

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: February 2, 2023

Re: September 15, 2022 Referral Letter relating to TRAP 52 notice and opportunity to cure

I. Matter referred to subcommittee

Texas Rule of Appellate Procedure 52. The Court requests the Committee to consider whether Texas Rule of Appellate Procedure 52 should be amended to require notice of procedural defects and an opportunity to cure before a petition is denied or dismissed and to draft any recommended amendments.

II. Subcommittee recommendation

The Subcommittee recommends adding new sections 52.8(d) and (e) to (1) provide for dismissal of the petition when circumstances merit; and (2) require notice of procedural defects and an opportunity to cure before a petition in an original proceeding is dismissed or denied:

52.8. Action on Petition

(d) *Petition Dismissed.* Except as provided in subsection (e), the court may dismiss the petition based on lack of jurisdiction, for want of prosecution, or as required by statute.

(e) *Defects in Procedure.* The court must not deny or dismiss the petition for formal defects or irregularities in appellate procedure without providing notice of, and a reasonable time to correct or amend, the defects or irregularities.

III. Discussion

The Texas Rules of Appellate Procedure are founded on the premise that appeals should be decided on their merits rather than curable procedural defects. The TRAPs expressly provide that the appellate courts may not dismiss an appeal based on curable defects.

44.3. Defects in Procedure. A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

61.3. Defects in Procedure. The Supreme Court will not affirm or reverse a judgment or dismiss a petition for review for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

Numerous other appellate rules provide notice and an opportunity to cure before dismissing based on a procedural defect. TRAP 1.2(c) (appellate court may not dismiss for failure to comply with local rule without first providing notice and an opportunity to cure); TRAP 28.2 (notice and opportunity to amend before dismissing an agreed interlocutory appeal for want of jurisdiction); TRAP 37.3(b) (notice and opportunity to cure before dismissing for failure to pay for clerk's record); TRAP 37.3(c) (notice and opportunity to cure before dismissing when no reporter's record was filed due to fault of appellant); TRAP 38.8 (appellate court may dismiss an appeal for failure to file a brief unless the party provides a reasonable explanation); TRAP 42.3 (appellate court may dismiss for failure to comply with rules or for want of prosecution only after first giving 10 days' notice).

These rules, however, relate to appeals and not to original proceeding under TRAP 52. There is no parallel provision in TRAP 52, which provides:

52.8. Action on Petition

(a) Relief Denied. If the court determines from the petition and any response and reply that the relator is not entitled to the relief sought, the court must deny the petition. If the relator in a habeas corpus proceeding has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond to be forfeited and render judgment against the surety.

Under this rule, the appellate court may deny a petition in an original proceeding even if the basis for the dismissal is a curable procedural defect. There is no provision requiring notice and an opportunity to correct prior to denial of the petition.

The subcommittee recommends that petitions in original proceedings be given the same treatment as appeals and petitions for review. TRAP 52 should be amended to provide for notice and an opportunity to cure procedural defects.

Although beyond the referral request, in reviewing the rule, the subcommittee also noticed that TRAP 52 does not expressly provide for dismissal of the proceeding. Dismissal would be the proper disposition if the court lacks jurisdiction, the relator has failed to prosecute, or dismissal is required by statute, such as in the case of a vexatious litigant. Technically, under current TRAP 52 the court has only two options—grant or deny. A court is arguably required to deny the petition even though dismissal is proper. The Subcommittee recommends that the rule expressly recognize that a petition may be dismissed if circumstances require.

Accordingly, the Subcommittee recommends that TRAP 52 be amended to provide for notice and an opportunity to cure procedural defects and to provide for dismissal of a proceeding if circumstances so require.