SMU

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

Memorandum

To: Members of the Supreme Court Advisory Committee
cc: Chief Justice Nathan L. Hecht, Chip Babcock, Blake Hawthorne, Martha Newton, Marti Walker
From: Bill Dorsaneo
Subject: Proposed Appellate Rule 57
Date: December 10, 2015

Summary of Constitutional Provisions

Art. V, Section 3-b, a 1940 constitutional provision provided and still provides for a direct appeal to the Texas Supreme Court "from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this state, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." Tex. Const. Art. V § 3-b.

2/10/1943, 48th Leg. R.S. Ch. 14, § 1, 1943 Tex. Gen. Laws 14, 14-15 (eff. Jan. 1, 1944). Legislature enacted statute authorizing both types of direct appeals. Civil Procedure Rule 499a, promulgated, effective 12/31/1943. May 29, 1983, 68th Leg., R.S. Ch. 839, § 2, 1983 Tex. Gen. Laws 4767, 4768. Repealed part of statute permitting direct appeals of orders regarding the validity of "State Board or Commission."

Amendment to Art. V, § 3, amended in 1981 to broaden Legislature's ability to prescribe appellate jurisdiction of Texas Supreme Court to "extend to all cases except criminal law matters and as otherwise provided in this Constitution or by law" Tex. Const. art. V, § 3 (effective 1/1/1981; amended 11/6/2001). *See Perry v. Del Rio*, 67 S.W.3d 85, 98n. 4). (Tex. 2001). This probably makes Art V. § 3-b unnecessary.

School of Law
Southern Methodist University PO Box 750116 Dallas TX 75275-0116
214-768-2626 Fax 214-768-4330 wdorsane@mail.smu.edu

New Legislation

The Legislature has now provided for direct appeals to the Texas Supreme Court in cases that do not involve orders granting or denying injunctions on the ground of a statute's constitutionality as provided in Section 22.001(c) of the Government Code. In addition to newly enacted Chapter 22A (Special Three-Judge District Court) of the Government Code, providing a procedure for convening a "three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts," (*see* Tex. Gov't Code § 22A.001 (a)), various other direct appeal statutes have been enacted. *See* Rance Craft, "Go Directly to the Texas Supreme Court, Do Not Pass the Court of Appeals, Do Not Collect a Court of Appeals Disposition," 24th Annual Conference on State and Federal Appeals, UTLAW CLE, June 5-6, 2014; *see also* Appendix A.

Summary of Rule Changes

But like its predecessors, Appellate Rule 57 has been drafted as if section 22.001(c) is the only basis for the Supreme Court's direct appeal jurisdiction. Similarly, as explained in Justice Willett's dissenting opinion in the *Episcopal Diocese* case, "in the vast majority of cases where we have exercised direct appeal jurisdiction, it has been abundantly clear that the trial court issued or denied an injunction on the ground of a statute's constitutionality." *Episcopal Diocese v. Episcopal Church*, 422 S.W.3d 646 (Tex. 2013); *see also Del Rio*, 67 S.W.3d at 98-100 (Phillips, C.J., dissenting).

The following rules of procedure have dealt with the Texas Supreme Court's direct appeal jurisdiction over time. Copies of these rules are attached as Appendix B.

1. Tex. R. Civ. P. 499-a (Direct Appeals) (new rule eff. 12/31/43);
2. Tex. R. Civ. P. 140 (Direct Appeal) (9/1/86)
3. Tex. R. Civ. P. 140 (Direct Appeals) (rewritten in 1990);
4. Tex. R. Ap. P. 57 (current rule).

APPENDIX A

Sec. 1205.021. Authority to Bring Action.

An issuer may bring an action under this chapter to obtain a declaratory judgment as to:

(1) the authority of the issuer to issue the public securities;

(2) the legality and validity of each public security authorization relating to the public securities, including if appropriate:

(A) the election at which the public securities were authorized;

(B) the organization or boundaries of the issuer;

(C) the imposition of an assessment, a tax, or a tax lien;

(D) the execution or proposed execution of a contract;

(E) the imposition of a rate, fee, charge, or toll or the enforcement of a remedy relating to the imposition of that rate, fee, charge, or toll; and

(F) the pledge or encumbrance of a tax, revenue, receipts, or property to secure the public securities;

(3) the legality and validity of each expenditure or proposed expenditure of money relating to the public securities; and

(4) the legality and validity of the public securities.

Sec. 1205.068. Appeals.

(a) Any party to an action under this chapter may appeal to the appropriate court of appeals:

(1) an order entered by the trial court under Section 1205.103 or 1205.104; or

(2) the judgment rendered by the trial court.

(b) A party may take a direct appeal to the supreme court as provided by Section 22.001(c).

(c) An order or judgment from which an appeal is not taken is final.

(d) An order or judgment of a court of appeals may be appealed to the supreme court.

(e) An appeal under this section is governed by the rules of the supreme court for accelerated appeals in civil cases and takes priority over any other matter, other than writs of habeas corpus, pending in the appellate court. The appellate court shall render its final order or judgment with the least possible delay.

History

Enacted by *Acts 1999, 76th Leg., ch. 227 (H.B. 3157), § 1*, effective September 1, 1999; am. *Acts 1999, 76th Leg., ch. 1064 (H.B. 3224), § 6*, effective September 1, 1999.

Sec. 39.303. Financing Orders; Terms.

(a) The commission shall adopt a financing order, on application of a utility to recover the utility's regulatory assets and other amounts determined under Section 39.201 or 39.262, on making a finding that the total amount of revenues to be collected under the financing order is less than the revenue requirement that would be recovered over the remaining life of the regulatory assets or other amounts using conventional financing methods and that the financing order is consistent with the standards in Section 39.301.

(b) The financing order shall detail the amount of regulatory assets and other amounts to be recovered and the period over which the nonbypassable transition charges shall be recovered, which period may not exceed 15 years. If an amount determined under Section 39.262 is subject to judicial review at the time of the securitization proceeding, the financing order shall include an adjustment mechanism requiring the utility to adjust its rates, other than transition charges, or provide credits, other than credits to transition charges, in a manner that would refund over the remaining life of the transition bonds any overpayments resulting from securitization of amounts in excess of the amount resulting from a final determination after completion of all appellate reviews. The adjustment mechanism may not affect the stream of revenue available to service the transition bonds. An adjustment may not be made under this subsection until all appellate reviews, including, if applicable, appellate reviews following a commission decision on remand of its original orders, have been completed.

(c) Transition charges shall be collected and allocated among customers in the same manner as competition transition charges under Section 39.201.

(d) A financing order shall become effective in accordance with its terms, and the financing order, together with the transition charges authorized in the order, shall thereafter be irrevocable and not subject to reduction, impairment, or adjustment by further action of the commission, except as permitted by Section 39.307.

(e) The commission shall issue a financing order under Subsections (a) and (g) not later than 90 days after the utility files its request for the financing order.

(f) A financing order is not subject to rehearing by the commission. A financing order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the financing order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

(g) At the request of an electric utility, the commission may adopt a financing order providing for retiring and refunding transition bonds on making a finding that the future transition charges required to service the new transition bonds, including transaction costs, will be less than the future transition charges required to service the transition bonds being refunded. On the retirement of the refunded transition bonds, the commission shall adjust the related transition charges accordingly.

History

Enacted by *Acts 1999, 76th Leg., ch. 405 (S.B. 7), § 39*, effective September 1, 1999; am. *Acts 2007, 80th Leg., ch. 1186 (H.B. 624), § 4*, effective June 15, 2007.

Sec. 36.405. Determination of System Restoration Costs.

(a) An electric utility is entitled to recover system restoration costs consistent with the provisions of this subchapter and is entitled to seek recovery of amounts not recovered under this subchapter, including system restoration costs not yet incurred at the time an application is filed under Subsection (b), in its next base rate proceeding or through any other proceeding authorized by Subchapter C or D.

(b) An electric utility may file an application with the commission seeking a determination of the amount of system restoration costs eligible for recovery and securitization. The commission may by rule prescribe the form of the application and the information reasonably needed to support the application; provided, however, that if such a rule is not in effect, the electric utility shall not be precluded from filing its application and such application cannot be rejected as being incomplete.

(c) The commission shall issue an order determining the amount of system restoration costs eligible for recovery and securitization not later than the 150th day after the date an electric utility files its application. The 150-day period begins on the date the electric utility files the application, even if the filing occurs before the effective date of this section.

(d) An electric utility may file an application for a financing order prior to the expiration of the 150-day period provided for in Subsection (c). The commission shall issue a financing order not later than 90 days after the utility files its request for a financing order; provided, however, that the commission need not issue the financing order until it has determined the amount of system restoration costs eligible for recovery and securitization.

(e) To the extent the commission has made a determination of the eligible system restoration costs of an electric utility before the effective date of this section, that determination may provide the basis for the utility's application for a financing order pursuant to this subchapter and Subchapter G, Chapter 39. A previous commission determination does not preclude the utility from requesting recovery of additional system restoration costs eligible for recovery under this subchapter, but not previously authorized by the commission.

(f) A rate proceeding under Subchapter C or D shall not be required to determine the amount of recoverable system restoration costs, as provided by this section, or for the issuance of a financing order.

(g) A commission order under this subchapter is not subject to rehearing. A commission order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

History

Enacted by *Acts 2009, 81st Leg., ch. 1 (S.B. 769), § 1*, effective April 16, 2009.

Sec. 2306.932. Injunctive Relief.

(a) A district court for good cause shown in a hearing and on application by the department, a migrant agricultural worker, or the worker's representative may grant a temporary or permanent injunction to prohibit a person, including a person who owns or controls a migrant labor housing facility, from violating this subchapter or a rule adopted under this subchapter.

(b) A person subject to a temporary or permanent injunction under Subsection (a) may appeal to the supreme court as in other cases.

History

Am. *Acts 2005, 79th Leg., ch. 60 (H.B. 1099), § 1*, effective September 1, 2005 (renumbered from *Health and Safety Code Sec. 147.012*).

Annotations

Notes

STATUTORY NOTES

Effect of amendments.

2005 amendment, in (a), added "a migrant agricultural worker, or the worker's representative" and "including a person who owns or controls a migrant labor housing facility," and twice substituted "subchapter" for "chapter."

Sec. 17.62. Penalties.

(a) Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with Section 17.60 or 17.61 of this subchapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material or merchandise or sample of merchandise is guilty of a misdemeanor and on conviction is punishable by a fine of not more than $5,000 or by confinement in the county jail for not more than one year, or both.

(b) If a person fails to comply with a directive of the consumer protection division under Section 17.60 of this subchapter or with a civil investigative demand for documentary material served on him under Section 17.61 of this subchapter, or if satisfactory copying or reproduction of the material cannot be done and the person refuses to surrender the material, the consumer protection division may file in the district court in the county in which the person resides, is found, or transacts business, and serve on the person, a petition for an order of the court for enforcement of Sections 17.60 and 17.61 of this subchapter. If the person transacts business in more than one county, the petition shall be filed in the county in which the person maintains his principal place of business, or in another county agreed on by the parties to the petition.

(c) When a petition is filed in the district court in any county under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order required to carry into effect the provisions of Sections 17.60 and 17.61 of this subchapter. Any final order entered is subject to appeal to the Texas Supreme Court. Failure to comply with any final order entered under this section is punishable by contempt.

History

Enacted by Acts 1973, 63rd Leg., ch. 143 (H.B. 417), § 1, effective May 21, 1973.

Sec. 36.053. [Expires September 1, 2015] Investigation.

(a) The attorney general may take action under Subsection (b) if the attorney general has reason to believe that:

(1) a person has information or custody or control of documentary material relevant to the subject matter of an investigation of an alleged unlawful act;

(2) a person is committing, has committed, or is about to commit an unlawful act; or

(3) it is in the public interest to conduct an investigation to ascertain whether a person is committing, has committed, or is about to commit an unlawful act.

(b) In investigating an unlawful act, the attorney general may:

(1) require the person to file on a prescribed form a statement in writing, under oath or affirmation, as to all the facts and circumstances concerning the alleged unlawful act and other information considered necessary by the attorney general;

(2) examine under oath a person in connection with the alleged unlawful act; and

(3) execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying of the material under Section 36.054.

(c) The office of the attorney general may not release or disclose information that is obtained under Subsection (b)(1) or (2) or any documentary material or other record derived from the information except:

(1) by court order for good cause shown;

(2) with the consent of the person who provided the information;

(3) to an employee of the attorney general;

(4) to an agency of this state, the United States, or another state;

(5) to any attorney representing the state under Section 36.055 or in a civil action brought under Subchapter C;

(6) to a political subdivision of this state; or

(7) to a person authorized by the attorney general to receive the information.

(d) The attorney general may use documentary material derived from information obtained under Subsection (b)(1) or (2), or copies of that material, as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(e) If a person fails to file a statement as required by Subsection (b)(1) or fails to submit to an examination as required by Subsection (b)(2), the attorney general may file in a district court of Travis County a petition for an order to compel the person to file the statement or submit to the examination within a period stated by court order. Failure to comply with an order entered under this subsection is punishable as contempt.

(f) An order issued by a district court under this section is subject to appeal to the supreme court.

History

Enacted by *Acts 1995, 74th Leg., ch. 824 (H.B. 2523), § 1*, effective September 1, 1995; am. *Acts 1997, 75th Leg., ch. 1153 (S.B. 30), §§ 4.01(b)*, 4.05, effective September 1, 1997 (renumbered from Sec. 36.005); am. *Acts 2005, 79th Leg., ch. 806 (S.B. 563), § 8*, effective September 1, 2005.

Notes

STATUTORY NOTES

Editor's Notes.

See Tex. *Hum. Res. Code Ann. § 21.002* for sunset provision.

Effect of amendments.

2005 amendment, added (c) — (f).

Sec. 36.054. [Expires September 1, 2015] Civil Investigative Demand.

(a) An investigative demand must:

(1) state the rule or statute under which the alleged unlawful act is being investigated and the general subject matter of the investigation;

(2) describe the class or classes of documentary material to be produced with reasonable specificity to fairly indicate the documentary material demanded;

(3) prescribe a return date within which the documentary material is to be produced; and

(4) identify an authorized employee of the attorney general to whom the documentary material is to be made available for inspection and copying.

(b) A civil investigative demand may require disclosure of any documentary material that is discoverable under the Texas Rules of Civil Procedure.

(c) Service of an investigative demand may be made by:

(1) delivering an executed copy of the demand to the person to be served or to a partner, an officer, or an agent authorized by appointment or by law to receive service of process on behalf of that person;

(2) delivering an executed copy of the demand to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail an executed copy of the demand addressed to the person to be served at the person's principal place of business in this state or, if the person has no place of business in this state, to a person's principal office or place of business.

(d) Documentary material demanded under this section shall be produced for inspection and copying during normal business hours at the office of the attorney general or as agreed by the person served and the attorney general.

(e) The office of the attorney general may not produce for inspection or copying or otherwise disclose the contents of documentary material obtained under this section except:

(1) by court order for good cause shown;

(2) with the consent of the person who produced the information;

(3) to an employee of the attorney general;

(4) to an agency of this state, the United States, or another state;

(5) to any attorney representing the state under Section 36.055 or in a civil action brought under Subchapter C;

(6) to a political subdivision of this state; or

(7) to a person authorized by the attorney general to receive the information.

(e-1) The attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or by an authorized representative of that person. The attorney general may use the documentary material or copies of it as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(f) A person may file a petition, stating good cause, to extend the return date for the demand or to modify or set aside the demand. A petition under this section shall be filed in a district court of Travis County and must be filed before the earlier of:

(1) the return date specified in the demand; or

(2) the 20th day after the date the demand is served.

(g) Except as provided by court order, a person on whom a demand has been served under this section shall comply with the terms of an investigative demand.

(h) A person who has committed an unlawful act in relation to the Medicaid program in this state has submitted to the jurisdiction of this state and personal service of an investigative demand under this section may be made on the person outside of this state.

(i) This section does not limit the authority of the attorney general to conduct investigations or to access a person's documentary materials or other information under another state or federal law, the Texas Rules of Civil Procedure, or the Federal Rules of Civil Procedure.

(j) If a person fails to comply with an investigative demand, or if copying and reproduction of the documentary material demanded cannot be satisfactorily accomplished and the person refuses to surrender the documentary material, the attorney general may file in a district court of Travis County a petition for an order to enforce the investigative demand.

(k) If a petition is filed under Subsection (j), the court may determine the matter presented and may enter an order to implement this section.

(l) Failure to comply with a final order entered under Subsection (k) is punishable by contempt.

(m) A final order issued by a district court under Subsection (k) is subject to appeal to the supreme court.

History

Enacted by *Acts 1995, 74th Leg., ch. 824 (H.B. 2523), § 1*, effective September 1, 1995; am. *Acts 1997, 75th Leg., ch. 1153 (S.B. 30), § 4.01(b)*, effective September 1, 1997 (renumbered from Sec. 36.006); am. *Acts 2005, 79th Leg., ch. 806 (S.B. 563), § 9*, effective September 1, 2005.

Annotations

Notes

STATUTORY NOTES

Editor's Notes.

See Tex. *Hum. Res. Code Ann. § 21.002* for sunset provision.

Effect of amendments.

2005 amendment, in (e), deleted "Except as ordered by a court for good cause shown," in the beginning of the paragraph, substituted "except:" for "to a person other than an authorized employee of the attorney general without the consent of the person who produced the documentary material" in the first sentence, and added subparagraphs (1) through (7); and designated the last two sentences of former (e) as (e-1).

APPENDIX B

Rule 496. Brief

A party who elects to file in this court a brief in addition to the brief filed in the Court of Civil Appeals, shall comply as nearly as may be with the rules prescribed for briefing causes in the latter court and shall confine his briefs to the points raised in the motion for a rehearing and presented in the application for a writ of error. The clerk may receive amicus curiae briefs or arguments, provided it is shown that copies have been furnished to all attorneys of record in the case. As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.

Source: Texas Rule 14 (for Supreme Court), unchanged.

Rule 497. Order of Trial of Causes

Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys.

Source: Art. 1755, with minor textual change.

Rule 498. Argument

In the argument of cases in the Supreme Court each side may be allowed thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by the petitioner. In cases of very great importance, involving difficult questions, the time allotted herein may be extended by the court, provided application therefor is made before argument begins. Not more than two counsel on each side will be heard, except on leave of the court.

Source: Texas Rule 16 (for Supreme Court) in part, unchanged.

Rule 499. Correspondence

Correspondence relative to any matter before the court must be conducted with the clerk and shall not be addressed to any of the justices, or to any judge of the Commission of Appeals.

Source: Texas Rule 20 (for Supreme Court), unchanged.

Rule 499–a. Direct Appeals

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as Section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited,

1

and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943.

This is a new rule effective December 31, 1943.

SECTION 2. JUDGMENT

Rule 500. Judgments in Open Court

In all cases decided by the Supreme Court, its judgments or decrees will be pronounced in open court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. Where the court, after the submission of a case, is of the opinion that the Court of Civil Appeals has entered the correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or refuse the application as though the writ had never been granted, without

Rule 136. Briefs of Respondents and Others

(a) **Time and Place of Filing.** Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error unless additional time is granted.

(b) **Form.** Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) **Objections to Jurisdiction.** If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

(d) **Reply and Cross-Points.** Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross-points that respondent has preserved and that establish respondent's rights.

(e) **Reliance on Prior Brief.** If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

(f) **Amendment.** The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

SECTION TEN. DIRECT APPEALS

Rule 140. Direct Appeals

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3–b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the court of appeals shall, insofar as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder.

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

Rule 160. Form and Content of Motions for Extension of Time

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) The court of appeals and the date of its judgment, together with the number and style of the case;

Notes and Comments

Comment: New (e). Former (e) becomes new (f); former (f) becomes new (g).

SECTION TEN. DIRECT APPEALS

RULE 140. DIRECT APPEALS

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) When a trial court has granted or denied an interlocutory or permanent injunction and its decision is based on the grounds of the constitutionality or unconstitutionality of any statute of this State, the Supreme Court shall have jurisdiction of a direct appeal of the trial court's order when the appeal contests that court's holding regarding the constitutionality or unconstitutionality of the statute.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only. A statement of facts shall not be brought up except to the extent it is necessary to show that the appellant has an interest in the subject matter of the appeal. If the Supreme Court would be required to determine any contested issue of fact in order to rule on the constitutionality of the statute in question as ruled on by the trial court, the appeal will be dismissed.

(d) The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with Section 22.001 of the Government Code and with this rule.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989.)

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) The court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

transmit to the court of appeals a certified copy of the orders denying, refusing or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

RULE 135. NOTICE OF GRANTING, ETC.

When the Supreme Court grants, denies, refuses or dismisses an application for writ of error or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by letter.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

RULE 136. BRIEFS OF RESPONDENTS AND OTHERS

(a) Time and Place of Filing. Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error in the Supreme Court unless additional time is granted.

(b) Form. Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) Objections to Jurisdiction. If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

(d) Reply and Cross-Points. Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross points that respondent has preserved and that establish respondent's rights.

(e) Length of Briefs. A brief in response to the application, a brief of an amicus curiae as provided in Rule 20 and any other brief shall not exceed 50 pages in length, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.

(f) Reliance on Prior Brief. If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

(g) Amendment. The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

(h) Service of Briefs. Any application filed in the court of appeals and all briefs filed in the Supreme Court shall at the same time be served on all parties to the trial court's final judgment.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988; amended by Court of Criminal Appeals effective Jan. 1, 1988; amended by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment: New (e). Former (e) becomes new (f); former (f) becomes new (g).

Comment to 1990 change: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.

SECTION TEN. DIRECT APPEALS TO THE SUPREME COURT

RULE 140. DIRECT APPEALS

(a) Application. This rule governs direct appeals to the Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.

(b) Jurisdiction. The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

(c) Statement of Jurisdiction. Appellant shall file with the record in the case a statement fully, clearly and plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after such statement is filed.

(d) Preliminary Ruling on Jurisdiction. If the Supreme Court notes probable jurisdiction over a direct appeal, the parties shall file briefs as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal shall be dismissed.

(e) Direct Appeal Exclusive While Pending. An appellant who has attempted to perfect a direct appeal to the Supreme Court may not, during the pendency of that appeal, pursue an appeal to the court of appeals. When a direct appeal is dismissed the appellant is not precluded from pursuing any other appeal available at the time the direct appeal was filed if the other appeal is pursued within time periods prescribed by these rules exclusive of the days during which the direct appeal was pending.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To make express provisions for direct appeal proceedings, to make review discretionary in direct appeals, and within time limitations to permit other appeals in event a direct appeal is dismissed.

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) the court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To provide that 12 copies of a motion for extension be filed.

SECTION TWELVE. SUBMISSION AND ORAL ARGUMENT IN THE SUPREME COURT

RULE 170. SUBMISSION

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument, upon the vote of at least six members.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To provide that a vote of at least six of nine members of the Supreme Court is required to deny oral argument.

RULE 171. SUBMISSION DAY

(a) When Case Ready for Submission. A case shall stand for submission upon the first regular day of the submission of causes coming after the expiration of twenty days from the day on which the writ of error was granted; provided the notice of granting the writ shall have been given ten days before such submission day. If not so given, then the case shall be subject to submission on the first regular submission day which falls ten days after giving of notice.

(b) Regular Submission Day. Causes in the Supreme Court will be regularly submitted on Wednesday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

RULE 172. ARGUMENT

(a) Time. In the argument of cases in the Supreme Court, each side may be allowed such time as the court orders. The court may, upon application before the day of argument, extend the time for argument, and may also align the parties for purposes of presenting oral argument.

(b) Number of Counsel. Not more than two counsel on each side will be heard, except on leave of the court.

Rule 57. Direct Appeals to the Supreme Court.

57.1 ***Application.*** This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.

57.2 ***Jurisdiction.*** The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

57.3 ***Statement of Jurisdiction.*** Appellant must file with the record a statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed.

57.4 ***Preliminary Ruling on Jurisdiction.*** If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

57.5 ***Direct Appeal Exclusive While Pending.*** If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.

Comment to 1997 change. — This is former Rule 140. The rule is amended without substantive change except subdivision 57.5 is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending, but allowing 10 days to perfect a subsequent appeal.