

Tab G

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 15, 2023

Re: July 23, 2023 Referral Letter relating to permissive appeals

I. Matter referred to subcommittee

Permissive Appeals. In the attached emails, Chief Justices Christopher and Worthen suggest changes to the procedures for permissive appeals. The Committee should review and draft any recommended amendments.

II. Relevant materials

Attached are copies of (1) the emails from Chief Justice Christopher, Chief Justice Worthen, and Chief Justice Adams (who sent his comment after the Court referred the issue to the subcommittee) and (2) Misc. Docket No. 23-9047 (the Court's order approving amendments to Rule 28.3).

III. Subcommittee recommendation

The Subcommittee recommends that the Court adopt the following revision to TRAP 28.3(e)(2) to specify additional materials that must be submitted with the petition for permission to appeal:

(e) *Contents.* The petition must:

...

(2) attach ~~a copy of the order from which appeal is sought~~:

(A) a copy of the file-marked order from which appeal is sought;

(B) a copy of every file-marked document that is material to the order from which appeal is sought and that was filed in the trial court; and

(C) a properly authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought, or a statement that the transcript has been ordered and will be filed when it

is received, or a statement that no evidence was adduced in connection with such order.

The Subcommittee also recommends that the Court consider adopting the following new TRAP 28.3(m) to address procedures for notice and opportunity to cure before denying a petition for failure to comply with the procedural requirements of Rule 28.3:

(m) Defective Petition. The court of appeals must not deny or dismiss the petition for formal defects or irregularities in procedure without providing notice of, and a reasonable time to correct or amend, the defects or irregularities.

IV. Discussion

A. The Court's Proposed TRAP 28.3(l)

After the last Committee meeting, the Court issued an order approving the addition of the following Rule 28.3(l):

(l) When Petition Denied. If the court of appeals denies the petition, the court must explain 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 court of appeals' denial de novo, and, if the Supreme Court concludes that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

The Court's order invited public comment on the proposed amendment.

B. Concerns from Courts of Appeals Justices

Chief Justice Christopher, Chief Justice Worthen, and Chief Justice Adams sent emails offering comments on the proposed amendments. Those emails are attached to this memo. Each email requests that the Court consider amending Rule 28.3 to require the parties to submit additional information with the petition for permission to appeal. They each suggest using Rule 52 (which specifies required attachments to a mandamus petition) as a model for the additional information and documents that should be required.

Chief Justice Christopher has also suggested that the rule should address whether the court must give notice and an opportunity to cure before denying a petition for permission to appeal for failure to comply with the procedural requirements of Rule 28.3.

C. Proposed Additional Procedures

1. Additional documents to be filed with the petition for permission to appeal

Chief Justice Christopher, Chief Justice Gray, Justice Kelly, and Justice Miskel met with the subcommittee to discuss the reasons for needing additional information with the petition for permission to appeal. The justices explained that many times even with the information currently required to be included in and filed with the petition for permission to appeal, it is difficult for the court to determine whether the statutory requirements are met and whether an immediate appeal is warranted. The additional requirements are based on materials required to be filed with a mandamus petition, with some modifications discussed below.

Rather than requiring “certified or sworn” copies, the subcommittee recommends requiring copies of the file-marked documents. With the move to electronic filing and the ease of obtaining copies of file-marked documents, the subcommittee believes there is no reason to require parties to go through the additional steps of obtaining certified copies or swearing under oath that the copies are “true and correct.”

The subcommittee also discussed expressly requiring only the motion that resulted in the order from which appeal is sought, any responses or replies, and any exhibits, but decided that the more general language in proposed 28.3(e)(2)(B) will provide greater flexibility while still requiring at least those documents.

With regard to transcripts, the subcommittee recommends expressly allowing parties to state that the transcript has been ordered and will be filed at a later date because of the short-fuse deadline for filing a petition for permission to appeal. By statute, the petition must be filed no later than 15 days after the order granting permission to appeal is signed. It may be difficult to obtain the transcript in that time period. The proposed rule also allows parties to avoid filing the transcript if no evidence was adduced at the hearing.

2. Notice of defect and opportunity to cure

Chief Justice Christopher also noted the possibility for differing practices among the appellate courts about how to handle petitions for permission to appeal that do not comply with the procedural requirements. The subcommittee has drafted language requiring notice and an opportunity to cure for the full Committee’s consideration.

The subcommittee recommends that the Court consider adopting new TRAP 28.3(m) to address this issue. The language in proposed Rule 28.3(m) is based on the proposed amendment to Rule 52.8 to address procedural defects in mandamus petitions, which the full Committee has already voted to recommend to the Court. The subcommittee recommends that if the Court opts to amend the rules to address procedural defects, the language in the two rules should be consistent.

ATTACHMENT 1

Subject: Permissive appeals

Date: Thursday, June 15, 2023 at 3:06:27 PM Central Daylight Time

From: Tracy Christopher

To: Chip Babcock, Nathan Hecht, Jane Bland, Jaclyn Daumerie, Tracy Christopher

Dear Chief Justice Hecht, Justice Bland and Chip,

I think the procedures related to permissive appeals need to be changed, given the new statute. Right now we review a 15 page petition for permission to appeal. It's often agreed, so we never see the other side of the issue. Unlike at the Supreme Court, we are unable to call for briefing before we decide whether to grant the petition. I think that needs to be changed. At a minimum, all briefing below and the reporters record, if any, needs to be included. Given the de novo review by the Supreme Court, I would think the Court would also like full briefing at our level. Many practitioners think their issue is a controlling one when it isn't. Many trial judges get confused as to whether there is a substantial ground for disagreement, when there isn't. If the trial judge made the correct legal call below, we have denied the petition.

If the legislature wanted us to grant all agreed permissive appeals, they could have written it that way. It has to be different from all the other interlocutory appeals.

Thank you for considering this.

Tracy Christopher

Chief Justice of the 14th Court of Appeals.

P.S. We need a current Justice of a COA on the appellate subcommittee.

P.P.S. Sorry to hear you are unavailable for the meeting, Chip.

Get [Outlook for iOS](#)

Vernis McGill

From: Tracy Christopher
Sent: Tuesday, July 25, 2023 2:59 PM
To: Rulescomments
Subject: TRAP 28.3

To the members of the Supreme Court:

This comment is in response to the new law and changes to rule 28.3.

In order to properly determine whether or not to grant a permission to appeal, we need more than the order. We need all of the information currently required for original proceedings—including 52.7(a)

While you may believe that parties will automatically supply that information, we have received motions for permissive appeal with nothing but the order.

Thank you for considering this change.

Tracy Christopher
Chief Justice, 14th Court of Appeals
Houston, TX 77002
[REDACTED]

From: [James Worthen](#)
To: [Rulescomments](#)
Cc: [Appellate Court Chiefs](#)
Subject: Proposed Amendments to TRAP 28.3
Date: Tuesday, July 25, 2023 4:04:19 PM

To: Chief Justice Hecht, Justices Lehrmann, Boyd, Devine, Blacklock, Busby, Bland, Huddle and Young,

I share Fourteenth COA Chief Justice Christopher's concerns regarding the changes to TRAP 28.3. My experience has been that more information, rather than less, is helpful in the administration of justice. I agree with her that the new TRAP 28.3 should require, at a minimum, the same information listed in TRAP 52.7 (a).

Thank you for your consideration.

Jim Worthen

From: [Terry Adams](#)
To: [Rulescomments](#)
Cc: [Terry Adams](#)
Subject: TRAP 28.3
Date: Friday, July 28, 2023 1:53:34 PM
Attachments: [TRAP 28.3.pdf](#)

To Chief Justice Hecht and Justices on the Supreme Court of Texas:

This comment is in response to the new law and proposed amendment to Texas Rule of Appellate Procedure 28.3.

We receive petitions for permissive appeal that contain nothing more than the order from which a permissive appeal is sought.

We need more information than that to properly determine whether or not to grant a permission to appeal. And we certainly need more information than that in order to be able to fully comply with new Rule 28.3(l).

Specifically, we need the same type of additional information that is currently required for an original proceeding under Rule 52.3(k)(1)(A), (C) and Rule 52.7(a)(1) and (2).

Attached above is proposed additional language (in [blue](#)) to Rule 28.3(e) to require that this additional information also be included with a petition for permissive appeal.

Thank you for considering this change.

Chief Justice Terry Adams

First Court of Appeals

301 Fannin

Houston, Texas 77002

Office-(713) 274-2700

<https://www.txcourts.gov/1stcoa/>

Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

28.3. Permissive Appeals in Civil Cases.

- (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
- (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.
- (c) *When Filed.* The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.
- (d) *Extension of Time to File Petition.* The court of appeals may extend the time to file the petition if the party:
 - (1) files the petition within 5 days after the deadline, and
 - (2) files a motion complying with Rule 10.5(b).
- (e) *Contents.* The petition must:
 - (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
 - (2) attach a **certified or sworn** copy of the order from which appeal is sought; **and**
 - (A) **unless voluminous or impracticable, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based;**

- (B) a certified or sworn copy of every document that is material to the order from which appeal sought and that was filed in the underlying proceeding; and
 - (C) a properly authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought, or a statement that no testimony was adduced in connection with such order;
- (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
 - (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

- (f) *Response; Reply; Cross-Petition; Time for Filing.* If any party timely files a petition, any other party may file a response or a cross-petition within 10 days. A party may file a response to a cross-petition within 10 days of the date the cross-petition is filed. A petitioner or cross-petitioner may reply to any matter in a response within 7 days of the date the response is filed. The court of appeals may extend the time to file a response, reply, and cross-petition.
- (g) *Length of Petition, Cross-Petition, Response, and Reply.* A petition, cross-petition, response, and reply must comply with the length limitations in Rule 9.4(i)(2)(D)-(E).
- (h) *Service.* A petition, cross-petition, response, and reply must be served on all parties to the trial court proceeding.
- (i) *Docketing Statement.* Upon filing the petition, the petitioner must file the docketing statement required by Rule 32.1.
- (j) *Time for Determination.* Unless the court of appeals orders otherwise, a petition, and any cross-petition, response, and reply, will be determined without oral argument, no earlier than 10 days after the petition is filed.
- (k) *When Petition Granted.* If the petition is granted, a notice of appeal is deemed to have been filed under Rule 26.1(b) on that date, and the appeal is governed by the rules for accelerated appeals. A separate notice of appeal need not be filed. A copy of the order granting the petition must be filed with the trial court clerk.
- (l) *When Petition Denied. If the court of appeals denies the petition, the court must explain 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 court of appeals' denial de novo, and, if the Supreme Court concludes that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.*

Comment to 2023 change: Rule 28.2 is repealed. Rule 28.3 is amended to implement sections 51.014(g) and (h) of the Civil Practice and Remedies Code and governs the procedure for all permissive appeals filed after September 1, 2023.

ATTACHMENT

2

Supreme Court of Texas

Misc. Docket No. 23-9047

Order Approving Repeal of Texas Rule of Appellate Procedure 28.2 and Amendments to Texas Rule of Appellate Procedure 28.3

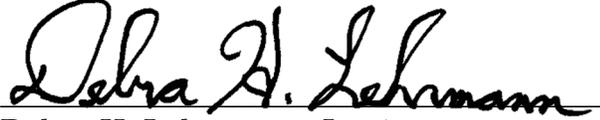
ORDERED that:

1. The Court invites public comments on the repeal of Texas Rule of Appellate Procedure 28.2 and on amendments to Texas Rules of Appellate Procedure 28.3.
2. To effectuate the Act of May 11, 2023, 88th Leg., R.S., ch. 209 (S.B. 1603, codified at TEX. CIV. PRAC. & REM. CODE § 51.014(g)-(h)), the repeal and amendments are effective September 1, 2023. But the repeal and amendments may later be changed in response to public comments. The Court requests public comments be submitted in writing to rulescomments@txcourts.gov by November 1, 2023.
3. The Clerk is directed to:
 - a. file a copy of this Order with the Secretary of State;
 - b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
 - c. send a copy of this Order to each elected member of the Legislature; and
 - d. submit a copy of this Order for publication in the *Texas Register*.

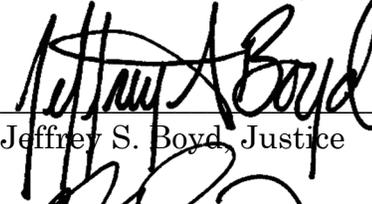
Dated: July 25, 2023.



Nathan L. Hecht, Chief Justice



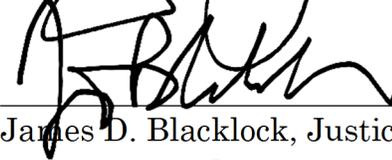
Debra H. Lehrmann, Justice



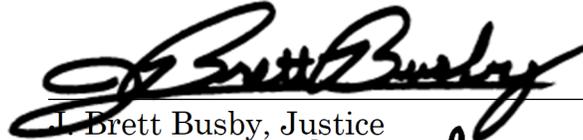
Jeffrey S. Boyd, Justice



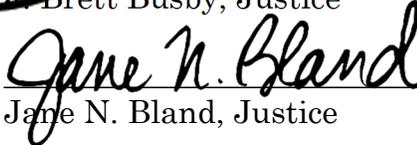
John P. Devine, Justice



James D. Blacklock, Justice



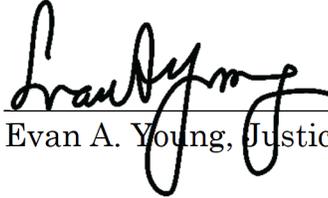
J. Brett Busby, Justice



Jane N. Bland, Justice



Rebeca A. Huddle, Justice



Evan A. Young, Justice

TEXAS RULES OF APPELLATE PROCEDURE

Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

28.3. Permissive Appeals in Civil Cases.

- (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
- (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.
- (c) *When Filed.* The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.
- (d) *Extension of Time to File Petition.* The court of appeals may extend the time to file the petition if the party:
 - (1) files the petition within 5 days after the deadline, and
 - (2) files a motion complying with Rule 10.5(b).
- (e) *Contents.* The petition must:
 - (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
 - (2) attach a copy of the order from which appeal is sought;
 - (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
 - (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal

from the order may materially advance the ultimate termination of the litigation.

- (f) *Response; Reply; Cross-Petition; Time for Filing.* If any party timely files a petition, any other party may file a response or a cross-petition within 10 days. A party may file a response to a cross-petition within 10 days of the date the cross-petition is filed. A petitioner or cross-petitioner may reply to any matter in a response within 7 days of the date the response is filed. The court of appeals may extend the time to file a response, reply, and cross-petition.
- (g) *Length of Petition, Cross-Petition, Response, and Reply.* A petition, cross-petition, response, and reply must comply with the length limitations in Rule 9.4(i)(2)(D)-(E).
- (h) *Service.* A petition, cross-petition, response, and reply must be served on all parties to the trial court proceeding.
- (i) *Docketing Statement.* Upon filing the petition, the petitioner must file the docketing statement required by Rule 32.1.
- (j) *Time for Determination.* Unless the court of appeals orders otherwise, a petition, and any cross-petition, response, and reply, will be determined without oral argument, no earlier than 10 days after the petition is filed.
- (k) *When Petition Granted.* If the petition is granted, a notice of appeal is deemed to have been filed under Rule 26.1(b) on that date, and the appeal is governed by the rules for accelerated appeals. A separate notice of appeal need not be filed. A copy of the order granting the petition must be filed with the trial court clerk.
- (l) *When Petition Denied.* If the court of appeals denies the petition, the court must explain 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 court of appeals' denial de novo, and, if the Supreme Court concludes that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

Comment to 2023 change: Rule 28.2 is repealed. Rule 28.3 is amended to implement sections 51.014(g) and (h) of the Civil Practice and Remedies Code and governs the procedure for all permissive appeals filed after September 1, 2023.