The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

May 6, 2022

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Appellate Procedure 39.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Appellate Procedure 39.7 to clarify that all parties may participate in oral argument when it is granted, even if a party did not request oral argument on the cover of the party's brief. The Committee should review and make recommendations.

Texas Rule of Civil Procedure 193.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Civil Procedure 193.7 to clarify that a party must specifically state that a particular document will be used against the producing party to trigger the 10-day period for the producing party to object to the document's authenticity. The Committee should review and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 39.7

I. Exact Language of Existing Rule

Rule 39. Oral Argument; Decision Without Argument

39.1. Right to Oral Argument

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

39.2. Purpose of Oral Argument

Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from prepared text. Counsel should assume that all members of the court have read the briefs before oral argument and counsel should be prepared to respond to questions. A party should not refer to or comment on matters not involved in or pertaining to what is in the record.

39.3. Time Allowed

The court will set the time that will be allowed for argument. Counsel must complete argument in the time allotted and may continue after the expiration of the allotted time only with permission of the court. Counsel is not required to use all the allotted time. The appellant must be allowed to conclude the argument.

39.4. Number of Counsel

Generally, only one counsel should argue for each side. Except on leave of court, no more than two counsel on each side may argue. Only one counsel may argue in rebuttal.

39.5. Argument by Amicus

With leave of court obtained before the argument and with a party's consent, an amicus curiae may share the allotted time with that party. Otherwise, counsel for amicus may not argue.

39.6. When Only One Party Files a Brief

If counsel for only one party has filed a brief, the court may allow that party to argue.

39.7 Request and Waiver

A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument waives the party's right to argue. But even if a party has waived oral argument, the court may direct the party to appear and argue.

39.8 Clerk's Notice

The clerk must send to the parties—at least 21 days before the date the case is set for argument or submission without argument—a notice telling the parties:

(a) whether the court will allow oral argument or will submit the case without argument;

(b) the date of argument or submission without argument;

(c) if argument is allowed, the time allotted for argument; and

(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court. A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Notes and Comments

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

II. Proposed Amendments to Existing Rule 39.7

Rule 39. Oral Argument; Decision Without Argument

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Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Comment to Proposed 2022 change: Subdivision 39.7 is amended to provide that if a court of appeals sets a case for oral argument, then all parties to the case that filed a brief shall be entitled to participate in the oral argument, even if one or more parties did not request oral argument on the cover of its brief.

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

The 1997 revisions to the rules of appellate procedure "[were] meant to take the traps out of TRAP." See Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither*, in MATTHEW BENDER C.L.E., PRACTICING UNDER THE NEW RULES OF TRIAL AND APPELLATE PROCEDURE 1-12 (Nov. 1997). Texas Rule of Appellate Procedure 39.7 is part of former Rule 75 and became effective on September 1, 1997. Unfortunately, Rule 39.7 is a vestige of the procedural traps that were sought to be eliminated.

Rule 39.7 describes the process for requesting (and currently waiving) oral argument in a court of appeals. Rule 39.7 provides that a party's ability to participate in oral argument is waived if the party did not request oral argument on the cover of its brief. When a court of appeals sets a case for oral argument, each party has a reasonable expectation that it will be allowed to participate at oral argument—even if that party did not request oral argument the cover of its brief. This expectation is reinforced by a majority of the courts of appeals that have addressed the issue in their Internal Operating Procedures (IOPs) (discussed below).

Elsewhere, this common situation under Rule 39.7 leads to an unexpected and harsh reality. For example, in the Dallas Court of Appeals, a party that does not request oral argument on the cover of its brief will receive a notice from the court setting the case for oral argument. After complying with the instruction in the notice to notify the court of the name of the attorney who will be presenting argument for that party ("no later than the Thursday prior to the date the case is scheduled for argument"), counsel will be contacted by the clerk's office and informed that it is not entitled to participate at oral argument *unless* an appropriate motion to argue is filed and granted before oral argument. The motion is often granted—sometimes just a day before oral argument.[1] Other times the motion is denied or the party may learn at oral argument that it cannot

[1] *See, e.g.*, 05-21-00267-CV (motion to argue granted 13 days before oral argument); 05-21-00367-CV (motion to argue granted 29 days before oral argument); 05-21-00469-CV (motion to argue granted 30 days before oral argument); 05-20-00546-CV (motion to argue granted 19 days before oral argument); 05-19-00224-CV (motion to argue granted 4 days before oral argument); 05-19-00432-CV (motion to argue granted 5 days before oral argument); 05-19-00921-CV (motion to argue granted 1 day before oral argument); 05-18-00052-CV (motion to argue granted 14 days before oral argument; 05-18-00487-CV (motion to argue granted 1 day before oral argument); 05-18-00844-CV (motion to argue granted 30 days before oral argument); 05-18-00876-CV (motion to argue granted 3 days before oral argument); 05-18-01041-CV (motion to argue granted 2 days before oral argument);); 05-18-01371-CV (motion to argue granted 10 days before oral argument); 05-17-00773-CV (motion to argue granted 5 days before oral argument); 05-17-00329-CV (motion to argue granted 30 days before oral argument); 05-17-00849-CV (motion to argue granted 19 days before oral argument); 05-17-01104-CR (motion to argue granted 34 days before oral argument); 05-16-00246-CV (motion to argue granted 6 days before oral argument); 05-16-00784-CV (motion to argue granted 4 days before oral argument); 05-16-01096-CV (motion to argue granted 1 day before oral argument); 05-15-01104-CV (motion to argue granted 30 days before oral argument); 05-14-01424-CV (motion to argue granted 14 days before oral argument).

participate.[2]

There is no uniformity for handling this recurring circumstance among the courts of appeals. They generally fall into three categories:

> First, the 4th (San Antonio), 5th (Dallas), and 7th (Amarillo) Courts of Appeals each provide in their IOPs that when a party does not request oral argument on the cover its brief, that party must file a motion with the court to participate in an oral argument set for the case.
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> Next, the 1st (Houston), 6th (Tyler), 8th (El Paso), and 14th (Houston) Courts of Appeals each provide in their IOPs that if the court grants oral argument, any party that filed a brief will be given an opportunity to argue, even if that party did not request oral argument on the cover of its brief. The 2nd (Fort Worth) Court of Appeals likewise rejects the notion of a party not being able to participate at oral argument.
>
> Lastly, the IOPs for the 3rd (Austin), 9th (Beaumont), 10th (Waco), 11th (Eastland), 12th (Tyler), and 13th (Corpus Christi-Edinburg) Courts of Appeals provide no specific guidance for this situation leaving counsel to guess what to do.

To remove this unfair and unanticipated trap for the unwary practitioner, the proposed change to Rule 39.7 would eliminate the current situation where a party that has not requested oral argument on the cover of its brief is not entitled to participate in oral argument that is set by the court. In at least three courts of appeals, that party must file a motion to participate close to the eve of oral argument. The proposed change to Rule 39.7 would eliminate uncertainty and disparate treatment and make it clear that if a court of appeals grants oral argument, any party that filed a brief will be given an opportunity to argue even if that party did not request oral argument on the cover of its brief. Stated differently in the proposed language: "A party's failure to request oral argument does not waive that party's right to argue, if the court of appeals sets the case for oral argument."

The other aspects of Rules 39 and 39.7 are unchanged.

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[2] *See Newsome v. State*, 1991 WL 214461 at *1 (Tex. App.—Dallas 1991, no pet.) ("Appellant's counsel failed to file a timely request for oral argument; appellant has waived oral argument. As oral argument was waived, the Court declines to assign counsel for the purpose of oral argument. Appellant's pro se motion to assign counsel for oral argument is denied.").

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR AMENDMENT TO RULE 193.7
TEXAS RULE OF CIVIL PROCEDURE

I. RELEVANT WORDING OF EXISTING RULE 193.7

193.7 Production of Documents Self-Authenticating

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

[COMMENT]

7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. See Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to object to authenticity. A trial court may also order this procedure. An objection to authenticity must be made in good faith.

II. PROPOSED RULE MODIFICATION:

193.7 Production of Documents Self-Authenticating

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the **specific** document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

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7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. See Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, ~~a~~ **the offering** party may identify prior to trial the documents intended to be offered, **by Bates numbers or other means,** thereby triggering the obligation to object to authenticity. **A general reference to all documents produced by a party is insufficient.** A trial court may also order this procedure. An objection to authenticity must be made in good faith.

III. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY THE PROPOSED NEW RULE:

Neither the Rules nor Texas jurisprudence clearly state whether a party may trigger the 10-day response requirement by making general averments that it intends to use "all documents" that have been produced or will be produced. This type of "bulk" designation has caused confusion and dispute over what seems to be a Rule designed to streamline the discovery process. Practitioners have noted the vagueness of the rule and debated whether the rule has (or should have) a specificity requirement. *See e.g.* Tate Hemingson, *Pro-Tips*: *Authentication Letter*, (https://www.mondaq.com/unitedstates/trials-appeals-compensation/402156/pro-tips-the-self-authentication-letter) ("What if the other side has produced 20,000 documents? Are you really going to use all 20,000 documents? Can you really expect them to raise authenticity objections within a 10-day period? The Rule is not clear on this.").

Many parties abuse this Rule by placing in their initial pleadings or discovery requests a statement that all documents produced by the opposing party will be used. This is done specifically as an effort to trigger Rule 193.7's objection requirement. However, practitioners have noted that Rules do not make clear whether this is effective. *See e.g.* Dan Christensen, *Common Discovery Issues in Personal Injury Litigation*, Annual LAU Seminar (2005) ("Whether this tactic would effectively trigger the 10-day objection period or not has not been addressed by any case known to this author."). Practitioners report that this is a widespread problem.

The Texarkana court commented on, but did not determine, the "specificity" issue, by concluding that the respondent waived a complaint by failing to timely complain about the vague notice. *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 130-31 (Tex. App.—Texarkana 2008), *rev'd on other grounds*, *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. 2010) ("If Wal-Mart had any complaints concerning the notice, it should have raised those complaints in the trial court at a time when any deficiency could have been remedied.").

The Bar would benefit from clarity of the question whether this requirement can be triggered by either (i) a general reference to all documents or a category of documents or (ii) a statement in a pleading that all documents produced by the opposing party will be used. The Committee believes that the better approach would be to require a party to make specific reference

to a document in order for the 10-day period to be triggered. The proposed amendment makes a single-word change to Rule 193.7 with the intent spelled out clearly in proposed amendments to the Rule's comment.