

# Memorandum



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**To:** Supreme Court Advisory Committee

**From:** Appellate Rules Subcommittee

**Date:** September 2, 2019

**Re:** TRAP 49.3, Motion for Rehearing

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## **I. Matter referred to subcommittee**

The Court's May 31, 2019 referral letter and Chairman Babcock's June 3 letter referred the following matter to the Appellate Rules Subcommittee:

**Motions for Rehearing in the Courts of Appeals.** Justice Christopher and the State Bar Court Rules Committee have each proposed amendments to Rule of Appellate Procedure 49.3, which are attached. The Committee should consider both and make recommendations.

The two proposals are attached to this memo (App. A, B).

## **II. Background**

TRAP 49.3 currently provides that a panel rehearing "may be granted by a majority of justices who participated in the decision. Otherwise, it must be denied."

In the November 2018 election, there was significant turnover in some of the appellate courts. As a result, for many opinions issued in late 2018, there was no longer "a majority of the justices who participated in the decision of the case" at the panel rehearing stage. Under TRAP 49.3, the appellate courts were required to automatically deny panel rehearing; and at least one court of appeals refused to grant an extension to file a panel rehearing because panel rehearing could not be granted under any circumstance (App. C).

The only relief available to the litigants in these cases was to seek en banc consideration. Under TRAP 41.2, en banc consideration is "not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." This is a much higher standard to meet than for panel rehearing. As Justice Christopher's memo notes, because of this higher standard, most of the en banc motions were denied.

As Justice Christopher explains, there were instances when the one remaining justice who participated in the panel decision found a rehearing motion meritorious but was unable to make any

correction because a majority of the original panel was no longer sitting. Short of convincing a majority of the en banc court that the correction met the high standard for en banc consideration, there was no avenue available to the remaining justice for altering the opinion and judgment.

As Justice Christopher notes in her memo, the events of November 2018 are capable of repetition: “Because of the uneven way that some justices on the courts of appeals are elected (i.e. 5 of 9 justices on both the First and Fourteenth court are elected at one time, and 8 of 13 were recently elected on the Fifth court) this problem can re-occur.” As she also notes, panel rehearing is a valuable tool: “According to a Westlaw search, in the past three years, the Fourteenth Court has withdrawn an opinion and issued a new opinion on panel rehearing approximately 28 times. The First Court has done this approximately 47 times and the Fifth Court has done this 12 times.”

Both Justice Christopher and the Court Rules Committee of the State Bar have proposed changes to TRAP 49.3. The proposals differ in significant ways and each is set out below.

### **III. Justice Christopher Proposal**

Justice Christopher proposes the following change to TRAP 49.3:

#### **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. In the event that a majority of the justices who participated in the decision of the case are no longer on the court and a remaining justice, who authored or joined the majority opinion, believes that the opinion should be revised in light of the motion, then that justice can ask for two new justices to review the motion. The new panel can then decide the motion and revise the opinion if needed. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The key elements of Justice Christopher’s proposal are:

- (1) there must be only one remaining justice who joined the majority opinion of the original panel;
- (2) that justice must request that additional justices be assigned to the panel to consider a motion for panel rehearing;
- (3) the procedure for selecting the justices to be added is left to the appellate court’s internal procedures (although use of the word “new” suggests the additional justices must be new to the court by election or appointment);
- (4) if two members of the original panel remain, those two justices will determine the panel rehearing; and
- (4) if no member of the original panel remains, the motion for panel rehearing must be denied and the complaining party must seek en banc consideration.

#### IV. State Bar Court Rules Committee Proposal

The State Bar Court Rules Committee has endorsed the following amendment to TRAP 49.3:

##### 49.3. Decision on Motion for Rehearing

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. However, if one or more of the justices on the original panel cannot participate in the motion for rehearing, the chief justice will ensure that sufficient additional justices are assigned to the case so that three justices participate in the decision on the motion for rehearing. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The key elements of the Court Rules Committee's proposal are:

- (1) there must be two or fewer justices remaining from the original panel (i.e., the rule applies anytime there are fewer than three justices remaining on the panel);
- (2) the court must ensure that three justices participate in all panel rehearings; and
- (3) the chief justice will determine the assignment of additional justices to the panel.

#### V. Issues for discussion

The subcommittee has identified and discussed the following issues raised by the proposals:

1. Should TRAP 49.3 be revised to address situations when one or more members of the original panel are no longer sitting at the panel rehearing stage?
2. Under what circumstances should extra justices be assigned to a panel rehearing: (a) in all cases where one or more of the original panel are not sitting; (b) in all cases where two or more of the original panel are not sitting; or (c) in only those cases where the sole remaining justice requests participation of additional justices on panel rehearing and, if so, must that justice have joined the original majority opinion?
3. If additional panel members are provided, should the rule direct how that is to be accomplished, such as providing for the departing justice's successor to be appointed to the panel or random draw, or should it be left to the court's internal operating procedures or to the chief justice?

These issues all appear to be simple, but they become quite complicated on longer reflection. As one subcommittee member observed, whatever change is made is "politically fraught." That label applies to two important questions: the dignity to be afforded the original panel opinion and the method of selecting additional justices:

*Weight of original opinion.* The current panel rehearing rule favors the original panel opinion by providing for no panel rehearing if the panel is short two or more members at

the time rehearing is considered; it permits only en banc consideration by the full court. Justice Christopher's proposal maintains that approach, allowing panel rehearing only when a justice who joined the original majority remains on the court and thinks the panel rehearing motion has merit. The Court Rules proposal takes the opposite approach and leaves open the possibility of alteration or even a flipped judgment on all panel rehearings.

*Method of selecting additional panel members.* The current panel rehearing rule does not provide for additional members so there is no method of selection provided. The current rules do not provide a method for selecting the original panel either – that is left to the court's internal operating procedures. Some courts of appeals assign panels randomly; some do not. TRAP 41.1(b) provides three methods when the original panel is deadlocked: the court picks another member to sit, the court asks the Chief Justice of the Texas Supreme Court to temporarily assign an eligible justice, or the court may take the matter en banc. Justice Christopher's proposal leaves the selection to the court's internal procedures (although use of the word "new" suggests the additional justices must be new to the court by election or appointment). The Court Rules proposal provides that the chief justice of the court of appeals will select additional panel members. The subcommittee unanimously agreed that any method of selecting additional members for a panel rehearing must be politically neutral, and generally favored a random system.

**The subcommittee seeks input from the full committee on these issues before drafting any proposed change to the panel rehearing rule.**

## App. A. Justice Christopher Proposal

### Memorandum



**To:** Chief Justice Nathan Hecht

**From:** Justice Tracy Christopher

**Date:** March 29, 2019

**Re:** Proposed revision to TRAP 49.3

I am asking that the Supreme Court consider an amendment to TRAP 49.3. This request is made on my own behalf and not on behalf of the Fourteenth Court of Appeals.

History: In November 2018, a number of appellate courts across the state lost many of its incumbent justices. As a result, for many of the opinions issued in December of 2018, there was no longer “a majority of the justices who participated in the decision of the case,” at the time a motion for rehearing was filed. Appellate courts then automatically denied the motion pursuant to rule 49.3. Litigants were then forced to try to get relief via an en banc motion. Because the standards for en banc relief are high, most of these motions were rightfully denied.

However, on some occasions, a remaining member of the panel who decided the case might think that the opinion should be revised because of the arguments in the rehearing motion. The only current way to revise the opinion is to ask for en banc review. This puts a burden on the en banc court that could be avoided by a rule change. My proposed rule change would allow a remaining justice—who was in the majority—to rehear the case with two new justices.

Because of the uneven way that some justices on the courts of appeals are elected (i.e. 5 of 9 justices on both the First and Fourteenth court are elected at one time, and 8 of 13 were recently elected on the Fifth court) this problem can re-occur.

According to a Westlaw search, in the past three years, the Fourteenth Court has withdrawn an opinion and issued a new opinion on panel rehearing approximately 28 times. The First Court has done this approximately 47 times and the Fifth Court

has done this 12 times. While this rule change may not affect many cases, I still believe that it is a useful one that the parties and lawyers would support.

Proposed additions to the rule are underlined.

Proposed rule 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.

In the event that a majority of the justices who participated in the decision of the case are no longer on the court and a remaining justice, who authored or joined the majority opinion, believes that the opinion should be revised in light of the motion, then that justice can ask for two new justices to review the motion. The new panel can then decide the motion and revise the opinion if needed.

If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

## App. B. Court Rules Committee of the State Bar Proposal

### 49.3. Decision on Motion for Rehearing

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. **However, if one or more of the justices on the original panel cannot participate in the motion for rehearing, the chief justice will ensure that sufficient additional justices are assigned to the case so that three justices participate in the decision on the motion for rehearing.** If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

## **App. C**

Order entered January 11, 2019



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-17-00855-CV**

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**APEX FINANCIAL CORPORATION, Appellant**

**V.**

**LOAN CARE, Appellee**

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**On Appeal from the 44th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-17-05921**

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### **ORDER**

Before the Court is appellant's Unopposed Motion to Extend Time to File Motion for Rehearing. Texas Rule of Appellate Procedure 49.3 provides, "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." Following the departures of two of the three justices who participated in this case, there remains no majority of justices who participated in the decision. As a result, the Court must deny a motion for rehearing filed in this proceeding. In the interest of justice, we **DENY** the unopposed motion to extend time to file a motion for rehearing.

/s/      **BILL WHITEHILL**  
         **JUSTICE**