

# Memorandum



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**To:** Supreme Court Advisory Committee

**From:** Appellate Rules Subcommittee

**Date:** March 9, 2022

**Re:** February 17, 2022 Referral Relating to TRAP 6.5(d) Motion to Withdraw

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## I. Matter referred to subcommittee

The Court's February 17, 2022 letter referred the following matter to the Appellate Rules Subcommittee:

**Texas Rule of Appellate Procedure 6.5(d).** In the attached memorandum, the State Bar Court Rules Committee proposes exempting non-lead counsel from Texas Rule of Appellate Procedure 6.5's withdrawal requirements if lead counsel continues representation. The Committee should review and make recommendations.

## II. The Court Rules Committee Proposal

The proposal from the State Bar Court Rules Committee is attached in full. The proposed change is very limited. It permits a less onerous motion to withdraw when the attorney withdrawing from the appeal is not lead counsel. Currently, TRAP 6.5 requires counsel seeking to withdraw on appeal to:

- 6.5(a)—file a motion stating (1) a list of current deadlines and settings in the case; (2) the party's name and last known address and telephone number; (3) a statement that a copy of the motion was delivered to the party; and (4) a statement that the party was notified in writing of the right to object to the motion.
- 6.5(b)—serve the motion on the party.
- 6.5(c)—if the motion is granted, notify the party of any additional deadlines not stated in the motion.

The State Bar Court Rules Committee proposal would no longer require the information in 6.5(a) and 6.5(c) if the withdrawing attorney is not lead counsel in the case.

#### A. Proposed changes to TRAP 6.5(d) from the Court Rules Committee

- (d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel*. If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

#### B. Reasons for the change as proposed by the Court Rules Committee

“Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel.”

### **III. Recommendation**

The Appellate Rules Subcommittee unanimously recommends adoption of the change as proposed by the State Bar Court Rules Committee for the reasons stated by that committee.

**STATE BAR OF TEXAS COURT RULES COMMITTEE**  
**PROPOSED AMENDMENT TO**  
**TEXAS RULE OF APPELLATE PROCEDURE 6.5(d)**

**I. Exact Language of Existing Rule**

**Rule 6. Representation by Counsel**

**6.1. Lead Counsel**

- (a) *For Appellant.* Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.
- (b) *For a Party Other Than Appellant.* Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.
- (c) *How to Designate.* The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

**6.2. Appearance of Other Attorneys**

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

**6.3. To Whom Communications Sent**

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

- (a) each party's lead counsel on appeal;
- (b) a party's lead counsel in the trial court if:
  - (1) that party was represented by counsel in the trial court;
  - (2) lead counsel on appeal has not yet been designated for that party; and

- (3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;
- (c) a party if the party is not represented by counsel.

#### **6.4. Nonrepresentation Notice**

- (a) *In General.* If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:
  - (1) state that the attorney is not representing the party on appeal;
  - (2) state that the court and other counsel should communicate directly with the party in the future;
  - (3) give the party's name and last known address and telephone number; and
  - (4) be signed by the party.
- (b) *Appointed Counsel.* In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

#### **6.5. Withdrawal**

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

- (a) *Contents of Motion.* A motion for leave to withdraw must contain the following:
  - (1) a list of current deadlines and settings in the case;
  - (2) the party's name and last known address and telephone number;
  - (3) a statement that a copy of the motion was delivered to the party; and
  - (4) a statement that the party was notified in writing of the right to object to the motion.
- (b) *Delivery to Party.* The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.
- (c) *If Motion Granted.* If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.
- (d) *Exception for Substitution of Counsel.* If an attorney substitutes for a withdrawing attorney, the motion to withdraw need not comply with (a) but must state only the

substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

## **6.6. Agreements of Parties or Counsel**

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

### **Notes and Comments**

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

## **II. Proposed Amendments to Existing Rule**

### **Rule 6. Representation by Counsel**

#### **6.1. Lead Counsel**

- (a) *For Appellant.* Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.
- (b) *For a Party Other Than Appellant.* Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.
- (c) *How to Designate.* The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

#### **6.2. Appearance of Other Attorneys**

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

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- (a) each party's lead counsel on appeal;
- (b) a party's lead counsel in the trial court if:
  - (1) that party was represented by counsel in the trial court;
  - (2) lead counsel on appeal has not yet been designated for that party; and
  - (3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;
- (c) a party if the party is not represented by counsel.

### **6.4. Nonrepresentation Notice**

- (a) *In General.* If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:
  - (1) state that the attorney is not representing the party on appeal;
  - (2) state that the court and other counsel should communicate directly with the party in the future;
  - (3) give the party's name and last known address and telephone number; and
  - (4) be signed by the party.
- (b) *Appointed Counsel.* In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

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An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

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- (b) *Delivery to Party.* The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.
- (c) *If Motion Granted.* If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.
- (d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel.* If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

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### Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

## III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the

associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel.

The other aspects of Rule 6.5(d) are unchanged. For example, if substitution of counsel is sought, the motion to withdraw must state the substitute attorney's name, contact information, and State Bar number. In addition, Rule 6.5(d) still requires the withdrawing attorney (whether or not seeking substitution) to comply with Rule 6.5(b), requiring delivery of the motion to withdraw to the party either in person or by certified and first-class mail to the party's last known address. The provisions in Rule 6.1(c) for designating new lead counsel also remain unchanged.