

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: June 14, 2023

Re: June 3, 2023 Referral Letter relating to SB 1603 and TRAP 28.3 permissive appeals

I. Matter referred to subcommittee

Permissive Appeals. On September 15, 2022, the Court asked the Committee to study permissive appeals, and the Committee discussed the issue at its February 17, 2023 meeting. The Court now asks that the Committee supplement its study and propose any recommended amendments in light of SB 1603. SB 1603 adds Civil Practice and Remedies Code § 51.014(g) and (h) to require a court of appeals that does not accept a permissive appeal to “state in its decision the specific reason for finding that the appeal is not warranted” and to expressly allow the Court to review de novo the decision not to accept a permissive appeal and direct the court of appeals to accept the appeal. The Committee should consider whether Texas Rule of Appellate Procedure 28.3 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

II. Relevant materials

Attached are copies of (1) SB 1603 and (2) Appellate Rules Subcommittee memo dated February 14, 2023.

III. Subcommittee recommendation

First, the Subcommittee recommends that the Court adopt the following revised version of proposed TRAP 28.3(l), which reflects the statutory language (including de novo review by the Supreme Court):

(l) *When Petition Denied.* If the court denies the petition, the court must state in its decision the specific reasons for its finding that an appeal is not warranted. On petition for review, the Supreme Court may review the denial of permission to appeal de novo, and, if the Supreme Court finds that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

Second, based on feedback received after the February 17, 2023 meeting, the Subcommittee also revises its recommendation regarding TRAP 28.2. Apparently, even though the prior version of section 51.014(d) was repealed effective September 1, 2011, there are a few cases that were filed before that date and remain pending. Thus, repeal appears to be premature. But to minimize the confusion caused by the continued presence of TRAP 28.2, the Subcommittee recommends adding an express reference to “cases filed before September 1, 2011” to the heading of TRAP 28.2.

IV. Discussion

A. Prior action for the Subcommittee and the Advisory Committee

At the Court’s request, the Subcommittee studied issues related to denial of permission to appeal and recommended adoption of TRAP 28.3(l). A copy of the Subcommittee’s February 15, 2023, memo is attached. At the February 2023 meeting of the Advisory Committee, the Committee voted 14-12 to recommend adoption of the following proposed TRAP 28.3(l):

- (l) ***When Petition Denied.*** If the petition is denied, the court must specifically identify in its order the reasons, if any, the petition does not satisfy the statutory or procedural requirements for a permissive appeal.

The Committee also voted unanimously to recommend repeal of TRAP 28.2.

B. Revised proposed TRAP 28.3(l)

After the February meeting, the Legislature passed SB 1603 and the Governor has signed it. A copy of the enrolled version of SB 1603 is attached.

SB 1603 adds sections 51.014(g) and (h) to the Civil Practice and Remedies Code. New (g) provides that:

- (g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).

New (h) provides that:

- (h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) de novo. If the supreme court concludes that the requirements to permit an appeal under Subsection (d) are satisfied, the court may direct the court of appeals to accept the appeal.

These new subsections apply only to cases filed after September 1, 2023.

Based on the enacted statutory language, the Subcommittee recommends that the Court adopt the revised TRAP 28.3(*l*) above. This version of the proposed rule tracks the language of CPRC 51.014(g). This language is arguably not as specific as the language approved by the Committee in February, but the Subcommittee concluded that it is best for the rule to track the statutory language.

The revised version of the proposed rule also covers the Supreme Court review contemplated by CPRC 51.014(h). Because the Court has already held that it has jurisdiction to grant a petition for review from a denial of permission to appeal, the proposed rule makes clear that review in the Supreme Court would be by petition for review. *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 736 (Tex. 2019).

There are two options in terms of when the change should be effective. Because 51.014(g) and (h) are similar (although not identical) to proposed TRAP 28.3(*l*) previously voted on by the full Committee, the new subsection could take effect on the rule's effective date and apply to all pending cases. Alternatively, the new subsection could track the statute and apply only to cases filed after September 1, 2023, with the addition of the following comment to TRAP 28:

Comment to 2023 change: Rule 28.3(*l*) applies only to cases filed after September 1, 2023.

C. Revised recommendation regarding TRAP 28.2

In the February 14, 2023, memo, the Subcommittee recommended repealing TRAP 28.2 because it applies only to cases filed before September 1, 2011. The Committee voted to recommend repeal to the Court. After that February meeting, a member of the Subcommittee received feedback from a Texas lawyer indicated that there are still cases pending that were filed before September 1, 2011 and to which Rule 28.2 could apply. In light of that feedback, the Subcommittee now recommends that the Court wait to repeal TRAP 28.2.

It does appear, however, that the continued existence of TRAP 28.2 is causing confusion about the proper procedure for permissive interlocutory appeals. There are a number of recent appellate decisions on petitions for permission to appeal that note that the parties failed to obtain the trial court's permission to appeal and apparently tried to appeal based solely on the parties' agreement.

To alleviate this confusion, the Subcommittee recommends that the Court revise the heading of TRAP 28.2 to make clear that it applies *only* to cases filed before September 1, 2011:

28.2. Agreed Interlocutory Appeals in Civil Cases (applicable only to cases filed before September 1, 2011)

While the current comments to TRAP 28 state that TRAP 28.2 applies only to cases filed before September 1, 2011, it appears the comment is not providing the intended guidance. The Subcommittee further recommends that the Court revisit possible repeal of TRAP 28.2 in the future.