

MEMO

To: Legislative Mandates Subcommittee and Texas SCAC

From: Robert Levy

Date: 6/14/2023

Re: Proposed Rulemaking to Implement SB 372

The Texas Legislature of passed [SB 372](#) on May 21, 2023 and it currently awaits the Governor's signature (or will go into effect without his signature unless it is vetoed).

The Senate [bill analysis](#) provides context for the legislation as being prompted by the 2021 leak of the draft of the U.S. Supreme Court's decision in the *Dobbs* case. This language from the analysis is particularly instructive:

S.B. 372 requires that a person, other than a justice or judge, who is involved in crafting an opinion or decision for an adjudicatory proceeding, shall maintain the confidentiality of all non[1]public judicial work product in accordance with Texas Supreme Court rules. Furthermore, a person, other than a justice or judge, with access to non-public judicial work product commits a Class A misdemeanor offense if the person knowingly discloses, wholly or partly, the contents of any non-public judicial work product. However, it would be a defense to prosecution if the disclosure was authorized either in writing by the justice or judge for whom the work product is prepared, or under Texas Supreme Court rules.

The text of the bill is relatively short and is set out below.

SB 372

AN ACT

relating to creating a criminal offense for the unauthorized disclosure of non-public judicial opinions and judicial work product.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 21, Government Code, is amended by adding Section 21.013 to read as follows:

Sec. 21.013. CONFIDENTIALITY OF JUDICIAL WORK PRODUCT; CRIMINAL OFFENSE. (a) In this section:

(1) "Judicial work product" means written, electronic, or oral material prepared or communications made in the course of an adjudicatory proceeding before a court determining legal rights, powers, duties, or privileges. The term includes all drafts of opinions or orders and memoranda of law.

(2) "Non-public judicial work product" means:

(A) any written or electronic judicial work product other than documents filed with the clerk of a court for release to the public; or

(B) any oral statement relating to judicial work product made in a closed session of a court or in judicial chambers.

(b) This section applies to:

(1) a court established under Section 1, Article V, Texas Constitution, other than a commissioners court; and

(2) a court subject to this subtitle.

(c) A justice or judge of a court shall comply with supreme court rules governing the confidentiality of non-public judicial work product.

(d) A person, other than a justice or judge, who is involved in crafting an opinion or decision for an adjudicatory proceeding, including a court staff attorney, court clerk, or law clerk, shall maintain the confidentiality of all non-public judicial work product in accordance with supreme court rules.

(e) A person, other than a justice or judge, with access to non-public judicial work product commits an offense if the person knowingly discloses, wholly or partly, the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, employee of an agency established under Chapter 71 or 72, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding.

(f) An offense under this section is a Class A misdemeanor.

(g) It is a defense to prosecution under this section that the disclosure of the non-public judicial work product is authorized:

(1) in writing by the justice or judge for whom the work product is prepared; or

(2) under supreme court rules.

SECTION 2. As soon as practicable after the effective date of this Act, the Texas Supreme Court shall adopt any rules necessary to implement Section 21.013, Government Code, as added by this Act.

SECTION 3. This Act takes effect September 1, 2023.

II.

I recommend that the appropriate rules to implement and effect SB 372 is to amend the [Texas Rules of Judicial Administration](#). The topic of disclosure of court records is found in the current Rule 12.5 exempts from the general principle of open court records, access to judicial work product. The following is a proposed rewrite of Rule 12.5 to specifically recognize the principle of protection of judicial work product and largely tracks the language from SB 372. (Additions to the rule are underlined and deletions are in ~~strike through~~.)

Proposed Amended Rule 12.5

12.5 Exemptions from Disclosure. Pursuant to Texas Law, the following records are ~~exempt~~ prohibited from disclosure under this rule: (a) Non-Public Judicial Work Product and Drafts. "Judicial work product" means written, electronic, or oral material prepared or communications made in the course of an adjudicatory proceeding before a court determining legal rights, powers, duties, or privileges. The term includes all drafts of opinions or orders and memoranda of law. ~~Any record that relates to a judicial officer's adjudicative decision-making process prepared by that judicial officer, by another judicial officer, or by court staff, an intern, or any other person acting on behalf of or at the direction of the judicial officer.~~) "Non-public judicial work product" means:

(A) any written or electronic judicial work product other than documents filed with the clerk of a court for release to the public; or

(B) any oral statement relating to judicial work product made in a closed session of a court or in judicial chambers.

12.5.1 A judge or justice of the court may not disclose non-public judicial work product unless authorized by the court.

12.5.2 A person, other than a justice or judge, who is involved in crafting an opinion or decision for an adjudicatory proceeding, including a court staff attorney, court clerk, or law clerk, shall maintain the confidentiality of all non-public judicial work product.

12.5.3 A person, other than a justice or judge, with access to non-public judicial work product commits a criminal offense if the person knowingly discloses, wholly or partly, the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, employee of an agency established under Chapter 71 or 72, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding.