached.

3. Federal Rule of Civil Procedure 5.1(c) grants state attorneys general a specific right to intervene when a state statute is subject to constitutional challenge. In the event that a state attorney general chooses to exercise this right, the state becomes an intervenor in the litigation. As a party to the litigation, the state is subject to the established authority of district courts to ensure that litigants are given reasonable opportunity to be heard, consistent with the need for the litigation to proceed in a fair and expedient manner. The Advisory Committee anticipates that, in cases in which the state intervenes in pending Texas court litigation to defend a state statute against constitutional attack, the state will not participate in a manner that will delay or hinder the efficient administration of justice, and that district courts will continue to discharge their duty to manage litigation in a fair and efficient manner.

4. Failure of notice under this Rule constitutes reversible error on appeal. But it does not result in the forfeiture of any constitutional claim or defense, as Rule __ (d) confirms. On remand, parties may renew their constitutional claim or defense, provided that they comply with the requirements of this Rule.

5. This Rule applies exclusively to state statutes that are subject to either state or federal constitutional challenge. It does not apply to state rules that are subject to constitutional challenge. Nor does it apply to municipal ordinances or franchises, unlike Texas Civil Practice & Remedies Code § 37.006.

6. Federal Rule of Civil Procedure 5.1 draws no distinction between facial and as applied constitutional attacks on state and federal statutes, and the Advisory Committee recommends adopting the same approach here.