

SCAC MEETING AGENDA
Friday, August 16, 2024
In Person at State Bar of Texas Building
1414 Colorado St.
Austin, TX 78701

FRIDAY, August 16, 2024:

I. WELCOME FROM CHIP BABCOCK

II. STATUS REPORT FROM CHIEF JUSTICE HECHT

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the June 28, 2024 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. REMOTE PROCEEDINGS RULES – PROPOSED CHANGES TO TRCP 176

167-206 Subcommittee:

Hon. Tracy Christopher – Chair

Hon. Ana Estevez – Vice-Chair

Hon. Harvey Brown

Jack Carroll

Alistair Dawson

Quentin Smith

A. August 13, 2024 Memo re: Remote Proceedings Task Force Suggestions Subpoenas – Update

V. RECORDING AND BROADCASTING COURT PROCEEDINGS

15-165A Subcommittee:

Richard Orsinger – Chair

Hon. Ana Estevez – Vice Chair

Prof. Elaine Carlson

Prof. William Dorsaneo

John Kim

Hon. Emily Miskel

Giana Ortiz

Pete Schenkan

Hon. John Warren

B. November 9, 2021 Subcommittee 1's Report and Recommendations

C. August 12, 2024 Memo re: TRCP 18c

D. August 6, 2024 Memo from Family Law Council, Executive Committee re: Proposed Rule Changes by the Texas Supreme Court

E. August 6, 2024 Memo from Family Law Council, Executive Committee re: TRCP 18C

VI. TRANSFER ON DEATH DEED FORMS

300-330 Subcommittee:

*Lamont Jefferson – Chair
Charles “Skip” Watson – Vice Chair
Prof. William Dorsaneo
Hon. R.H. Wallace
Hon. Sharena Gilliland*

F. February 2, 2024 Letter from Probate Forms Task Force

VII. ARTIFICIAL INTELLIGENCE

1-14c Subcommittee:

*Hon. Harvey Brown – Chair
John Kim – Vice Chair
Connie Pfeiffer
Marcy Greer
Hon. John Browning (on subcommittee for this topic)
Robert Levy (on subcommittee for this topic)*

G. Taskforce for Responsible AI in the Law Interim Report

H. August 8, 2024 Memo re: Potential Rule Amendments to Address Artificial Intelligence

I. August 6, 2024 Memo from Family Law Council, Executive Committee re: Proposed Changes to TRCP 13 & TRE 901

VIII. ERROR PRESERVATION CITATIONS

Appellate Subcommittee:

*Hon. Bill Boyce – Chair
Connie Pfeiffer – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Hon. David Keltner
Rich Phillips
Macey Reasoner Stokes
Charles “Skip” Watson*

J. August 7, 2024 Memo re: Proposed Response to State Bar Rule Committee’s 2015 Suggestion

K. State Bar Court Rules Committee Proposed Changes to TRAP 9.4, 38.1, and 38.2

IX. TEXAS RULE OF CIVIL PROCEDURE 4

1-14c Subcommittee:

Hon. Harvey Brown – Chair

John Kim – Vice Chair

Connie Pfeiffer

Marcy Greer

L. June 5, 2024 Email from V. Katz re: TRCP 4

M. August 6, 2024 Memo re: Final Rule 4 Proposal

X. COURTS OF APPEALS OPINIONS

Appellate Subcommittee:

Hon. Bill Boyce – Chair

Connie Pfeiffer – Vice Chair

Prof. Elaine Carlson

Prof. William Dorsaneo

Hon. David Keltner

Rich Phillips

Macey Reasoner Stokes

Charles “Skip” Watson

N. August 1, 2024 Memo re: Proposal Regarding Publication of
Court of Appeals Opinions

Tab A

Memorandum



To: Supreme Court Advisory Committee

From: Rule 167-206 Subcommittee

Date: August 13, 2024

Re: Remote Proceeding Task Force suggestions on subpoenas–Update

The Supreme Court asked us to review a Remote Proceeding Task Force memorandum governing subpoenas. The subcommittee met and discussed the memorandum, along with a proposed memorandum for a Federal Rule change to subpoenas. The 2013 amendments to the Federal Rules were designed to allow nationwide service of subpoenas to allow trial or deposition testimony remotely—notwithstanding the 150-mile limit of subpoena range. Some courts questioned whether the rules adequately captured that idea, leading to the current proposal. The purpose of the Task Force proposed amendments were to also authorize state-wide subpoenas for remote depositions or testimony.

After reviewing both memos, our subcommittee agrees with this change for Texas and proposes the following amendments to our rules.

We have revised the rules in response to suggestions and emails from the committee.

176.2 Required Actions.

A subpoena must command the person to whom it is directed to do either or both of the following:

(a) attend and give testimony at a deposition, hearing, or trial. A deposition subpoena shall specify whether the attendance is to be in person or by remote means. A subpoena for a hearing or trial shall be in person unless the party issuing the subpoena obtains leave of the court pursuant to 21(d)* for remote attendance. If attendance is by remote means, the subpoena shall specify the details for the witness to attend;

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

176.3 Limitations.

(a) Range. A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2).

(b) Notwithstanding the limitations in 176.3(a), a subpoena from an issuing county may be served at any place in the State of Texas to command a person to appear at proceedings under this Rule by telephone or by remote means, to the extent such a subpoena requires any travel, it may not require travel of more than 150 miles from where the person resides or is served.

(~~b~~ c) Use for discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

*Comment: Nothing in Rule 176, including its subparts, will be understood to modify or otherwise abrogate Rule 21d.

A minor suggestion is made to the following rule:

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the ~~place~~ of deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

And changes are suggested for Rule 500.8

500.8. Subpoenas.

(a) Use. A subpoena may be used by a party or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in person in a county that is more than 150 miles from where the person resides or is served.

(b) Notwithstanding that limitation, a subpoena from an issuing county may be served at any place in the State of Texas to command a person to appear at proceedings under this Rule by telephone or by remote means, to the extent such a subpoena requires any travel, it may not require travel of more than 150 miles from where the person resides or is served.

*Comment: Nothing in Rule 500, including its subparts, will be understood to modify or otherwise abrogate Rule 21d.

We agreed with the Task Force that tackling the production of documents in a remote deposition was better left to the parties.

We had a robust discussion of alternative methods to serve subpoenas (such as by certified mail or by electronic media or email as provided for in Rule 106) but ultimately the committee did not recommend a change.

Tab B

November 9, 2021

To: Remote Proceedings Task Force
From: Lisa Hobbs, chair, Subcommittee 1
Re: Subcommittee 1's Report and Recommendations

Subcommittee one met on the following dates:

September 29, 2021

October 12, 2021

November 3, 2021

Our proposed new and amended rules are attached as Exh. A.

Task 1: Recording and Broadcasting Rules

One of the most difficult of our subcommittee's tasks was to review and recommend amendments to the Texas rules governing the recording and broadcasting of court proceedings in light of the trend towards remote proceedings via Zoom, YouTube, etc. The subcommittee reviewed two rules. *See* TEX. R. CIV. P. 18c; TEX. R. APP. P 14 (copies of current rules attached as Exh. B).

In addition to the current rules, the subcommittee also reviewed and relied on two other documents. First, the Office of Court Administration has created a document entitled *Background and Legal Standards – Public Right to Access Remote Hearings During Covid-19 Pandemic*. (See Exh. C.)¹ Second, in the early nineties, the Texas Supreme Court studied and finalized uniform rules for the coverage of court proceedings, which served as a template for many counties who have adopted a local rule on broadcasting. *See, e.g.*, Misc. Docket No. 92-0068 (attached as Exh. D).

The subcommittee observed the differences in approaches to the various rules and standards. Most notably, current Rule 18c appears to require consent of participants before a proceeding can be recorded or broadcast. *See also In re BP Products North America Inc.*, 263 S.W.3d 117 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding)

¹ OCA provided trial courts a wealth of information on remote proceedings during the pandemic, which can be accessed here: [TJB | Court Coronavirus Information | Electronic Hearings \(Zoom\)](https://www.txcourts.gov/TJB/Court-Coronavirus-Information/Electronic-Hearings-Zoom) ([txcourts.gov](https://www.txcourts.gov))

(conditionally issuing writ of mandamus in a case where a Galveston trial court allowed the “gavel to gavel” broadcast of a trial over one party’s objection). Rule 18c is alone in this approach. The other rules and guidelines, including TRAP 14, leave the decision to record or broadcast to the trial or appellate court, presumably even over an objection by a party or participant.

The variance left a lot for the subcommittee to discuss. Some discussions were more philosophical; some discussions were more practical:

- When these rules were originally drafted, they contemplated a television camera in a physical courthouse to air on an evening newscast. Technology, and thus an individual’s expectation of access and to information, has increased dramatically. There is room to completely re-write the rules with those expectations and technological advances in mind.
- Any “right to access” the courthouse is not an unfettered right. Live broadcasts during the pandemic were not an entitlement; they were a practical necessity for the participants and so the judicial process did not grind to a halt. As we get back to “normal,” courthouses are and will be physically opened. There is no established “right” for the public to watch a proceeding from the comfort of their own homes.
- When sensitive and protected information is presented in a courtroom, rather than in person or remotely, that information must be protected. Any new rules should address that issue (particularly the issue of trade secrets) directly.
- A definition of “remote proceeding” might be helpful. A remote proceeding is not any proceeding in which any participant is participating remotely. A remote proceeding is one in which the judge is not in the courtroom, *i.e.*, there is no physical courtroom to “open” to the public.
- What is the nature of the public’s right to access? What are the parameters of that right? The current rules, though philosophically different, already adopt the basic principle that the public’s right to access is not unfettered and is subject to reasonable restrictions. (*See In re M-I L.L.C.*, 505 S.W.3d 569, 577-78 (Tex. 2016) (“To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests.”)). We need not start from a blank slate. We should consider the limitations and restrictions already considered in Texas in past studies.
- With the publication of proceedings on a site like YouTube, there is the potential for misuse that was less of a concern under the traditional context of a media

entity recording portions of a proceeding for news broadcast purposes. These readily available, unedited recordings may pose security risks for the participants. They are also easy to manipulate and to be used for nefarious purposes—particularly in a state like Texas that elects judges. The potential for misuse raises practical questions, *e.g.*, should there be time limits for how long footage is stored/accessible?

- Should the procedures and standards for recording or broadcasting be different whether the medium is traditional media versus a court-controlled medium (like You-Tube)? Courts that regularly livestream their docket do not want an unwieldy process that might encourage objections to what is now seen as routine. This philosophy may create tension with business litigants who prefer a more defined procedure to guide a trial court when proprietary or trade secret information is at issue in a lawsuit.
- How detailed should the rule be?
 - Should it be a broad rule, leaving the issue in the trial court’s sole discretion?
 - Should it provide time limitations or broader concepts like “reasonableness”/ “opportunity to be heard”?
 - Should the rule be permissive (“may... under these limitations...”) or prohibitive (“cannot . . . unless”)?
 - Who has the burden? What is the showing? Should findings be required?
 - Should there be an avenue for appellate review? If so, what is the standard of review?
 - Should a local jurisdiction be able to expand or restrict access inconsistent with any new rule?
- A final concern that did not get incorporated in the draft due to time constraints: some subcommittee member would expressly state that the ruling on an objection to recording/broadcasting must be made prior to a proceeding being recorded/broadcast, whether as a matter of good procedure or so that a party would have an express ruling for mandamus purposes. Others felt the ruling would be implicit in the trial court’s action to record/broadcast (or not).

Task 2: TRAP recommendations

The subcommittee also reviewed the Texas Rules of Appellate Procedure to consider whether any rules needed to be amended to account for any new rules regarding remote proceedings that are recorded or broadcast.

As a result of its review, the subcommittee proposes amendments to the Texas Rules of Appellate Procedure to (1) conform TRAP 14 with new proposed TRCP 18c; and (2) expressly authorize remote oral argument in all cases. In making these recommendations, the subcommittee reviewed the relevant provisions of Chapter 22 of the Government Code and makes a few observations.

First, the Government Code authorizes any appellate court to “order that oral argument be presented through the use of teleconferencing technology.” TEX. GOV’T CODE §22.302.² The Government Code also authorizes the two high courts to record and post online their arguments. TEX. GOV’T CODE §22.303 (“If appropriated funds or donations are available in the amount necessary to cover the cost, the supreme court and the court of criminal appeals shall make a video recording or other electronic visual and audio recording of each oral argument and public meeting of the court and post the recording on the court’s Internet website.”). The Government Code does not appear to authorize livestreaming for any appellate court and, more importantly, does not appear to authorize the intermediate appellate courts to even record and post online their oral arguments. Proposed amendments to TRAP 14 expressly provide that authority for all appellate courts.

Second, generally speaking, transferred cases must be heard in the originating appellate district unless all parties agree otherwise. TEX. GOV’T CODE §73.003. Likewise, some courts of appeals must hold argument in certain cases in a specific city or county. *See* TEX. GOV’T CODE TEX. GOV’T CODE §22.204 (Third CA must hold argument in Travis County in Travis County); §22.205 (Fourth CA must hold argument in Bexar County appeals in Bexar County); §22.207 (Sixth CA must hold argument in Bowie County appeals in Texarkana); §22.209 (Eighth CA must hold argument in El Paso appeals in El Paso county); §22.213 (Twelfth CA must hold argument in Smith County appeals in Tyler); TEX. GOV’T CODE §22.214 (Thirteenth CA must hold argument in Nueces County cases in Nueces County and cases from Cameron, Hidalgo, or Willacy County shall be heard and transacted in Cameron, Hidalgo, or Willacy counties). *See also* Roger Hughes, *The Fixed Locale Requirements for Appellate Court Proceedings: The Importance of Being Somewhere if You’re Not Anywhere*, 22 APP. ADVOC. 122 (Winter 2009) (discussing in greater detail “fixed locale requirements” for Texas appellate courts and their history).

² There is also a specific authorization for remote proceedings in election proceedings. TEX. GOV’T CODE §22.305(b) (entitled “PRIORITY OF CERTAIN ELECTION PROCEEDINGS,” and providing “[i]f granted, oral argument for a proceeding described by Subsection (a) may be given in person or through electronic means”). This is probably unnecessary given the general authorization in Section 22.302.

Even in these situations, however, it appears that appellate courts can hold argument remotely in lieu of in-person argument at a specific location. *See, e.g.*, TEX. GOV'T CODE §73.003(e) (allowing the chief justice of an appellate court to elect to “hear oral argument through the use of teleconferencing technology” in transferred cases); §22.302 (more generally authorizing an appellate “court and the parties or their attorneys [to] participate in oral argument from any location through the use of teleconferencing technology.” Nevertheless, the subcommittee recommends adding a provision in proposed amendments to TRAP 39.8 to make clear that the general authority to hear a case remotely applies even when a particular case, by statute, must be heard in a particular location.

The additional notice requirements were added as good policy and to conform with existing practice.

The subcommittee recognized that having a recording of a proceeding, in addition to a transcribed record of the proceeding, may create confusion concerning the “official record” of a proceeding for purposes of appeal. The subcommittee unanimously agreed that the “official record” of a proceeding for purposes of appeal is only the transcribed record. The broadcast/recording is not the official record and should not be made a part of the appellate record. Moreover, any disputes about the “official record,” whether prompted by a recording or otherwise, should be resolved by the trial court, not an appellate court. The subcommittee ultimately decided to include in proposed Rule 18c a notation about this issue. A similar provision could be added to TRAP 13.2 (duties of “official recorders”).

Task 3: Rule of Judicial Administration 12

Rule of Judicial Administration 12 provides public access to “judicial records.” The Rule is essentially the judiciary’s version of the Public Information Act. The rule defines “judicial record” to expressly exclude records “pertaining to [a court’s] adjudicative function, regardless of whether that function relates to a specific case.” TEX. R. JUD. ADMIN. 12.2(d). “A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record.” *Id.* Thus, under the current version of the rule, a “Zoom” recording of a hearing or proceeding is not a “judicial record” subject to Rule 12. *See, e.g.*, Rule 12 Decision, Appeal No. 21-009 (May 24, 2021) (available online at [21-009.pdf \(txcourts.gov\)](https://www.txcourts.gov/21-009.pdf)).

Nevertheless, courts continue to receive requests for recordings of case-specific hearings and proceedings. The subcommittee recommends amending Rule 12 to make the current law more express as it relates to recordings of court proceedings.

EXHIBIT A

New Texas Rule of Civil Procedure 18c:

Recording and Broadcasting of Court Proceedings

18c.1. Recording and Broadcasting Permitted

A trial court may permit courtroom proceedings to be recorded or broadcast in accordance with this rule and any standards adopted by the Texas Supreme Court. This rule does not apply to an investiture, or other ceremonial proceedings, which may be broadcast or recorded at the trial court's sole discretion, with or without guidance from these rules.

18c.2. Recording and Broadcasting as a Matter of Course

A trial court may record or broadcast courtroom proceedings over which the trial court presides via a court-controlled medium. If a trial court elects to broadcast the proceeding, the trial court must give reasonable notice to the parties. Reasonable notice may include posting on the trial court's official webpage a general notice stating the types of proceedings recorded and broadcasted as a matter of course and the medium of broadcasting. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

18c.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding.* A person wishing to cover a court proceeding by broadcasting, recording, or otherwise disseminating the audio, video, or images of a court proceeding must file with the court clerk a request to do so. The request must state:

- (A) the case style and number;
- (B) the date and time when the proceeding is to begin;
- (C) the name of the requesting person or organization;
- (D) the type of coverage requested (for example, televising or photographing);
- (E) the type and extent of equipment to be used; and
- (F) that all parties were notified of the request.

(b) *Response.* Any party may file a response to the request. If a party objects to coverage of a hearing, the objections must not be conclusory and must state the specific and demonstrable injury alleged to result from coverage.

(c) *Hearing.* The requestor or any party may request a hearing on objections to broadcasting or recording a proceeding, which may be granted so long as the hearing will not substantially delay the proceeding or cause undue prejudice to any party or participant.

18c.4. Decision of the Court

In making the decision to record or broadcast court proceedings, the court may consider all relevant factors, including but not limited to:

- (1) the importance of maintaining public trust and confidence in the judicial system;
- (2) the importance of promoting public access to the judicial system;
- (3) whether public access to the proceeding is available absent the broadcast or recording of the proceeding;
- (4) the type of case involved;
- (5) the importance of, and degree of public interest in, the court proceeding;
- (6) whether the coverage would harm any participants;
- (7) whether trade secrets or other proprietary information will be unduly disseminated;
- (8) whether the coverage would interfere with the fair administration of justice, provision of a fair trial, or the rights of the parties;
- (9) whether the coverage would interfere with any law enforcement activity;
- (10) the objections of any of the parties, prospective witnesses, victims, or other
- (11) participants in the proceeding of which coverage is sought;
- (12) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;
- (13) the extent to which the coverage would be barred by law in the judicial proceeding;
- (14) undue administrative or financial burden to the court or participants; and
- (15) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.¹

18c.5 Official Record

Video or audio reproductions of a proceeding pursuant to these rules shall not be considered as part of the official court record.

18c.6 Violations of Rule

Any person who records, broadcasts, or otherwise disseminates the audio, video, or imagery of a court proceeding without approval in accordance with this rule may be subject to disciplinary action by court, up to and including contempt.

¹ Some subcommittee members would remove the phrase “to which fact the court shall give great weight” because it may cause more confusion than clarity. This phrase comes from the factors the supreme court adopted in Misc. Docket No. 92-0068.

Proposed Revisions to Texas Rules of Appellate Procedure 14:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Recording and Broadcasting as a Matter of Course

An appellate court may record or broadcast courtroom proceedings over which the court presides via a court-controlled medium upon reasonable notice to the parties. Reasonable notice may include posting a general notice on the court's official webpage. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

14.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

- (A) the case style and number;
- (B) the date and time when the proceeding is to begin;
- (C) the name of the requesting person or organization;
- (D) the type of coverage requested (for example, televising or photographing); and
- (E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court.* In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

Proposed Revisions to Texas Rules of Appellate Procedure 39:

Rule 39. Oral Argument; Decision Without Argument

39.8. Remote Argument

An appellate court may hold oral argument with participants physically present in the courtroom or remotely by audio, video, or other technological means. An oral argument held remotely complies with statutory provisions requiring argument be held in a specific location regardless of where the justices and participants are located at the time of argument.

39.9 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; and
- (e) if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Proposed Revisions to Texas Rules of Appellate Procedure 59:

Rule 59. Submission and Argument

59.2. Submission With Argument

If the Supreme Court decides that oral argument would aid the Court, the Court will set the case for argument. The clerk will notify all parties of the submission date, location, and, if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information to which Chapter 552, Government Code, is made inapplicable by statute, rule, or other provision of law, other than Section 552.003(1)(B);

(c) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decision, or another provision of law

(d) elected officials other than judges; or

(e) recordings of a remote proceeding made pursuant to Rule 18c.

EXHIBIT B

Texas Rules of Civil Procedure 18c provides:

Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

- (a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or
- (b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or
- (c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

Texas Rules of Appellate Procedure 14 provides:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

- (A) the case style and number;
- (B) the date and time when the proceeding is to begin;
- (C) the name of the requesting person or organization;
- (D) the type of coverage requested (for example, televising or photographing);
- and
- (E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court.* In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

EXHIBIT C



BACKGROUND AND LEGAL STANDARDS – PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC¹

On March 13, 2020, the Supreme Court of Texas and Court of Criminal Appeals issued the First Emergency Order Regarding the COVID-19 State of Disaster and authorized all courts in Texas in any case – civil or criminal – without a participant’s consent to: 1) conduct any hearing or court proceeding remotely through teleconferencing, videoconferencing, or other means; and 2) conduct proceedings away from the court’s usual location *with reasonable notice and access to the participants and the public.*² This emergency order’s recognition of the public’s right to reasonable notice and access to court proceedings, both civil and criminal, is consistent with traditional practice in Texas state courts and with federal and state precedent as discussed below.

The 6th Amendment of the Constitution of the United States affords defendants the right to a public trial, including all phases of criminal cases. Texas extends that right through the 14th Amendment to juvenile justice cases brought under Chapter 54 of the Texas Family Code.³

The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts.⁴ Although the Supreme Court has never specifically held that the public has a First Amendment right of access to *civil* proceedings,⁵ federal and state courts that have considered the issue have overwhelmingly held

¹ The Office of Court Administration wishes to thank District Judge Roy Ferguson (394th) for primary authorship on this document.

² The Third Emergency Order Regarding the COVID-19 State of Disaster amended the First Emergency Order to remove the requirement that the court conduct the proceedings in the count of venue.

³ Texas courts have recognized the juvenile’s right to public proceedings in quasi-criminal juvenile justice cases under the 14th Amendment and Section 54.08 of the Texas Family Code. Article 1, Section 13 of the Texas Constitution states that “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law.” Courts construing this provision interpret it to prohibit the erection of barriers to the redress of grievances in the court system. So, the phrase “open courts” in Section 13 does not appear to mean “public trial.”

⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing that the 1st Amendment to the United States Constitution guarantees the public a right of access to judicial proceedings).

⁵ Although the holding is specific to the criminal case, the constitutional analysis in *Richmond Newspapers* applies similarly to civil cases. As Chief Justice Burger in the majority opinion opined, “What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.” *Id.* at 576. In his concurrence, Justice Stevens wrote, “[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the judicial branch[.]” Justice Brennan added, “Even more significantly for our present purpose, [...] open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because ‘contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[.]’” *Id.* And Justice Stewart specifically addressed the issue of civil cases, saying, “the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.” *Id.* at 599.

that there is a public right to access in civil cases under the 1st Amendment.⁶ Courts must ensure and accommodate public attendance at court hearings.⁷ However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm.⁸ Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public.⁹ In some instances, improper or unjustified closure of court proceedings constitutes structural error, requiring “automatic reversal and the grant of a new trial.”¹⁰

The Texas Family Code expressly authorizes the limiting of public access by agreement in contested hearings involving SAPCR claims and rights.¹¹ If supported by appropriate findings made on the record, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.¹² But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in *Waller* regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties’ agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.

It is the court’s affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access.¹³ Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. At this time, the movement of the general public is limited by the executive branch through the governor and various county judges. Shelter-in-place orders and prohibitions on non-essential travel prevent members of the general public from viewing hearings in the courthouse. While hearings in courthouses are no longer mandatory under the First Emergency Order Regarding the COVID-19 State of Disaster, the emergency order requires “reasonable notice and access to the participants and the public.” Even if a judge is physically in a courtroom for the virtual hearing, it is the court’s burden to ensure public access to each hearing and take reasonable measures to remove barriers thereto. There is no reasonable access to the public for a hearing, whether remote or physically located in a courthouse, when emergency measures are in place that would require the public to commit a jailable criminal offense to attend the hearing in person in a courtroom.¹⁴ For the duration of this crisis and while these emergency orders are in effect, courts must find a practical and effective way to enable public access to virtual court proceedings. Choosing not to provide reasonable and meaningful public access to remote court proceedings at this time may equate to constitutional error and mandate reversal.

⁶ See *Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647, 648-50 (S.D. Tex. 1996) (discussing 3rd, 6th and 7th Circuit decisions and concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).

⁷ See *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012).

⁸ See *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).

⁹ See *In re A.J.S.*, 442 S.W.3d 562 (Tex. App.—El Paso 2014, no pet.)(discussing open courts in juvenile cases).

¹⁰ Id. (citing *Steadman v. State*, 360 S.W.3d 499, 510 (Tex.Crim.App. 2012)(violation of 6th Amendment right)).

¹¹ Tex. Fam. Code § 105.003(b).

¹² Tex. Fam. Code. § 105.003.

¹³ See *Lilly*, 365 S.W.3d at 331.

¹⁴ See Executive Order GA-14 (March 31, 2020) and Tex. Gov’t Code § 418.173.

Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. The trial court must consider all reasonable alternatives to closing the proceeding and make findings in open court on the record adequate to support the closure.¹⁵ The court must weigh the totality of the circumstances in making these fact specific findings. For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings.

The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases. Appellate courts have reversed judgments when a single less-restrictive solution existed but was not considered on the record.¹⁶

Courts should strongly consider employing protective measures short of interrupting or terminating the live stream. Federal courts, including the Fifth Circuit, have held that a partial closure of a proceeding – limiting access rather than excluding the public – does not raise the same constitutional concerns as a complete closure from public access.¹⁷ To employ a less-restrictive measure (for example, temporarily obscuring video but not audio, or not displaying exhibits through screen share,¹⁸ providing a phone number for the public to access the audio of the proceeding only, or providing a link that permits certain members of the public only to view the hearing either through a YouTube private link or a link to the Zoom meeting), the court need only find a “substantial reason” for the limitation and employ a restriction that does not exceed justifiable limits.¹⁹ Terminating or interrupting the livestream without an alternative means for the public to view the hearing – even temporarily – would constitute a complete closure, and the higher burden would apply.

It bears mentioning that this is not a new issue created by video hearings or public livestreaming. Sensitive and embarrassing testimony is entered in every contested family law hearing yet rarely merits closure or clearing of courtrooms. Child protection cases categorically involve evidence that is or may be damaging or embarrassing to the child. Commercial disputes commonly involve protected internal corporate operations. Rarely – if ever – have such trials been closed to the public. Such testimony should not now be evaluated differently simply because more people may exercise their constitutional right to view court proceedings than ever before. Public exercise of a constitutional right does not change the court’s evaluation of whether that right should be protected. Nor should courts erect barriers or hurdles to public attendance at hearings to discourage public exercise of that right. On the contrary, courts are required to take whatever steps are reasonably calculated to accommodate public attendance. Closure of courtrooms is constitutionally suspect and risky and should be a last resort.

¹⁵ *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

¹⁶ See *Cameron v. State*, 535 S.W.3d 574, 578 (Tex.App.—San Antonio 2017, no pet.)

¹⁷ *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Circ. 1995).

¹⁸ The Supreme Court has ruled that the media does not have a First Amendment right to copy exhibits. *Nixon v. Warner Communications*, 435 U.S. 589 (1978).

¹⁹ *A.J.S.*, 442 S.W.3d at 567 (citing *Osborne*, 68 F.3d at 94, and applying the 6th Amendment *Waller* and “substantial reason” standards to 14th Amendment public rights).

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 92-0068

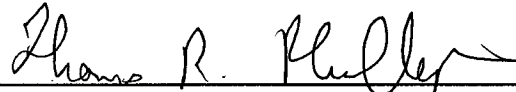
ADOPTION OF RULES FOR RECORDING AND BROADCASTING COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

ORDERED:

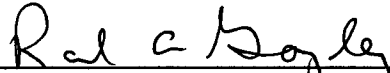
At the request of the civil district courts, county courts at law, and probate court of Travis County, the attached rules are adopted governing the recording and broadcasting of civil proceedings in those courts. TEX. R. CIV. P. 18c; TEX. R. APP. P. 21.

This Order shall be effective for each such court when it has recorded the Order in its minutes and complied with Texas Rule of Civil Procedure 3a(4).

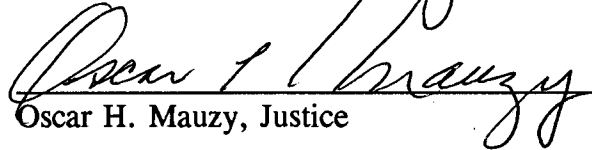
SIGNED AND ENTERED this 11th day of March, 1992.



Thomas R. Phillips, Chief Justice



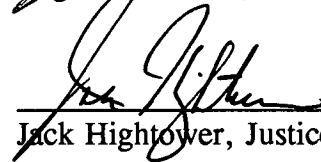
Raul A. Gonzalez, Justice



Oscar H. Mauzy, Justice



Eugene A. Cook, Justice



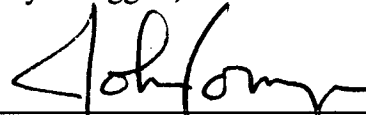
Jack Hightower, Justice



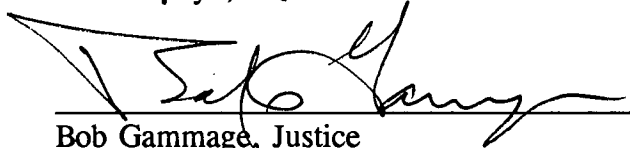
Nathan L. Hecht, Justice



Lloyd Doggett, Justice



John Cornyn, Justice



Bob Gammage, Justice

**RULES GOVERNING THE RECORDING AND
BROADCASTING OF COURT PROCEEDINGS IN
CERTAIN CIVIL COURTS OF TRAVIS COUNTY**

Pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the following rules govern the recording and broadcasting of court proceedings before the civil district courts, county courts at law, and probate court of Travis County, and their masters and referees.

1. Policy. The policy of these rules is to allow media coverage of public civil court proceedings to facilitate the free flow of information to the public concerning the judicial system, to foster better public understanding about the administration of justice, and to encourage continuing legal education and professionalism by lawyers. These rules are to be construed to provide the greatest access possible while at the same time maintaining the dignity, decorum and impartiality of the court proceeding.

2. Definitions. Certain terms are defined for purposes of these rules as follows.

2.1. "Court" means the particular court, master or referee in which the proceeding will be held.

2.2. "Media coverage" means any visual or audio coverage of court proceedings by a media agency.

2.3. "Media" or "media agency" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news reporting or news gathering agency.

2.4. "Visual coverage" means coverage by equipment which has the capacity to reproduce or telecast an image, and includes still and moving picture photographic equipment and video equipment.

2.5. "Audio coverage" is coverage by equipment which has the capacity to reproduce or broadcast sounds, and includes tape and cassette sound recorders, and radio and video equipment.

3. Media coverage permitted.

3.1. Media coverage is allowed in the courtroom only as permitted by Rule 18c of the Texas Rules of Civil Procedure and these rules.

3.2. If media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c(c) of the Texas Rules of Civil Procedure, permission for, and the manner of such

coverage, are determined solely by the court, with or without guidance from these rules. If media coverage is for other than investiture or ceremonial proceedings, that is, under Rule 18c(a) or (b) of the Texas Rules of Civil Procedure, the provisions of these rules shall govern.

3.3. Media coverage under Rule 18c(a) and (b) of the Texas Rules of Civil Procedure is permitted only on written order of the court. A request for an order shall be made on the form included in these rules. The following procedure shall be followed, except in extraordinary circumstances and only if there is a finding by the court that good cause justifies a different procedure: (i) the request should be filed with the district clerk or county clerk, depending upon the court in which the proceeding is pending, with a copy delivered to the court, court administrator, all counsel of record and, where possible, all parties not represented by attorneys, and (ii) such request shall be made in time to afford the attorneys and parties sufficient time to confer, to contact their witnesses and to be fully heard by the court on the questions of whether media coverage should be allowed and, if so, what conditions, if any, should be imposed on such coverage. Whether or not consent of the parties or witnesses is obtained, the court may in its discretion deny, limit or terminate media coverage. In exercising such discretion the court shall consider all relevant factors, including but not limited to those listed in rule 3.5 below.

3.4. If media coverage is sought with consent as provided in Rule 18c(b) of the Texas Rules of Civil Procedure, consent forms adopted by the court shall be used to evidence the consent of the parties and witnesses. Original signed consent forms of the parties shall be attached to and filed with the request for order. Consent forms of the witnesses shall be obtained in the manner directed by the court. No witness or party shall give consent to media coverage in exchange for payment or other consideration, of any kind or character, either directly or indirectly. No media agency shall pay or offer to pay any consideration in exchange for such consent.

3.5. If media coverage is sought without consent, pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the decision to allow such coverage is discretionary and will be made by the court on a case by case basis. Objections to media coverage should not be conclusory but should state the specific and demonstrable injury alleged to result from media coverage. If the court denies coverage, it shall set forth in its order the findings upon which such denial is based. In determining an application for coverage, the court shall consider all relevant factors, including but not limited to:

- (a) the type of case involved;
- (b) whether the coverage would cause harm to any participants;
- (c) whether the coverage would interfere with the fair administration of justice, advancement of a fair trial, or the rights of the parties;
- (d) whether the coverage would interfere with any law enforcement activity;

- (e) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;
- (f) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;
- (g) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought; and
- (h) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.

4. Media coverage prohibited

4.1. Media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Audio coverage and closeup video coverage of conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench is prohibited.

4.2. Visual coverage of potential jurors and jurors in the courthouse is prohibited except when in the courtroom the physical layout of the courtroom makes it impossible to conduct visual coverage of the proceeding without including the jury, and the court so finds. In such cases visual coverage is allowed only if the jury is in the background of a picture of some other subject and only if individual jurors are not identifiable.

5. Equipment and personnel. The court may require media personnel to demonstrate that proposed equipment complies with these rules. The court may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceedings. Unless the court in its discretion and for good cause orders otherwise, the following standards apply.

5.1. One television camera and one still photographer, with not more than two cameras and four lenses, are permitted.

5.2. Equipment shall not produce distracting sound or light. Signal lights or devices which show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden lighting changes shall not be used.

5.3. Existing courtroom sound and lighting systems shall be used without modification. An order granting permission to modify existing systems is deemed to require that the modifications be installed, maintained, and removed without public expense. Microphones and wiring shall be unobtrusively located in places approved by the court and shall be operated by one person.

5.4. Operators shall not move equipment or enter or leave the courtroom while the court is in session, or otherwise cause a distraction. All equipment shall be in place in advance of the proceeding or session.

5.5. Identifying marks, call letters, words and symbols shall be concealed on all equipment. Media personnel shall not display any identifying insignia on their clothing.

6. Delay of proceedings. No proceeding or session shall be delayed or continued for the sole purpose of allowing media coverage, whether because of installation of equipment, obtaining witness consents, conduct or hearings related to the media coverage or other media coverage questions. To assist media agencies to prepare in advance for media coverage, and when requested to do so: (i) the court will attempt to make the courtroom available when not in use for the purpose of installing equipment; (ii) counsel (to the extent they deem their client's rights will not be jeopardized) should make available to the media witness lists; (iii) and the court administrator will inform the media agencies of settings or proceedings.

7. Pooling. If more than one media agency of one type wish to cover a proceeding or session, they shall make pool arrangements. If they are unable to agree, the court may deny media coverage by that type of media agency.

8. Official record. Films, videotapes, photographs or audio reproductions made in the proceeding pursuant to these rules shall not be considered as part of the official court record.



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

P.O. BOX 12248 AUSTIN, TEXAS 78711

TEL: (512) 463-1312

FAX: (512) 463-1365

CLERK
JOHN T. ADAMS

EXECUTIVE ASST.
WILLIAM L. WILLIS

ADMINISTRATIVE ASST.
MARY ANN DEFIBAUGH

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
BOB GAMMAGE

September 22, 1992

Ms. Amalia Mendoza
District Clerk
Post Office Box 1748
Austin, Texas 78767

Dear Ms. Mendoza,

Enclosed, please find a corrected copy of the order of this Court of March 11, 1992 that approved local rules for recording and broadcasting court proceedings in certain civil courts of Travis County. Please destroy previous versions of this order.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc:
Hon. B. B. Schraub
3rd Admin Judicial Rgn

Hon. Joseph H. Hart
126th District Court

County Clerk

Mr. Ray Judice
Office of Court Admin

State Law Library

Chmn Supreme Ct Adv Committee



JOSEPH H. HART
DISTRICT JUDGE
126TH JUDICIAL DISTRICT COURT

P. O. BOX 1748
AUSTIN, TEXAS 78767

April 17, 1992

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Thank you for forwarding to me a copy of the Order recently issued by the Supreme Court adopting rules for recording and broadcasting court proceedings in civil courts in Travis County. A few omissions and errors have been brought to my attention that the Court may wish to change.

There is some inconsistency between the first paragraph of the rules and paragraph 2.1. The opening paragraph does not include district court masters and referees, while paragraph 2.1 does. Paragraph 2.1 does not include county courts at law and the probate court of Travis County, while the opening paragraph does. I believe we intended to have all of the courts covered by the rules, and they all should be included in both the opening paragraph and paragraph 2.1.

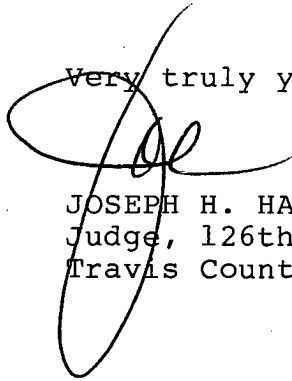
In paragraph 3.5(c) the conjunction "and" was probably included inadvertently and is not necessary.

The last sentence of paragraph 4.2 reads in part as follows: "In such cases visual coverage is allowed only of the jury is in the background of a picture" The "of" should be changed to "if" so that the sentence begins as follows: "In such cases visual coverage is allowed only if the jury is in the background of a picture"

Paragraph 5.1 reads in part as follows: "One television camera and one still photographers..." The word should be "photographer," singular, rather than "photographers," plural.

Thank you, the Court and your staff for working with us on these rules. If there is a problem in making the corrections, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to be 'JH', written over the typed name 'JOSEPH H. HART'.

JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/bjv

Tab C

Memorandum
On Proposed Changes to TRCP 18c on
Recoding and Broadcasting of Court
Proceedings

August 12, 2024

From: Richard R. Orsinger, Chair
Subcommittee on Rules 15-165a
of the Supreme Court Advisory Committee

Chief Justice Hecht, in his letter of July 17, 2024, referred to the Supreme Court Advisory Committee the November 9, 2021 Report and Recommendations of Subcommittee 1 of the Remote Proceedings Task Force. Task 1 mentioned in the Report related to Rules for Recording and Broadcasting proceedings in Texas trial courts. Having reviewed Task Force Subcommittee 1's observations and proposed changes to Texas Rule of Civil Procedure 18c, the Subcommittee on Rules 15-165a presents this Memorandum.

1. **Correlation with Appellate Rules.** The Task Force Subcommittee considered TRCP 18c and Tex. R. App. P. 14 together. The Subcommittee on Rules 15-165a agrees that the two rules should be considered together, but the benefits and risks of permitting or requiring broadcasting, televising, recording or photographing of proceedings in the trial courts are different from in appellate courts.
2. **The Current Rule.** The language of current Rule 18c, adopted in 1990, provides: RULE 18c. RECORDING AND BROADCASTING OF COURT PROCEEDINGS

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

- (a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or
- (b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or
- (c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

The Comment to this Rule said: "New rule. To provide for guidelines for

broadcasting, televising, recording, and photographing court proceedings.”

3. **Trial Court Discretion.** Current Rule 18c gives the trial court discretion whether to permit the broadcasting, televising, recording, or photographing (“BTRP”) of trial court proceedings. The question arises whether this should continue to be in the trial court’s discretion, or whether BTRP should be mandated for all trial court proceedings and, if so, whether certain exceptions should be recognized. The Comment to Tex. R. App. 14 says that the Rule “allows recording and broadcasting of court proceedings at the discretion of the court and subject to the stated guidelines.” The reference is to the guidelines stated in TRAP 14. A question to be addressed for TRCP 18c is whether guidelines should be stated in the Rule, or in some other manner.
4. **Consent of Participants.** The Task Force Report noted that “current Rule 18c appears to require consent of participants before a proceeding can be recorded or broadcast.” Report, p. 1. Current Rule 18c(b) makes it a condition to BTRP that the parties consent, and that the consent to being “depicted and recorded” be obtained from each witness whose testimony will be “broadcast, televised, or photographed.” Depicting and recording seems to be equated to broadcasting, televising, and photographing. Could depicting mean a drawing by a courtroom sketch artist? Does consent to recording equate to consent to broadcasting, televising and photographing? Does broadcast mean audio only, as distinguished from audio and visual? The inference is that a proceeding cannot be BTRP without the consent of all parties, and that the testimony of a witness cannot be BTRP without the consent of that witness. No mention is made of how and when notice is to be provided to the parties and each witness. No mention is made of whether and how and when notice is made to the public, in contrast to TRCP 76a, which requires notice to the public of the sealing of court records. And no mention is made of the right to object, or the standards that apply upon objection. The same is true if a party wants to request that a proceeding the BTRP when that is not planned by the trial court.
5. **Supreme Court Guidelines.** The requirement of consent in current Rule 18c(b) is, however, only one of three disjunctive conditions for publication. The others are that BTRP is permitted: (a) is “in accordance with guidelines promulgated by the Supreme Court for civil cases,” or (c) “the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.” So consent is not required if guidelines are promulgated by the Supreme Court and these guidelines are adhered to.
6. **Cameras in the Courtroom.** The Task Force subcommittee noted that TRCP 18c and TRAP 14 were promulgated in contemplation of a television camera in the courtroom with expected broadcast on the evening newscast. The current capability is to live-stream court proceedings on the internet where they can be conveniently viewed around the world and will not doubt be permanently recorded for replay at any time.

7. **Does an Open Courtroom Satisfy Public Access?** The Task Force Subcommittee said that “any ‘right to access’” is not an unfettered right. The Task Force Subcommittee said that there was no established “right” to remote access to court proceedings. The necessity for that arose during the COVID-19 closures but no longer exists and is a matter of choice post- COVID. TO what extent, if any, there is a right to access via the internet is a question to be considered in rewriting Rule 18c. The Rules 15-165a Subcommittee believes that public policy, the public interest, privacy considerations, potential misuse, and the impact on trial proceedings should be thoroughly considered in connection with modernizing Rule 18c.

8. **Sensitive and Protected Information.** The Task Force Subcommittee said that “sensitive and protected information” must be protected, and should be addressed in any new rules. The Subcommittee mentioned trade secrets. Sensitive data is addressed in Tex. R. Civ. P. 21c, Privacy Protection for Filed Documents, and is defined to include “(1) a driver’s license number, passport number, social security number, tax identification number, or similar government-issued personal identification number; (2) a bank account number, credit card number, or other financial account number; and (3) a birth date, a home address, and the name of any person who was a minor when the underlying suit was filed.” Rule 21c applies only to documents filed with the court, presumably meaning the clerk of the court or the judge. It does not seem that Rule 21c applies to marking exhibits in court proceedings, or testifying to sensitive data contained in documents, or lawyers mentioning sensitive data in addressing the court or a jury. Notably, Rule 21c(f) says: “Restriction on Remote Access. Documents that contain sensitive data in violation of this rule must not be posted on the Internet.” It would seem that the same policy that applies to filed documents would apply to exhibits, testimony, and argument in a court proceeding. Also to be considered is TRCP 192.6, Protective Order, which recognizes the right of a party from whom discovery is sought, or who may be affected by a discovery request, to move for a protective order “[t]o protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights.” To what extent do those same considerations apply to testimony, exhibits, and argument in a courtroom proceeding? TRCP 76a permits sealing of court records only upon the showing of “(a) a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness; [and] (2) any probable adverse effect that sealing will have upon the general public health or safety...” The question can be asked if any of these standards should be used in connection with BTRP of courtroom proceedings. The Texas Trade Uniform Secret Act applies only to proceedings where a party is seeking to recover damages under Chapter 134A of Tex. Civ. Prac. & Rem. Code ch. 134A. Section 134A.006 describes steps courts can take to preserve secrecy by issuing “[p]rotective orders [that] may include provisions limiting access to confidential information to only the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.” Section 134A.006 even permits courts to “exclude a party and the party’s

representative or limit a party's access to the alleged trade secret of another party
” Whether these legislative standards should influence the court rule
is a valid question to ask.

9. **Remote Proceeding.** The Task Force Subcommittee suggested consideration of remote proceedings in which the court is conducting a hearing on-line, where there is no proceeding in the physical courtroom. The Rules 15-165a Subcommittee believes that guidance is needed on whether and how to allow the public to participate in court proceedings conducted solely on-line and not in the courtroom.
10. **Right to Access.** The Task Force Subcommittee raised the question of what is the public's right to access to civil court proceedings? The topic was not discussed in depth in the Subcommittee's Report, but the issue was recently written about and discussed in the Supreme Court Advisory Committee's deliberations regarding the possible amendment of TRCP 76a.
11. **Greater Risks With New Technology.** The Task Force Subcommittee commented that the potential for misuse is greater with on-line sites such as YouTube, which do not benefit from editorial oversight of television news programs. The Subcommittee also mentioned security risks for participants and the possibility of manipulation of recordings. In the past, the SCAC has discussed “Practical Obscurity,” which has been defined as “the principle that private information in public records is effectively protected from disclosure as the result of practical barriers to access,” with further explanation that “practical barriers to access include travel to view the record, the passage of time, and the limits of indexing. When public records are accessible on the internet, those barriers are diminished.”¹ Also, given today's computing power it is possible for digital records to be altered in a way that is hard to detect. And some media would permit the posting of public comments about a court proceeding, either contemporaneous with the proceeding or afterward.
12. **Different Procedures Depending on the Type of Media.** The Task Force Subcommittee asked whether different factors should be considered for traditional media versus court-controlled internet broadcast. The Rule 15-165a Subcommittee believes that new technologies create new avenues of access to court proceedings but also new dangers of misuse and possible negative effects on court proceedings, such as reluctance of potential jurors to answer questions candidly during jury selection, or reluctance of witnesses to testify while being recorded or broadcast, if proceedings are being disseminated on the internet.
13. **Rule Versus Standards.** The Task Force Subcommittee asked “how detailed should the rule be?” The Rule 15-165a Subcommittee raises the questions of whether there should be rules or instead should be standards, and if there are standards then what should they say and how should they be promulgated? Is there a presumption of openness as under TRCP 76a, or a presumption in favor of granting protective orders relating to alleged trade secrets like the Trade Secrets’

Act, or no presumption at all?

14. **Notice and Opportunity to Heard.** The final discussion point made by the Task Force Subcommittee related to the opportunity to object to recording/broadcasting and even to seek mandamus review before hearing or trial. If the trial court has a standing policy on recording/broadcasting, the duty naturally falls on the parties or witnesses to raise their objection before the hearing or trial. Where the trial court does not have a standing policy on recording/broadcasting, then should that decision to record/broadcast be made sufficiently in advance of the event to give an opportunity for a party or witness to object and seek mandamus review? Then there is the question of courts that do not routinely record/broadcast proceedings and whether a party can move for the court to allow the recording/broadcast of a court proceeding.
15. **The Proposed New Rule 18c.** The Task Force Subcommittee's Report presented as Exhibit A a proposed revised TRCP 18c, consisting of six subparts. The Rules 15-165a Subcommittee discussed this proposed Rule and has the following comments.
16. Proposed Rule 18c.1 relates to parties or third-parties making recordings or broadcasting court proceedings. The proposed rule makes recording or broadcasting permissive, not mandatory, at the trial court's discretion, but subject to rules or standards adopted by the Supreme Court. Ceremonial activities are excepted, and are subject to the trial court's discretion without regard to the Rules of Procedure. Perhaps rules of standards should be promulgated that apply to ceremonial activities, since there may be public interest in the swearing-in of judges, and the like. It would be good to clarify what is meant by "recording" and "broadcasting," since those activities could overlap or differ, and broadcasting has been understood to mean transmitting by radio or television when dissemination via the internet is the greater issue. Also, it should be clarified that "recording" as used in this rule is different from the court reporter's stenographic recording or audio recording of the court proceedings.

¹ Dictionary of Archives Terminology <<https://dictionary.archivists.org/entry/practical-obscurity.html>>.

17. Proposed Rule 18c.2 relates to the court making recordings or broadcasting court proceedings. It requires the court to give advance notice of the intent to record or broadcast. Not recording or broadcasting is the default, as there is no requirement that a court give notice that a proceeding (or proceedings generally) will not be recorded or broadcast. The Rules 15-165a Subcommittee concurs with the idea that parties can object to recording or broadcasting. Note that the proposed Rule 18c.2 eliminates the requirement under current Rule 18c of consent of parties and each witness, leaving the matter purely discretionary with the court. This step should be discussed thoroughly as it is a major policy change. The proposed rule limits the court's discretion to "a court-controlled medium." The meaning of that term needs to be made clear.
18. Proposed Rule 18c.3 relates to a party wishing to "cover" a court proceeding. This is phrased as if addressing a journalist, radio or television reporter, or other news professional will attend in person with a camera and microphone. Consideration should be given to professionals or non-professionals seeking remote access and permission to record the proceeding. The proposed rule includes "images," meaning photographs and perhaps drawings, with no audio recording. Proposed Rule 18c.3(b) permits parties to object, but not witnesses. Persons summoned for jury duty and participating in jury selection are not mentioned. The proposed rule requires the objecting party to state a "specific and demonstrable injury alleged to result from coverage." This standard differs from TRCP 21c, and TRCP 76a and TRCP 192.6, and the question arises whether it is the best articulation of the policy involved. The proposed rule allows but does not require the court to conduct a hearing on the objection to recording/broadcasting. This is in contrast to TRCP 76a.4 which requires a hearing.
19. Proposed Rule 18c.4 lists factors that the court may consider in deciding whether to record or broadcast a court proceeding. Many of the factors are case-specific, which would seem to weigh against a court adopting a standing policy to disseminate all court proceedings on YouTube or other internet service.
20. Proposed Rule 18c.5 says that a video or audio "reproduction" of a proceeding is not part of the official record. The Rules 15-165a Subcommittee agrees with this suggestion.
21. Proposed Rule 18c.6 says that persons who violate the court's order may be subject to disciplinary action "up and including contempt." The proscription applies to "imagery," which needs to be defined.
22. The Rules 15-165a Subcommittee has prepared a proposed version of a new Rule 18c, which is attached to this Memorandum.
23. The Rules 15-165a Subcommittee believes that there are issues of judicial ethics that should be considered for inclusion in the Texas Code of Judicial Conduct, or in guidelines promulgated by the Supreme Court, regarding judges not engaging in on-line conversations or posting comments about pending cases. But that raises the question of whether judges can "defend themselves" from criticism posted on-

line.

24. The Rules 15-165a Subcommittee summarizes its discussions with the following points:

(1) Most of the concerns outlined in the referral letter relate to ethical matters, and they should be addressed within the Code of Judicial Conduct:

a. extraneous judicial commentary and extrajudicial remarks made in connection with such proceedings;

b. permitting the posting of public comments in reaction to official court proceedings and judicial responses to such commentary; and

c. the acceptance of financial compensation in connection with posting official court proceedings.

(2) The rules in the trial courts should be drafted in consideration of the rules governing appellate courts; they are not the same but should be consistent.

(3) The Supreme Court should consider what to include in Rules of Procedure, what to included in Comments to the Rules, and what to promulgate in other ways, such as Miscellaneous Orders or instructional pamphlets disseminated through judicial continuing education. For example, the factors listed in proposed Rule 18c.4 may be better placed in something other than a rule of procedure.

(4) As stated in proposed Rule 18c.5, recordings such as these should not be considered a court record. There should be no obligation for the court or court reporter to maintain these kinds of recordings.

(5) The ability to punish violation of the rules of court by contempt is fine, but not calling it a disciplinary action.

(6) The Subcommittee did not achieve consensus on whether “broadcast” meant television and radio only, or additionally live-streaming on the internet. There was also not consensus on whether courts should be required to keep these types of recordings for later access by the public. And there was not consensus whether there should be a uniform rule for all trial courts, or whether each court should be free to do as it wishes, guided by standards or following rules promulgated by the Supreme Court. The Subcommittee did not achieve consensus on whether there is a “right” to privacy and, if so, whether it should be listed as a factor to be weighed.

25. It should be noted that TRCP 76a, on sealing court records, does not apply to action originally arising under the Family Code. Consideration should be given to applying that exemption to recording and broadcasting Family Law proceedings

which frequently involve sensitive financial and private information and privileged information.

26. The Executive Committee of the Family Law Council of the State Bar of Texas' Family Law Section has submitted a memorandum of thoughts which should be considered as part of the discussions surrounding amending Rule 18c. A copy of that memorandum is included in the Agenda for the August 16, 2024 Supreme Court Advisory Committee meeting.

SCAC Subcommittee for Rules 15-165a's Proposed Revisions to TRCP 18c:

18c.1 Recording and Broadcasting Permitted

(a) Recording and Broadcasting by the Court

A trial court may record or broadcast courtroom proceedings over which the trial court presides via a court-controlled medium in accordance with this rule and any standards adopted by the Texas Supreme Court.

(b) Recording and Broadcasting by Others

A trial court may permit courtroom proceedings to be recorded or broadcast in accordance with this rule and any standards adopted by the Texas Supreme Court.

(c) Notice and Objection

The trial court must give reasonable notice to the parties if a proceeding will be recorded or broadcast. Reasonable notice may include the court's written policy stating the types of proceedings recorded and broadcasted as a matter of course and the medium of broadcasting. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

(d) Exceptions

This rule does not apply to an investiture or other ceremonial proceedings, which may be broadcast or recorded at the trial court's sole discretion, with or without guidance from these rules.

(e) Written Policy

Each court must have a written policy governing recording and broadcasting of court proceedings, which will be posted on the TOPIC website maintained by OCA.

Comments:

- a. Need to define "recording" and "broadcasting" – Live only? Or uploaded and made available?

- b. Will we require trial courts to take down recordings after a specified time?
- c. Need to define “court-controlled” – does it include services like YouTube, as long as it’s a channel maintained by the court? Or does it mean court websites only?

~~18c.2 Recording and Broadcasting as a Matter of Course~~

[combined into 18c.1.]

~~18c.3 Procedure Upon Request~~

[Remove this level of detail from the rules. These topics should be covered within each court’s written policy.]

~~18c.4 Decision of the Court~~

[Remove this from the Rules. These standards should be published in “standards adopted by the Texas Supreme Court.]

18c.5 Official Record

Video or audio reproductions of a proceeding pursuant to these rules shall not be considered as part of the official court record.

18c.6 Violations of Rule

Any person who records, broadcasts, or otherwise disseminates the audio, video, or imagery of a court proceeding without approval in accordance with this rule may be subject to disciplinary action by the court, up to and including contempt.

END

Tab D

MEMORANDUM

TO: Richard Orsinger, Chair of SCAC Subcommittee on Rules 15-165A
Judge Ana Estevez, 251st District Court of Potter County, Texas

FROM: Executive Committee, Family Law Council

SUBJECT: Proposed Rule Changes by the Texas Supreme Court

DATE: August 6, 2024

I SUMMARY

The Supreme Court has asked the Supreme Court Advisory Committee (SCAC) to examine existing court rules and suggest recommendations on several proposed changes to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, Texas Rules of Evidence, and State Bar Court Rules. At the request of Richard Orsinger, Chair of the SCAC Subcommittee on Rules 15-165a, the Family Law Council reviewed all matters to be addressed by the SCAC Subcommittee and provides comments on two of the matters as specifically identified below.

II COMMENTS

1. **Recording and Broadcasting Court Proceedings**
 - a. *See attached Memorandum on Rule 18c*
2. **Transfer on Death Deed Forms**
 - a. The Family Law Council provides no comments on this issue.
3. **Artificial Intelligence**
 - a. *See attached Memorandum on Artificial Intelligence*
4. **Third-Party Litigation Funding**
 - a. The Family Law Council provides no comments on this issue.
5. **Error Preservation Citation**
 - a. The Family Law Council provides no comments on this issue.
6. **Texas Rule of Appellate Procedure 18.1**
 - a. The Family Law Council provides no comments on this issue.
7. **Texas Rules of Civil Procedure 4**
 - a. The Family Law Council provides no comments on this issue.
8. **Texas Rules of Evidence**
 - a. The Family Law Council provides no comments on this issue.
9. **Court of Appeals Opinions**
 - a. The Family Law Council provides no comments on this issue.

Tab E

MEMORANDUM

TO: Richard Orsinger, Chair of SCAC Subcommittee on Rules 15-165A
Judge Ana Estevez, 251st District Court of Potter County, Texas

FROM: Executive Committee, Family Law Council

SUBJECT: Proposed Rule Changes to Texas Rules of Civil Procedure 18C

DATE: August 6, 2024

**I
SUMMARY**

The Texas Supreme Court is charged with addressing changes to the Texas Rules of Civil Procedure 18c. It has asked the Supreme Court Advisory Committee (SCAC) to examine the existing rule and suggest recommendations. At the request of Richard Orsinger, Chair of the SCAC Subcommittee on Rules 15-165a, the Family Law Council has reviewed this matter and provides the comments in this Memorandum for the benefit of his committee and SCAC as a whole.

As noted by Chief Justice Hecht in his referral letter to SCAC,¹ the Committee previously discussed changes to TRCP 18c in 2022. Those proposed changes were part of the proposals submitted to the Texas Supreme Court by the Remote Proceedings Task Force.² Much has changed since the first iteration of the proposed TRCP 18c considered by SCAC was conceived and crafted. Now that Texas courts have emerged from the lockdown, the changes to TRCP 18c should reflect the future of court proceedings in a post-Covid environment, rather than addressing concerns specific to fully remote court proceedings from the “locked-down” pandemic era. We believe that, in order to function effectively, the rules should be adapted to encompass and apply equally to fully remote, hybrid, and in-person proceedings.

¹ See letter from Chief Justice Nathan L. Hecht dated July 17, 2024.

² See Subcommittee 1’s Report and Recommendations, November 9, 2021.

II COMMENTS

Constitutional Open Court Requirement

Of great concern when remote proceedings were first implemented by Emergency Order in March of 2020 was how to comply with Constitutional open courts requirements. Courts must ensure and accommodate meaningful and unfettered public access to court proceedings. However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, including promoting security, preventing disclosure of private information, ensuring a fair trial, and protecting a child from emotional harm. Limiting visibility or accessibility of live streamed proceedings implicates serious considerations and may constitute structural error requiring “automatic reversal and the grant of a new trial.”³ Both the Court of Criminal Appeals and the Texas Supreme Court have addressed remote proceedings in rulings over the last several years. To avoid problems, rules must be carefully formed so as to not permit courts to violate the public right of access to open court proceedings.

Remote Proceedings, In-Person Proceedings and Hybrid Proceedings

The current version of TRCP 18c was adopted by the Texas Supreme Court in 1990 and is clearly in need of revision to bring the rule into conformity with the reality of court proceedings following the pandemic. The changes to TRCP 18c that were reviewed by SCAC in 2022 do not differentiate between (1) court recording of remote proceedings, (2) court recordings of in-person or hybrid proceedings, (3) a court’s live-streaming of proceedings for compliance with open court requirements, (4) a court’s livestreaming of in-person proceedings when not required for open court compliance, (5) third-party recording of court proceedings, and (6) third-party livestreaming of court proceedings.

We strongly believe that Rule 18c should be split into separate and discrete categories for discussion and consideration in order to be most effective and to avoid confusion and problems. Key issues and concerns differ for each of these categories of digital recording. For example, when public access is available in the physical courthouse, certain testimony may be excluded from broadcast without constitutional or open courts implications. However, if the livestream is the only means of public access, the same exclusion may create structural and reversible error. We suggest that there may need to be separate and carefully crafted rules for live-streaming by a court in order to meet

³ For a broader discussion of open courts requirements, see “Background and Legal Standards – Public Right to Access to Remote Hearings during COVID-19 Pandemic,” Office of Court Administration, May, 2020.

constitutional open courts requirements, and recording/streaming/broadcast of in-person or hybrid proceedings by press or non-court personnel. Modification of the rules must not unintentionally cause conflicting requirements for in-person broadcast versus streamed remote-proceedings, but the issues and priorities are significantly different.

Publication of Sensitive Information

Public broadcast and livestream of court proceedings should be carefully crafted to protect court participants. Once recordings are posted on or streamed to the Internet, they take on a life of their own and cannot be controlled in any way. Rule 18c.3 as currently proposed lacks sufficient protections for family law and child welfare cases, including ensuring the safety and welfare of children, and preserving and protecting extremely sensitive images and information, financial/identifying information in divorce cases, and medical, psychiatric, and psychological information. There are also no restrictions on broadcast of jurors' faces or identities. Without such protections, court participants and children may suffer long term trauma and financial consequences. This concern should be of paramount importance in addressing live-streaming requirements of family law cases. Due to the potential conflict with open-courts requirements, careful consideration must be given.

There is a market on social media and YouTube that provides live commentary on broadcast streams of judicial proceedings, and these shows are uncontrolled and uncensored. Live public commentary on court proceedings could chill testimony of reluctant witnesses and interfere with the court's ability to render just decisions. Child welfare and family law cases often include allegations and evidence of child abuse, mental health diagnoses, and drug usage. Broadcasting the testimony and photographic medical records of a Sex Assault Nurse Examiner could publicly humiliate and revictimize crime and abuse victims. Broadcasting personally identifying information such as full names and addresses on the internet creates significant security risks, especially in suits involving allegations (founded or unfounded) of family violence, abuse, or neglect. Broadcasting private financial records of parties and children could leave them exposed to risks of future financial and physical harm. Given the significant threat of online abuse, and the potential conflict of restricting public access to sensitive information with open-courts requirements, careful attention must be given to all factors and consequences before any rule amendment is promulgated.

Monetization of Broadcasting by Lawyers and Judges

The Judicial Code of Conduct prohibits judges from reaping financial benefit from their titles or jobs. Canon 2.B. states that, “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others[.]” We believe this Canon encompasses all forms of financial benefit that may be derived from broadcast or streaming of court proceedings, and as such there is no need for new rules regarding monetization of

streaming or broadcasting. If clarification is desired to remove all doubt, we suggest that a comment could be added under Canon 2.B making clear that it applies to such avenues of financial benefit. We take no position on the ability of the Court to limit attorney use and monetization of such streams and recordings. Research and study is needed to assess the risks, dangers, impacts, and enforceability of such a rule.

Live Stream Commentary

We are aware of reports that a few judges permitted live chat and commentary on their livestreams, and even engaged with viewers or audience members by responding to their comments during livestreamed court proceedings. We believe that this sort of conduct is encompassed within and prohibited by existing Canons of the Judicial Code of Conduct, but do not oppose a specific rule that prohibits the live-streaming platform from permitting commenting or live-chat to take place.

Retention Policies

We do not believe that a specific rule on retention or mandatory destruction by courts of nonpublic video recordings of remote or livestreamed proceedings would necessarily improve the system. Retention policies are unique to each specific court. In the absence of a state-wide retention policy that applies to all judicial records including emails, audio recordings, Zoom recordings, court reporter recordings, security recordings, voicemails, or written communications, carving out video or audio recordings of live streams would cause confusion. If such a system is to be considered, it should be researched and thoroughly vetted prior to implementation.

Currently, recordings of streamed or recorded court proceedings are excluded from disclosure or production as “judicial records” under Rule of Court Administration 12. However, we agree that Rule 12 should be amended to clearly state that such recordings are not judicial records.

There are concerns regarding the long-term posting of court proceedings online by courts (such as leaving such recordings posted on the court’s YouTube channel after a hearing is concluded). **We believe that a rule providing that the court’s recordings of virtual, live-streamed, or broadcast court proceedings should not be maintained in a publicly-available format after conclusion of a hearing would benefit the system and would help avoid the noted concerns.** It is worth noting that this rule could not constrain the use of third-party or press recordings permitted under what is currently titled Rule 18c.3, which would not be subject to the court’s control.

Any state-wide retention policy would affect county budgets significantly. A study of the effect of any such policy should be required before the policy is proposed or implemented.

III CONCLUSION

The draft of proposed changes to TRCP 18c considered by SCAC in 2022 was the result of a year-long effort by the Remote Proceedings Task Force, which submitted its final report to the Texas Supreme Court in November of 2021. The Task Force's recommendations were then referred by the Supreme Court to SCAC, which discussed the proposals at length over the course of 2022. Much has changed in the time since the proposed revisions to TRCP 18c were first introduced. The task of revising TRCP 18c should not be rushed. Sufficient time should be spent to identify and evaluate all relevant concerns and strike a balance between the compelling and competing interests involved.

Tab F

Supreme Court of Texas Probate Forms Task Force

P.O. Box 12487 • Austin, TX 78711-2487 • Tel: 512-427-1855 • Fax: 512-427-4160

Chair
Hon. Polly Jackson
Spencer

Members
Mr. Carlos Aguiñaga
Ms. Barbara Anderson

Ms. Julie Balovich

Mr. Craig Hopper

Ms. Cathy Horvath

Mr. Jerry Jones

Hon. Steve M. King

Ms. Trish McAllister

Ms. Christy Nisbett

Ms. Arielle Prangner

*Supreme Court of Texas
Liaison*
Hon. Eva M. Guzman

*Supreme Court of Texas
Staff Representative*
Osler McCarthy

February 2, 2024

Justice Brett Busby
The Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Report to the Supreme Court of Texas, Misc. Docket No. 16-9003

Dear Justice Busby and Justices of the Supreme Court of Texas:

As I believe the Court is aware, the Probate Forms Task Force has finally completed our assigned tasks with the forwarding of the enclosed Transfer on Death Deed (TODD) forms, related forms, and instructions. The Task Force members originally appointed by the Supreme Court on January 21, 2016 are Judge Polly Jackson Spencer as chair, Carlos Aguinaga, Barbara McComas Anderson, Julie Balovich, Craig Hopper, Cathy Horvath, Jerry Frank Jones, Judge Steve M. King, Trish McAllister, Christy Nisbett, and Arielle M. Prangner. Of our original group, Christy Nisbett retired. Julie Balovich and Cathy Horvath took different jobs but remained involved in this phase of our assignment to some degree. Judge King and Jerry Frank Jones were unable to participate in the work on these forms due to other commitments. We were privileged, though, to have Ronald Lipman, an attorney in Houston, working with us. As you know, he expressed a particular interest in working on these forms and has extensive experience in form preparation in general. We continued to meet almost monthly, primarily by Zoom, to work on this project. Our primary contact at the Texas Access to Justice Commission, Trish McAllister, also left to take another position, but she volunteered to continue to work with us. Her involvement was crucial to the completion of this task.

The process has continued to be interesting, challenging, and educational but also much more difficult and time-consuming than any of us anticipated. The Task Force consists of very detail-oriented people from different backgrounds – estate planning attorneys, Legal Aid attorneys, judges, and clerks – all of whom see problems relating to the use of these forms from different perspectives. We tried to accommodate the concerns raised by each member in drafting these forms as we have with our other forms. We believed, though, that our mandate was to write forms in “plain language” for people to complete without the assistance of an attorney.

Related to the point made in the preceding paragraph, I recently had a conversation with an attorney not from San Antonio where I live. She told me that she and her partner had been reviewing the will forms which the Task Force prepared and the Court put out last spring. She raised concerns about the use of these forms by lay people and the possibilities for various misunderstandings and mistakes – problems likely to require the assistance of attorneys, at some cost, to straighten out. She was surprised and chagrined about our conversation when I told her that I had been on the Task Force that prepared the forms. I assured her that those of us on the Task Force shared her concerns, but the task given to us was to prepare forms for lay people to use without requiring the assistance of an attorney. I mention this because it highlights the need for the work recently done by the Working Group on Access to Legal Services on which both Craig Hopper and I were privileged to serve, and the need for implementation of suggestions included in the Group’s Report to the Texas Access to Justice Commission delivered on December 15, 2023.

We are pleased to present these forms to the Court as a product into which much time, thought, and effort has gone. We recognize that the forms will be reviewed and likely revised by the Court. We also recognize that no form will be perfect and that they will probably be revised from time to time as the public uses them and provides information about their ease of use and general value. I speak for all of us when I say we would like to discuss any revisions the Court makes. I know I speak for all of us when I say that it has been an honor for us to be asked to be a part of this important work and this task force.

Very truly yours,

A handwritten signature in blue ink that reads "Polly Jackson Spencer". The signature is fluid and cursive, with the first name "Polly" being the most prominent.

Hon. Polly Jackson Spencer
Chair

**INSTRUCTIONS AND FAQs
REVOCABLE TRANSFER ON DEATH DEED
FOR AN INDIVIDUAL OWNER**

You can use this **Revocable Transfer on Death Deed** (“TODD”) form to transfer ownership of real property located in Texas when you die without going to court. To sign a TODD, you must have the legal and mental capacity to sign a contract. The Transfer on Death Deed is authorized under [Chapter 114 of the Texas Estates Code](#).

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You are an owner of real property located in Texas and want to transfer ownership of the property to someone else when you die without a court hearing being required.
- You already filed a TODD in the deed records in the County Clerk’s office of the county where the property is located, and you want to create a new TODD to change who will receive the property on your death.

Use the TODD form for Married Owners or Two Co-Owners if:

- You own the property with another co-Owner and you both want to transfer your interest in the property to each other when you die.
- You are married, the real property is community property, and you both want to transfer your interest in the property to each other when you die.

Do not use this form if:

- You do not own an interest in the property. (However, it is okay to use this form if your interest in the property is subject to a mortgage.)

Consult an Attorney if:

- You are married and you do not want to transfer your interest in the property to your spouse. Your spouse may still have homestead rights in the property if you die first.

Helpful Words to Know:

- Community property: Real property is community property if it is acquired during your marriage, except for separate property acquired before or during the marriage.
- Separate property: Real property is separate property if you owned it before your marriage, received it during your marriage by gift or inheritance, or purchased it with separate property money.

The rules of community property and separate property are complicated. If you are not sure whether your property is community or separate property, contact a lawyer for advice.

NOTICE TO PROPERTY OWNERS: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact a lawyer for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your Social Security number or driver’s license number on this form. They are not required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. What does a Transfer on Death Deed (“TODD”) do?

A TODD transfers ownership of real property, including mineral interests, located in Texas to someone else when you die without going to court. It does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

2. What does this Individual Owner Revocable TODD do?

The Individual Owner Revocable TODD form can be used to transfer ownership of real property to someone else when you die without going to court.

3. Who can I name as a beneficiary or alternate beneficiary in the Individual Owner Revocable TODD form?

You can name anyone you want as a beneficiary or alternate beneficiary, including a family member, a friend or other person, a charity, an educational institution, a trustee of a trust (including the trustee of a revocable or irrevocable trust), a custodian under the Uniform Transfers to Minors Act, etc. You must include the name and address of each person or entity you name as beneficiary or alternate beneficiary, so make sure you have this information when you prepare the form. You do not have to notify any beneficiary that you have named them in the form, but it is recommended that you do.

4. Does a TODD change my ownership of the property or my ownership rights before I die?

No. Even though you must file the TODD in the deed records before you die, you still own your interest in the property and retain your interest in the property rights until you die. This includes the right to use your interest in the property as collateral for a loan, obtain property tax exemptions on your interest, make repairs or other improvements, sell, or transfer your interest in the property as long as the sale or transfer complies with marital property or other co-owner rights, etc.

5. Can I use this Individual Owner Revocable TODD form if I’m married?

It depends.

If you are married and want to name your spouse as the beneficiary, you can use this form if:

- the property is your separate property and your spouse does not have any ownership interest in the property.
- the property is community property, or your spouse has an ownership interest in the property, and you want your interest in the property to transfer to your spouse when you die. If both spouses intend for the property to transfer to the surviving spouse when the first spouse dies, each spouse needs to sign a TODD form naming the other spouse as the beneficiary **or** you can use the TODD form and instructions for Married or Two Co-Owners instead.

If you are married and you want to name someone other than your spouse as the beneficiary, you should consult an attorney, even if the property is your separate property and your spouse has no ownership interest in it. If you create and file a TODD leaving your separate real property to someone other than your spouse, your spouse may still have homestead rights in the property if you die first.

6. What happens when I die?

As long as the TODD is filed in the deed records in the County Clerk's office of each county where the property is located before your death, the property transfers to the beneficiary or beneficiaries named in the TODD (or to their descendants, if this option is chosen) who survive you by at least 120 hours in the shares indicated in the TODD.

If all beneficiaries (and their descendants, if that option is chosen) are deceased or do not survive you by at least 120 hours, then the property transfers to the alternate beneficiaries named in the TODD (or to their descendants, if that option is chosen) in the shares indicated in the TODD.

7. What property can I transfer using a TODD?

A TODD only transfers real property located in Texas. You can only transfer the portion of the real property that you own. A TODD does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

If you are married and you want to name someone other than your spouse as the beneficiary, you should consult an attorney, even if the property is your separate property and your spouse has no ownership interest in it. If you create and file a TODD leaving your separate real property to someone other than your spouse, your spouse may still have homestead rights in the property if you die first.

8. Can I transfer more than one piece of property in this TODD form?

This TODD form is designed to transfer one piece of real property. If you own more than one piece of real property in Texas and you want to transfer additional properties using a TODD form, you should complete and file a separate TODD form for each piece of property.

9. Can I use a TODD to transfer a mobile or manufactured home?

If you want to use a TODD to transfer a mobile or manufactured home, you must:

- Own the real property that the mobile or manufactured home is permanently attached to,
- Have a Statement of Ownership declaring that the mobile or manufactured home is a part of the real property, and
- That Statement of Ownership must have been filed in the deed records in the County Clerk's office of each county where the mobile or manufactured home is located.

For more information, see the Texas Department of Housing and Community Affairs website at <https://www.tdhca.state.tx.us/mh/ownership-location.htm> and the Application for a Statement of Ownership form at <https://www.tdhca.state.tx.us/mh/docs/1037-applysol.pdf>.

10. What if I have a Will that leaves the property to someone else?

A properly filed TODD overrules a Will. The property transfers to the beneficiary named in the TODD, not the person named in your Will. This is true even if you make a Will after you have completed and filed the TODD. If you already have a Will or plan to sign one, contact a lawyer for advice about the best method for transferring your real and personal property upon your death.

11. What do I do with the TODD after I fill it out and sign it?

Once you have completed the TODD and signed it in front of a Notary Public, you must file it in the deed records in the County Clerk’s office of each county where the property is located. You may need to show the Notary Public a form of identification. You will have to pay a filing fee. Contact the County Clerk for more information. The County Clerk may file the TODD immediately and hand the original back to you, or the Clerk may mail the original TODD to the person you listed in the “After Recording, Return to:” box. Keep the original TODD in a safe place.

12. Does the beneficiary need to do anything to claim the property when I die?

After you die, an “Affidavit of Death” should be filed in the deed records in the County Clerk’s office of each county where the TODD was filed. Filing the Affidavit of Death notifies the public that the property has transferred to the new owner or owners. The Affidavit of Death form included with this TODD form can be used at that time.

13. If I change my mind, how can I “undo” a TODD?

If you change your mind, you can revoke (cancel) a TODD at any time before you die either by creating a new TODD or by completing a Cancellation of TODD form. You cannot revoke a TODD by tearing it up once it’s been filed. The new TODD or the Cancellation of TODD must be filed in the deed records in each County Clerk’s office where you originally filed a TODD. There will be a filing fee.

NOTE: If you cancel your TODD or make a new one, it only affects the portion of the property that you own. It will not affect the ownership rights of any other co-owners.

14. What happens if I get divorced after I have filed this Individual Revocable TODD?

A TODD naming your spouse as beneficiary will remain in effect unless, before you die, a notice of the divorce judgment or a final decree of divorce is filed in the County Clerk’s office in each county where the TODD was originally filed. A filed notice of the divorce judgment or final decree of divorce revokes (cancels) your ex-spouse as a beneficiary but does not change the alternate beneficiaries, such as your ex-spouse’s children or relatives. A filed Cancellation of TODD or a new TODD will completely revoke the TODD.

You can get a notice of divorce judgment or a final decree of divorce from the clerk of the court where your divorce was finalized. Check with the County Clerk’s office where you filed the TODD to see if you need a certified copy of a notice of divorce judgment or a final decree of divorce. If so, you will need to get a certified copy from the clerk of the court where your divorce was finalized, and a fee may be charged.

Because a notice of divorce judgment and a Cancellation of TODD are shorter than a divorce decree, they are significantly less expensive to file. A divorce decree may also include private information, such as the names of children or other private information, so it is best to use a notice of divorce judgment or a Cancellation of TODD.

15. What if I owe debts on the property I want to transfer?

You can sign a TODD to transfer the property even if there is a debt or lien on the property, such as a mortgage. The property transfers to the beneficiary or beneficiaries when you die even if there are debts or liens on the property. A TODD does not protect the property from your creditors. Any mortgages, liens, homeowners' association fees, property taxes, homeowners' insurance, etc., will still need to be paid as required. The property could also be used to pay any other unpaid debts at your death or expenses related to your death. A title company or other party asked to rely on the TODD may request proof that there are no such outstanding debts or expenses, including taxes. If you have questions or concerns about this, consult an attorney.

16. Will a TODD affect my Medicaid benefits?

No. It will not affect your Medicaid benefits because the property does not transfer until you die.

17. What if there is a Medicaid Estate Recovery Program (MERP) claim against my estate after I die?

If the State wants to be repaid after you die for Medicaid benefits you received during your lifetime, property properly transferred under a TODD is not subject to a MERP claim under current law. If you have questions or concerns about this, consult an attorney.

B. COMPLETING THE REVOCABLE TRANSFER ON DEATH DEED FOR INDIVIDUAL OWNER FORM

1. Owner

Enter the owner's full name exactly as it appears on your original property deed. If your name has changed, enter the name as shown on the deed followed by "AKA" (also known as) and your current name.

2. The "Property" is:

Physical Address of the Property: Enter the physical address of the property, including the number, street name, city, county, state, and zip code.

Legal Description of the Property: Print the legal description of the property, which is different from the mailing or physical address. Use the legal description exactly as it appears on your property deed. **It is very important that this information is correct.** If you do not have a copy of your property deed, you may request a copy from the County Clerk's office in the county where the property is located because it should have been filed there when you acquired the property. If you are not able to obtain a copy of your deed or are unsure of the legal description, you may want to consult an attorney.

If you have no other alternative, you can use the property description listed on your property tax statement but be aware that it may not be correct or sufficient to transfer title of the property to the beneficiary or beneficiaries.

3. Beneficiary or Beneficiaries

Print the name of the beneficiary or beneficiaries you want to receive the property when you die. You can name up to four beneficiaries on this form. Use additional pages if you want to name more than four beneficiaries. See FAQ 3 for who or what can be listed as a beneficiary. If you name the trustee of a revocable or irrevocable trust, you should use a format similar to the following:

"[Name of trustee], trustee of the [Name of trust] under trust agreement dated [Date]"

You should also enter the address of the trustee and also indicate that the relationship of this beneficiary is either "revocable trust" or "irrevocable trust" (whichever applies). Do not check the box indicating that the share passing to the trust will instead pass to the surviving descendants of the beneficiary, as a trust does not have descendants.

- If more than one beneficiary is listed and there is no indication of how the property should be divided, then the property transfers in equal shares to the beneficiaries who are listed.
- If you name only one beneficiary or one alternate beneficiary, you should enter "100%" in the percentage box for that person. If you name more than one beneficiary or alternate beneficiary, enter the percentage or fraction of the property that you want each beneficiary to receive.
- **It is very important that the shares you list add up to 100% (if you are using percentages) or to 1 (if you are using fractions). If there is a math error and the shares listed for all beneficiaries do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owner.**

For example:

If you have five children and you want to transfer the property to them in equal shares when you have died, you would enter the following shares for each child:

$$20\% + 20\% + 20\% + 20\% + 20\% = 100\% \text{ -- or -- } 1/5 + 1/5 + 1/5 + 1/5 + 1/5 = 1$$

If you list three beneficiaries and you want all of them to receive an equal share, you should enter 1/3 for each beneficiary named:

$$1/3 + 1/3 + 1/3 = 1$$

If you have three children and you do not want them to have equal shares, you could give Child A 50% (or 1/2) of the property and give Child B and Child C 25% (or 1/4) each:

$$50\% + 25\% + 25\% = 100\% \text{ -- or -- } 1/2 + 1/4 + 1/4 = 1$$

- Enter the relationship of the beneficiary to you, if applicable (i.e., "child", "brother", "friend," etc.). This information is not required but will be helpful in identifying the beneficiary if necessary.
- A beneficiary you name in the TODD may die before you do. If you want the shares of any named beneficiary who does not survive you to transfer to their surviving descendants, check the box provided for this purpose. If the box is not checked, or if that deceased beneficiary has no surviving descendants, then that deceased beneficiary's share transfers in the same proportion to the surviving beneficiaries. A person's descendants are their children, grandchildren, etc.

4. Alternate Beneficiary or Beneficiaries

Print the name of the alternate beneficiary or alternate beneficiaries you want to receive the property if all beneficiaries identified in Section 3 of the TODD form (and any of their descendants if the box was checked) have died. You can name up to four alternate beneficiaries on this form. Use additional pages if you want to name more than four alternate beneficiaries. See FAQ 3 for who or what can be listed as a beneficiary or alternate beneficiary.

Follow the instructions provided in #3 above for calculating shares of the property and completing the rest of this section of the form.

5. No Surviving Beneficiaries

You cannot change this section of the TODD. If all beneficiaries and alternate beneficiaries included in sections 3 and 4 on the form do not survive the Owner by at least 120 hours, the TODD becomes void and the property will pass as a part of the Owner’s estate.

6. Error in Property Division

You cannot change this section of the TODD. It is very important that the shares for the beneficiaries or alternate beneficiaries total 100% or 1. If there is a math error and they do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owner. This way, the whole property transfers under the TODD even if there is a math error.

7. Transfer of Property to Descendants

You cannot change this section of the TODD. If the “Share Transfers to Surviving Descendants” box is checked indicating that the property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary’s share will transfer to that deceased beneficiary’s children in equal shares, with the share of any deceased child transferring to that deceased child’s children in equal shares, and so on.

If you do not check the “Share Transfers to Surviving Descendants” box for any of the beneficiaries you have named in the form, then that beneficiary’s share will be divided among the remaining beneficiaries. It will not go that beneficiary’s children, grandchildren, etc.

8. Signatures and Dates

When the TODD form is completely filled out, you will need to sign the TODD in front of a Notary Public. A Notary Public needs to see you sign the form. You may need to show the Notary Public a form of identification. The Notary Public will complete and sign the Notary section. THIS IS VERY IMPORTANT – the TODD cannot be filed unless your signature is notarized.

9. “After recording, return to:” Box

In this box, write the name and address of the person you want the TODD form returned to after the County Clerk has recorded it. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **A person acting as your agent under a Power of Attorney CANNOT sign this TODD for you. The Owner MUST sign it.**
- **DO NOT sign the TODD until you are in front of a Notary Public. The Notary Public MUST see you sign it.**
- **A TODD MUST be recorded in the County Clerk’s office in each county where the property is located (“Deed Records”) BEFORE you die. If not, the property will not transfer.**
- **The TODD beneficiary(s) MUST survive you by at least 120 hours. If none of the beneficiaries or alternate beneficiaries you name survive you, the TODD will not be effective to transfer the property.**
- **Filing Fees:** The County Clerk will charge a fee to file the TODD. You may want to call the County Clerk’s office or check their website to find out how much it costs and what forms of payment they will take before you go.
- **Do Not File the Instructions:** If you file the instructions, it may cause confusion and will also cost you more money.

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: Your social security number or your driver's license number.

Note: This form does not require either a social security number or driver's license number.

**REVOCABLE TRANSFER ON DEATH DEED
FOR INDIVIDUAL OWNER**

1. Owner:

Full Name:
Address:

2. The "Property" is:

Physical Address of the Property:

Address:

Legal Description of the Property:

Insert the full legal description found on the deed (add additional pages if needed at the end):

3. Beneficiary or Beneficiaries:

Upon the death of the Owner, the Property transfers to the following beneficiary or beneficiaries listed below who survive the Owner by at least 120 hours.

If a beneficiary fails to survive the Owner by at least 120 hours and the box below is checked, that deceased beneficiary's share of the Property transfers instead to that beneficiary's surviving descendants (as defined below). If the box is not checked, or if that deceased beneficiary has no surviving descendants, then that deceased beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one beneficiary is listed, and there is no indication of how the Property

should be divided, then the Property transfers in equal shares to the following beneficiaries who are listed below, or to the descendants of a beneficiary if indicated below.

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

4. Alternate Beneficiary or Beneficiaries:

If no beneficiary included in Section 3 above survives the Owner, then the Property transfers to the following alternate beneficiaries (or to the descendants of an alternate beneficiary, if indicated below) who survive the Owner by at least 120 hours.

If an alternate beneficiary fails to survive the Owner and the box below is checked, that alternate beneficiary's share of the Property transfers instead to that alternate beneficiary's surviving descendants (as defined below). If the box is not checked, or if that alternate beneficiary has no surviving descendants, then that alternate beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one alternate beneficiary is listed, and there is no indication of how the Property should be divided, then the Property transfers in equal shares to the following alternate beneficiaries who are listed below (or to the descendants of an alternate beneficiary if indicated below).

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

Full Name:		Percentage or fractional share of the Property (see Instructions #3): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owner	

5. No Surviving Beneficiaries:

This Transfer on Death Deed shall have no effect if all beneficiaries and alternate beneficiaries included in sections 3 and 4 above fail to survive the Owner by at least 120 hours.

6. Distributions to a Minor (Optional):

If a beneficiary named in either section 3 or 4 (or a surviving descendant of a deceased beneficiary named in either section 3 or 4) is a minor when the Owner dies, the share passing to the beneficiary shall be held by the following named person as custodian under the Texas Uniform Transfers to Minors Act (UTMA):

Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:

Additional custodians may be added on an attachment to this Transfer of Death Deed.

7. Error in Property Division:

If the percentages or shares indicated in either section 3 or section 4 add up to more or less than all of the Property, then the Property transfers *pro rata* to the surviving beneficiaries or alternate beneficiaries, with each beneficiary receiving a percentage or share equal to that beneficiary's portion of the total listed. [An example of a pro rata distribution: If the box lists 3 beneficiaries each getting a 1/4 share of the Property (which only totals 3/4 of the Property), the Owner's intent will be interpreted to mean that each beneficiary will receive 1/3 share of the Property.]

8. Definition of Surviving Descendants:

If the box is checked indicating that the Property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

9. Revocation Prior to Death:

I understand that I have the right to revoke this Transfer on Death Deed at any time prior to my death.

10. Effect on Existing Transfer on Death Deed:

By signing and properly filing this document, the Owner revokes any prior Revocable Transfer on Death Deed regarding the Owner's interest in this Property.

11. Signature and Date:

Sign full name here

Dated: _____

STATE OF TEXAS §

§

COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by
_____.

Notary Public, State of Texas

After recording, return to:

Name:
Address:

**INSTRUCTIONS AND FAQs
REVOCABLE TRANSFER ON DEATH DEED
FOR MARRIED OWNERS OR TWO CO-OWNERS**

You can use this **Revocable Transfer on Death Deed** (“TODD”) form to transfer ownership of your real property located in Texas when you die without going to court. To sign a TODD, you must have the legal and mental capacity to sign a contract. The Transfer on Death Deed is authorized under [Chapter 114 of the Texas Estates Code](#).

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You want to transfer your interest in the property to your spouse or co-owner. This form must be completed and signed by both Owners.
- You already filed a TODD in the deed records in the County Clerk’s office of the county where the property is located, and you want to create a new TODD to change who will receive the property on your death.

Use the TODD form for Individual Owners if:

- You want to transfer your interest in the property to someone **other** than your spouse or co-owner.

Do not use this form if:

- You do not own an interest in the property. (However, it is okay to use this form if your interest in the property is subject to a mortgage.)

Helpful Words to Know:

- Community property: Real property is community property if it was acquired during your marriage, except for separate property acquired before or during the marriage.
- Separate property: Real property is separate property if you owned it before your marriage, received it during your marriage by gift or inheritance, or purchased it with separate property money.

The rules of community property and separate property are complicated. If you are not sure whether your property is community or separate property, contact a lawyer for advice.

NOTICE TO PROPERTY OWNERS: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact a lawyer for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your Social Security number or driver’s license number on this form. They are not required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. What does a Transfer on Death Deed (“TODD”) do?

A TODD transfers ownership of real property, including mineral interests, located in Texas to someone else when you die without going to court. It does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

2. What does this Married Owners or Two Co-Owners Revocable TODD do?

The Married Owners or Two Co-Owners Revocable TODD form can be used by a married couple or two co-owners who want to give real property to the other Owner when the first Owner dies and then have the ownership pass to someone else after both Owners have died.

3. Who can I name as a beneficiary or alternate beneficiary in the Married Owners or Two Co-Owners Revocable TODD form?

This Married Owners or Two Co-Owners Revocable TODD form transfers your interest in the property to your spouse or co-owner when you die. If you want to transfer your interest in the property to someone else, use the TODD form and instructions for an Individual Owner instead.

The Married Owners or Two Co-Owners Revocable TODD form transfers the portion of the property owned by the person who dies first to the Surviving Owner. When the Surviving Owner dies, the property transfers to the beneficiary or alternate beneficiary listed in the TODD.

You can name anyone you want as beneficiary or alternate beneficiary to receive the property after the death of the Surviving Owner, including a family member, a friend or other person, a charity, an educational institution, a trustee of a trust (including the trustee of a revocable or irrevocable trust), a custodian under the Uniform Transfers to Minors Act, etc. You must include the name and address of each person or entity you name as beneficiary or alternate beneficiary, so make sure you have this information when you prepare the form. You do not have to notify any beneficiary that you have named them in the form, but it is recommended that you do.

4. Does a TODD change my ownership of the property or my ownership rights before I die?

No. Even though you must file the TODD in the deed records before you die, you still own your interest in the property and retain your interest in the property rights until you die. This includes the right to use your interest in the property as collateral for a loan, obtain property tax exemptions on your interest, make repairs or other improvements, sell, or transfer your interest in the property as long as the sale or transfer complies with marital property or other co-owner rights, etc.

5. Can my spouse or co-owner change or cancel the TODD after I die?

Yes. If you die first, the Surviving Owner will own your interest in the property and their own interest, and can cancel the TODD, prepare a new TODD, or transfer the property by any other legal means.

6. What happens when both of us die?

As long as the TODD is filed in the deed records in the County Clerk’s office of each county where the property is located before your deaths, the property transfers to the beneficiary or beneficiaries named in the TODD (or to their descendants, if this option is chosen) who survive the Surviving Owner by at least 120 hours in the shares indicated in the TODD.

If all beneficiaries (and their descendants, if that option was chosen) are deceased or do not survive the Surviving Owner by at least 120 hours, then the property transfers to the alternate beneficiaries named in the TODD (or to their descendants, if that option was chosen) in the shares indicated in the TODD.

7. What property can I transfer using a TODD?

A TODD only transfers real property located in Texas. You can only transfer the portion of the real property that you own. A TODD does not transfer any other kind of property, such as personal property (cars, cash, jewelry, etc.) or any real property located outside of Texas. If you want to use a TODD to transfer a mobile or manufactured home, see FAQ 9.

This Married Owner or Two Co-Owner Revocable TODD form transfers your interest in the property to your spouse or co-owner when you die. If you want to transfer your interest in the property to someone else, use the TODD form and instructions for an Individual Owner instead.

8. Can I transfer more than one piece of property in this TODD form?

This TODD form is designed to transfer one piece of real property. If you own more than one piece of real property in Texas and you want to transfer additional properties using a TODD form, you should complete and file a separate TODD form for each piece of property.

9. Can I use a TODD to transfer a mobile or manufactured home?

If you want to use a TODD to transfer a mobile or manufactured home, you must:

- Own the real property that the mobile or manufactured home is permanently attached to,
- Have a Statement of Ownership declaring that the mobile or manufactured home is a part of the real property, and
- That Statement of Ownership must have been filed in the deed records in the County Clerk’s office of each county where the mobile or manufactured home is located.

For more information, see the Texas Department of Housing and Community Affairs website at <https://www.tdhca.state.tx.us/mh/ownership-location.htm> and the Application for a Statement of Ownership form at <https://www.tdhca.state.tx.us/mh/docs/1037-applysol.pdf>.

10. What if I have a Will that leaves the property to someone else?

A properly filed TODD overrules a Will. The property transfers to the Surviving Owner or beneficiary named in the TODD, not the person named in your Will. This is true even if you make a Will after you have completed and filed the TODD. If you already have a Will or plan to sign one, contact a lawyer for advice about the best method for transferring your real and personal property upon your death.

11. What do I do with the TODD after I fill it out and sign it?

Once you and your spouse or co-owner have completed the TODD and signed it in front of a Notary Public, you must file it in the deed records in the County Clerk's office of each county where the property is located. You may need to show the Notary Public a form of identification. You will have to pay a filing fee. Contact the County Clerk for more information. The County Clerk may file the TODD immediately and hand the original back to you, or the Clerk may mail the original TODD to the person you listed in the "After Recording, Return to:" box. Keep the original TODD in a safe place.

12. Does the Surviving Owner or beneficiary need to do anything to claim the property when I die?

After an owner has died, an "Affidavit of Death" should be filed in the deed records in the County Clerk's office of each county where the TODD was filed. Filing the Affidavit of Death notifies the public that the property has transferred to the new owner or owners. The Affidavit of Death form included with this TODD form can be used at that time.

13. If I change my mind, how can I "undo" a TODD?

If you change your mind, you can revoke (cancel) a TODD at any time before you die either by creating a new TODD or by completing a Cancellation of TODD form. You cannot revoke a TODD by tearing it up once it's been filed. The new TODD or the Cancellation of TODD must be filed in the deed records in each County Clerk's office where you originally filed a TODD. There will be a filing fee.

NOTE: If you cancel your TODD or make a new one, it only affects the portion of the property that you own. It will not affect the ownership rights of any other co-owners.

14. What happens if I get divorced after I have filed this Married or Two-Co-Owner Revocable TODD?

A TODD naming your spouse as beneficiary will remain in effect unless, before you die, a notice of the divorce judgment or a final decree of divorce is filed in the County Clerk's office in each county where the TODD was originally filed. A filed notice of the divorce judgment or final decree of divorce revokes (cancels) your ex-spouse as a beneficiary but does not change the alternate beneficiaries, such as your ex-spouse's children or relatives. A filed Cancellation of TODD or a new TODD will completely revoke the TODD.

You can get a notice of divorce judgment or a final decree of divorce from the clerk of the court where your divorce was finalized. Check with the County Clerk's office where you filed the TODD to see if you need a certified copy of a notice of divorce judgment or a final decree of divorce. If so, you will need to get a certified copy from the clerk of the court where your divorce was finalized, and a fee may be charged.

Because a notice of divorce judgment and a Cancellation of TODD are shorter than a divorce decree, they are significantly less expensive to file. A divorce decree may also include private information, such as the names of children or other private information, so it is best to use a notice of divorce judgment or a Cancellation of TODD.

15. What if I owe debts on the property I want to transfer?

You can sign a TODD to transfer the property even if there is a debt or lien on the property, such as a mortgage. The property transfers to the surviving owner or beneficiaries when you die even if there are debts or liens on the property. A TODD does not protect the property from your creditors. Any mortgages, liens, homeowners’ association fees, property taxes, homeowners’ insurance, etc., will still need to be paid as required. The property could also be used to pay any other unpaid debts at your death or expenses related to your death. A title company or other party asked to rely on the TODD may request proof that there are no such outstanding debts or expenses, including taxes. If you have questions or concerns about this, consult an attorney.

16. Will a TODD affect my Medicaid benefits?

No. It will not affect your Medicaid benefits because the property does not transfer until you die.

17. What if there is a Medicaid Estate Recovery Program (MERP) claim against my estate after I die?

If the State wants to be repaid after you die for Medicaid benefits you received during your lifetime, property properly transferred under a TODD is not subject to a MERP claim under current law. If you have questions or concerns about this, consult an attorney.

B. COMPLETING THE REVOCABLE TRANSFER ON DEATH DEED FOR MARRIED OR TWO CO-OWNER FORM

1. Owners

Enter the full names of both owners exactly as they appear on your original property deed. If either name has changed, enter the name as shown on the deed followed by “AKA” (also known as) and the owner’s current name.

2. The “Property” is:

Physical Address of the Property: Enter the physical address of the property, including the number, street name, city, county, state, and zip code.

Legal Description of the Property: Print the legal description of the property, which is different from the mailing or physical address. Use the legal description exactly as it appears on your property deed. **It is very important that this information is correct.** If you do not have a copy of your property deed, you may request a copy from the County Clerk’s office in the county where the property is located because it should have been filed there when you acquired the property. If you are not able to obtain a copy of your deed or are unsure of the legal description, you may want to consult an attorney.

If you have no other alternative, you can use the property description listed on your property tax statement but be aware that it may not be correct or sufficient to transfer title of the property to the surviving owner or beneficiary.

3. Death of One Owner

You cannot change this section of the TODD, which states that both Owners intend for the Surviving Owner to receive their interest in the property when the first Owner dies. (If you want to transfer your interest in the

property to someone other than your spouse or co-owner, use the TODD form and instructions for an Individual Owner instead.)

4. Beneficiary or Beneficiaries

Print the name of the beneficiary or beneficiaries you want to receive the property when the Surviving Owner dies. You can name up to four beneficiaries on this form. Use additional pages if you want to name more than four beneficiaries. See FAQ 3 for who or what can be listed as a beneficiary. If you name the trustee of a revocable or irrevocable trust, you should use a format similar to the following:

"[Name of trustee], trustee of the [Name of trust] under trust agreement dated [Date]"

You should also enter the address of the trustee and also indicate that the relationship of this beneficiary is either "revocable trust" or "irrevocable trust" (whichever applies). Do not check the box indicating that the share passing to the trust will instead pass to the surviving descendants of the beneficiary, as a trust does not have descendants.

- If more than one beneficiary is listed and there is no indication of how the property should be divided, then the property transfers in equal shares to the beneficiaries who are listed.
- If you name only one beneficiary or one alternate beneficiary, you should enter "100%" in the percentage box for that person. If you name more than one beneficiary or alternate beneficiary, enter the percentage or fraction of the property that you want each beneficiary to receive.
- **It is very important that the shares you list add up to 100% (if you are using percentages) or to 1 (if you are using fractions). If there is a math error and the shares listed for all beneficiaries do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owners.**

For example:

If you and the other owner have five children and you want to transfer the property to them in equal shares when you both have died, you would enter the following shares for each child:

$$20\% + 20\% + 20\% + 20\% + 20\% = 100\% \text{ -- or -- } 1/5 + 1/5 + 1/5 + 1/5 + 1/5 = 1$$

If you list three beneficiaries and you want all of them to receive an equal share, you should enter 1/3 for each beneficiary named:

$$1/3 + 1/3 + 1/3 = 1$$

If you and the other owner have three children and you do not want them to have equal shares, you could give child A 50% (or 1/2) of the property and give child B and child C 25% (or 1/4) each:

$$50\% + 25\% + 25\% = 100\% \text{ -- or -- } 1/2 + 1/4 + 1/4 = 1$$

- Enter the relationship of the beneficiary to you, if applicable (i.e., "child", "brother", "friend," etc.). This information is not required but will be helpful in identifying the beneficiary if necessary.
- A beneficiary you name in the TODD may die before you do. If you want the shares of any named beneficiary who does not survive you to transfer to their surviving descendants, check the box provided

for this purpose. If the box is not checked, or if that deceased beneficiary has no surviving descendants, then that deceased beneficiary's share transfers in the same proportion to the surviving beneficiaries. A person's descendants are their children, grandchildren, etc.

5. Alternate Beneficiary or Beneficiaries

Print the name of the alternate beneficiary or alternate beneficiaries you want to receive the property if the Surviving Owner and all beneficiaries identified in Section 4 of the TODD form (and any of their descendants if the box was checked) have died. You can name up to four alternate beneficiaries on this form. Use additional pages if you want to name more than four alternate beneficiaries. See FAQ 3 for who or what can be listed as a beneficiary or alternate beneficiary.

Follow the instructions provided in #4 above for calculating shares of the property and completing the rest of this section of the form.

6. No Surviving Beneficiaries

You cannot change this section of the TODD. If all potential beneficiaries and alternate beneficiaries included in sections 4 and 5 on the form do not survive the Owners by at least 120 hours, the property will pass as a part of the Surviving Owner's estate.

7. Error in Property Division

You cannot change this section of the TODD. It is very important that the shares for the beneficiaries or alternate beneficiaries total 100% or 1. If there is a math error and they do not total 100% or 1, the property transfers to the surviving beneficiaries in proportions consistent with the assumed intent of the Owners. This way, the whole property transfers under the TODD even if there is a math error.

8. Transfer of Property to Descendants

You cannot change this section of the TODD. If the "Share Transfers to Surviving Descendants" box is checked indicating that the property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

If you do not check the "Share Transfers to Surviving Descendants" box for any of the beneficiaries you have named in the form, then that beneficiary's share will be divided among the remaining beneficiaries. It will not go that beneficiary's children, grandchildren, etc.

9. Signatures and Dates

When the TODD form is completely filled out, both you and the other Owner will need to sign the TODD in front of a Notary Public. A Notary Public needs to see you sign the form. You may need to show the Notary Public a form of identification. The Notary Public will complete and sign the Notary section. THIS IS VERY IMPORTANT – the TODD cannot be filed unless your signatures are notarized.

10. "After recording, return to:" Box

In this box, write the name and address of the person you want the TODD form returned to after the County Clerk has recorded it. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **A person acting as your agent under a Power of Attorney CANNOT sign this TODD for you. Both Owners MUST sign it.**
- **DO NOT sign the TODD until you are in front of a Notary Public. The Notary Public MUST see you sign it.**
- **A TODD MUST be recorded in the County Clerk's office in each county where the property is located ("Deed Records") BEFORE you die. If not, the property will not transfer.**
- **The TODD beneficiary(s) MUST survive you by at least 120 hours. If none of the beneficiaries you name survive you, the TODD will not be effective to transfer the property.**
- **Filing Fees:** The County Clerk will charge a fee to file the TODD. You may want to call the County Clerk's office or check their website to find out how much it costs and what forms of payment they will take before you go.
- **Do Not File the Instructions:** If you file the instructions, it may cause confusion and will also cost you more money.

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: Your social security number or your driver's license number.

Note: This form does not require either a social security number or driver's license number.

**REVOCABLE TRANSFER ON DEATH DEED
FOR MARRIED OWNERS OR TWO CO-OWNERS**

1. Owners:

Full Name of Owner A:
Address:

Full Name of Owner B:
Address:

2. The "Property" is:

Physical Address of the Property:

Address:

Legal Description of the Property:

Insert the full legal description found on the deed (add additional pages if needed at the end):

3. Death of An Owner:

When the first of the Owners dies (the "Deceased Owner"), the Deceased Owner's interest in the Property transfers to the other Owner (the "Surviving Owner"). If the Owners die within 120 hours of each other, the Property transfers to the beneficiary or beneficiaries listed below who survive both Owners by at least 120 hours.

4. Beneficiary or Beneficiaries:

When both Owners have died, the Property transfers to the following beneficiaries listed below (or to the descendants of a beneficiary, if indicated below) who survive the Owners by at least 120 hours, in the shares indicated below.

If a beneficiary fails to survive the Owners by at least 120 hours and the box below is checked, that deceased beneficiary's share of the Property transfers instead to that beneficiary's surviving descendants (as defined below). If the box is not checked, or if that beneficiary has no surviving descendants, then that deceased beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one beneficiary is listed and there is no indication of how the Property should be divided, then the Property transfers in equal shares to the following beneficiaries who are listed below (or to the descendants of a beneficiary, if indicated below).

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

5. Alternate Beneficiary or Beneficiaries:

If no beneficiary included in Section 4 survives the Owners, then the Property transfers to the following alternate beneficiaries who are listed below (or to the descendants of an alternate beneficiary, if indicated below) who survive the Owners by at least 120 hours.

If an alternate beneficiary fails to survive the Owners and the box below is checked, that alternate beneficiary's share of the Property transfers instead to that alternate beneficiary's surviving descendants (as defined below). If the box is not checked, or if that alternate beneficiary has no surviving descendants, then that alternate beneficiary's share transfers *pro rata* to the surviving beneficiaries.

If more than one alternate beneficiary is listed, and there is no indication of how the Property should be divided, then the Property transfers in equal shares to the following alternate beneficiaries who are listed below (or to the descendants of an alternate beneficiary, if indicated below).

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

Full Name:		Percentage or fractional share of the Property (see Instructions #4): _____
Address:		
Relationship:	<input type="checkbox"/> Share transfers to surviving descendants if beneficiary fails to survive Owners	

6. No Surviving Beneficiaries

This Transfer on Death Deed shall have no effect if all beneficiaries and alternate beneficiaries included in sections 4 and 5 above fail to survive the Owners by at least 120 hours.

7. Distributions to a Minor (Optional):

If a beneficiary named in either section 4 or 5 (or a surviving descendant of a deceased beneficiary named in either section 4 or 5) is a minor after both Owners have died, then the share passing to the beneficiary shall be held by the following named person as custodian under the Texas Uniform Transfers to Minors Act (UTMA):

Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:
Name of Custodian:	As custodian for [name of minor]:

Additional custodians may be added on an attachment to this Transfer of Death Deed.

8. Error in Property Division:

If the percentages or shares indicated in either section 4 or section 5 add up to more or less than all of the Property, then the Property transfers *pro rata* to the surviving beneficiaries or alternate beneficiaries, with each beneficiary receiving a percentage or share equal to that beneficiary's portion of the total listed. [An example of a pro rata distribution: If the box lists 3

beneficiaries each getting a 1/4 share of the Property (which only totals 3/4 of the Property), the Owner's intent will be interpreted to mean that each beneficiary will receive 1/3 share of the Property.]

9. Definition of Surviving Descendants:

If the box is checked indicating that the Property will transfer to the surviving descendants of a deceased beneficiary, then the deceased beneficiary's share will transfer to that deceased beneficiary's children in equal shares, with the share of any deceased child transferring to that deceased child's children in equal shares, and so on.

10. Right to Revoke Prior to Death:

Either Owner has the right to revoke this Revocable Transfer on Death Deed as to that Owner's interest at any time prior to that Owner's death.

11. Effect on Existing Transfer on Death Deed:

By signing and properly filing this document, an Owner revokes any prior Revocable Transfer on Death Deed regarding that Owner's interest in this Property.

Signatures page follows

**INSTRUCTIONS AND FAQs
CANCELLATION OF REVOCABLE TRANSFER ON DEATH DEED**

You can use this Cancellation of Revocable Transfer on Death Deed form to cancel any Transfer on Death Deed (TODD) that has been filed, including the Revocable Transfer on Death Deed for Individual Owner and the Revocable Transfer on Death Deed for Married Owners or Two Co-Owners. The Transfer on Death Deed is authorized under [Chapter 114 of the Texas Estates Code](#).

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You already filed a TODD in the deed records in the County Clerk’s office of each county where the property is located, and you want to cancel the TODD without creating a new one.

Do not use this form if:

- You already filed a TODD in the deed records in the County Clerk’s office of each county where the property is located, and you want to create a new TODD to change who will receive the property on your death. It is not necessary to file both a Cancellation of TODD and a new TODD. You can simply complete and file a new Revocable Transfer on Death Deed for Individual Owners or the Revocable Transfer on Death Deed for Married Owners or Two Co-Owners.

NOTICE TO PROPERTY OWNERS: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact a lawyer for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your Social Security number or driver’s license number, or any other sensitive or private information on this form. They are not required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. If I change my mind, how can I “undo” a TODD?

If you change your mind, you can revoke (cancel) a TODD at any time before you die either by creating a new TODD or by completing a Cancellation of TODD form. You cannot revoke a TODD by tearing it up once it’s been filed.

If you want to cancel the TODD and do not want to transfer the property to someone else using a TODD, use the Cancellation of TODD form. If you want to create a new TODD to change who will receive the property on your death, you can simply complete and file a new Revocable Transfer on Death Deed for Individual Owners or the Revocable Transfer on Death Deed for Married or Two Co-Owners. The new TODD or the Cancellation of TODD must be filed in the deed records in each County Clerk’s office where you originally filed a TODD. There will be a filing fee.

NOTE: If you cancel your TODD or make a new one, it only affects the portion of the property that you own. It will not affect the ownership rights of any other co-owners. See FAQ 4.

2. Can I just tear up my TODD to cancel it?

No. Tearing up or destroying your TODD will not cancel it.

3. What happens if I cancel my TODD without making a new one?

Your interest in the property can pass to someone else in a variety of ways. The most common ways are through another type of deed to the property, through a Will, or through Texas laws if you die without a Will.

4. If I used the Revocable Transfer on Death Deed for Married Owners or Two Co-Owner’s form and I am the only one who wants to change it, do both of us need to sign the Cancellation of TODD form?

No. You can file this Cancellation of TODD form, which will cancel the transfer of your interest in the property.

5. If I used the Revocable Transfer on Death Deed for Married Owners or Two Co-Owner’s form and both of us want to change it, what do we do?

If both of you want to cancel the TODD, you should each file a Cancellation of TODD.

6. Should I cancel my TODD if I get divorced?

Maybe. A divorce does not automatically cancel a TODD naming your ex-spouse or the children or relatives of your ex-spouse. The TODD will remain in effect unless a final decree of divorce, a notice of the divorce judgment, a Cancellation of TODD, or a new TODD is filed in the deed records in the County Clerk’s office in each county where the TODD was originally filed.

You can get a final decree of divorce or a notice of divorce judgment from the clerk of the court where your divorce was finalized. Check with the County Clerk’s office where you filed the TODD to see if you need a certified copy of the final decree of divorce or the notice of final judgment of divorce. If so, you will need to get a certified copy from the clerk of the court where your divorce was finalized, and a fee may be charged.

Because a Cancellation of TODD and a notice of divorce judgment are shorter than a divorce decree, they are significantly less expensive to file. A divorce decree may also include private information, such as the names of children or other private information, so it is best to use a Cancellation of TODD or a notice of divorce judgment.

B. COMPLETING THE CANCELLATION OF REVOCABLE TRANSFER ON DEATH DEED FORM

1. Owner:

Enter the owner’s full name exactly as it appears on your original property deed. If your name has changed, enter the name as shown on the deed followed by “AKA” (also known as) and your current name.

2. Physical Address of the Property:

Enter the physical address of the property, including the number, street name, city, county, state, and

zip code.

3. Legal Description of the Property:

Print the legal description of the property, which is different from the mailing or physical address. Use the legal description exactly as it appears on your TODD. **It is very important that this information is correct.** If you do not have your TODD, you may request a copy from the County Clerk’s office in the county where the TODD was filed, which should be the county where the property is located. Some County Clerks’ offices have a copy of your TODD available online. If you are not able to obtain a copy of your TODD or are unsure of the legal description, you may want to consult an attorney.

4. Cancellation: This section states you are cancelling your TODD. You cannot make changes to this section.

5. Signature and Date:

When the form is completely filled out, you will need to sign the form in front of a Notary Public. A Notary Public needs to see you sign the form. You may need to show the Notary Public a form of identification. The Notary Public will complete and sign the Notary section. **THIS IS VERY IMPORTANT** – the Cancellation of TODD cannot be filed unless your signature is notarized.

6. “After recording, return to:” Box

In this box, write the name and address of the person you want the TODD form returned to after the County Clerk has recorded it. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **DO NOT sign the Cancellation of TODD until you are in front of a Notary Public. The Notary Public MUST see you sign it.**
- **A Cancellation of TODD MUST be recorded in the deed records in the County Clerk’s office of each county where the property is located BEFORE you die. If not, the existing TODD will not be cancelled.**
- **Filing Fees:** The County Clerk will charge a fee to file the Cancellation of TODD. You may want to call the County Clerk’s office or check their website to find out how much it costs and what forms of payment they will take before you go.
- **Do Not File the Instructions:** If you file the instructions, it may cause confusion and will also cost you more money.

CANCELLATION OF REVOCABLE TRANSFER ON DEATH DEED

1. Owner:

Full Name:
Address:

2. The "Property" is:

Physical Address of the Property:

Address:

Legal Description of the Property:

Insert the full legal description found on the deed (add additional pages if needed at the end):

3. Cancellation:

I cancel all of my previous transfers of the Property by transfer on death deed.

4. Signature and Date:

Do not sign or date until you are in front of a notary. Once the Cancellation of Revocable Transfer on Death Deed is signed and notarized, you must file it with the county clerk in the county where the property is located.

Sign full name here

Dated: _____

STATE OF TEXAS §

§

COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by
_____.

Notary Public, State of Texas

After recording, return to:

Name:
Address:

INSTRUCTIONS AND FAQs AFFIDAVIT OF DEATH

A TODD beneficiary can use this Affidavit of Death to establish that the Owner who signed a Revocable Transfer on Death Deed (TODD) has died. This Affidavit of Death is to be used with the Revocable Transfer on Death Deed forms approved by the Supreme Court of Texas. The Transfer on Death Deed is authorized under [Chapter 114 of the Texas Estates Code](#).

This TODD Set Contains four forms with frequently asked questions and instructions on how to complete the following forms: a Revocable Transfer on Death Deed for an Individual Owner, a Revocable Transfer on Death Deed for Married Owners or Two Co-Owners, a Cancellation of Revocable Transfer on Death Deed, and an Affidavit of Death.

Use this form if:

- You are a named beneficiary of a TODD and need to establish that the real property Owner who created the TODD has died.
- You are a Co-Owner named as a Surviving Owner in a TODD and need to establish that the other Co-Owner has died.

Do not use this form if:

- The real property Owner has not died.
- It has been less than the period of survival required in the TODD since the deceased Owner died or if the TODD does not state a period of survival, it has been less than 120 hours.

NOTICE TO SURVIVING BENEFICIARY: Carefully read all instructions for this form before completing and signing it. This form is designed to fit some but not all situations. If you have questions after reading these FAQs and instructions, you should contact an attorney for advice. These instructions are not a substitute for the advice of an attorney.

For privacy and identity theft reasons, **do not** put your or the deceased Owner's Social Security number, driver's license number, or any other sensitive or private information on this form. Do not attach the death certificate. This information is **not** required.

A. FREQUENTLY ASKED QUESTIONS (FAQs)

1. When Should I File an Affidavit of Death?

You should file the Affidavit of Death as soon as possible after the period of survival stated in the TODD or if the TODD does not state a period of survival, after 120 hours has passed.

2. Why Do I Need to File an Affidavit of Death?

An Affidavit of Death lets the public, including title companies, know that the property owner has died and ownership of the property has transferred to the Surviving Owner, beneficiary, or beneficiaries. It is also helpful in other situations, such as when:

- Continuing payments to the current mortgage lender, if one exists;
- Dealing with the County Appraisal District to get a homestead exemption or get or remove

- other exemptions, or when assessing the value of the property for property tax purposes;
- Insuring the property;
- Selling the property;
- Borrowing money against the property;
- Applying for FEMA relief if the property is damaged during a disaster; or
- Applying for Medicaid Estate Recovery Programs, Exemption, or Waiver.

3. Who can sign an Affidavit of Death?

Usually, the Surviving Owner or a beneficiary named in the TODD signs the Affidavit, but anyone who is competent, at least 18 years old, and willing to swear that the facts stated in the Affidavit are true may sign it.

4. What Happens if I Don't File an Affidavit of Death?

If you don't file the Affidavit, it can slow down your ability to deal with the property as an owner.

5. Where do I File the Affidavit of Death?

You must file the Affidavit in the deed records in the County Clerk's office of the county where the TODD was filed. If a TODD was filed in more than one county, you must file a separate Affidavit in the deed records in the County Clerk's office in each county.

6. Do I need to bring anything to prove the Owner died when I file the Affidavit of Death?

No. You do not need to bring a death certificate or obituary to file the Affidavit but a title company may require proof of death.

7. What if I don't want the property or I am receiving public benefits?

Contact a lawyer as soon as you can to avoid potential costs and problems, especially if you are receiving public benefits.

B. COMPLETING THE AFFIDAVIT OF DEATH FORM

1. Information of Person Signing Affidavit: Enter your first, middle (if any), and last name.
2. Transfer on Death Deed Filed by Decedent:
 - Enter the name of the person who signed the TODD and has now died exactly as it appeared in the TODD. This person is called the "Decedent" in this Affidavit.
 - Enter in the appropriate blanks the name of the county where the TODD was filed.
 - Enter the instrument or document number the Clerk assigned to the TODD, and the volume and page number if you have it. Some counties may not include volume and page numbers. This information can be found on the filed and recorded TODD. If you don't have a recorded copy of the TODD, you can get a copy at the County Clerk's office in the county where it was filed. Some County Clerks' offices have a copy of the TODD available online.
3. Information of Person Who Signed the Transfer on Death Deed: Enter the date the Decedent died, and the city, county, state, and country where the person died in the box.

4. Signature and Date: This Affidavit must be signed in front of a notary. Do not sign your name or enter the date until a notary can see you sign the document. The Notary Public will complete and sign the Notary section.
5. "After Recording, Return to" Section: After recording, the Clerk will return the Affidavit to the person whose name is in the box. Enter the name and address of that person. If you want it returned to you, enter your name and address.

IMPORTANT INFORMATION ABOUT THIS FORM:

- **DO NOT sign the Affidavit of Death until you are in front of a Notary Public. The Notary Public MUST see you sign it.**
- **An Affidavit of Death should be recorded in the deed records in the County Clerk's office of each county where the property is located to show that the Owner who signed a revocable TODD has died.**
- **Filing Fees:** The County Clerk will charge a fee to file the Affidavit of Death. You may want to call the County Clerk's office or check their website to find out how much it costs and what forms of payment they will take before you go.
- **Do Not File the Instructions:** If you file the instructions, it may cause confusion and will also cost you more money.

notarized, you **must** file it in the deed records in the County Clerk's office of the county where the Property is located.

Sign full name here

Dated: _____

STATE OF TEXAS §

§

COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20__, by

(Name of Person Signing Affidavit).

Notary Public, State of Texas

After recording, return to:

Name:
Address:

Tab G

Taskforce for Responsible AI in the Law

Interim Report to the State Bar of Texas Board of Directors

Introduction

In 2023, under the leadership of State Bar President Cindy Tisdale, the Taskforce for Responsible AI in the Law (TRAIL) was formed to address the growing impact of Artificial Intelligence (AI) in the legal profession. The taskforce has worked to identify ways that the emergence of new AI technology might affect the practice of law and how lawyers, judges, and the State Bar should respond. The work of TRAIL focuses on crafting guidelines, navigating challenges, and embracing the potential of AI within the legal profession.

This interim report represents an initial step in understanding the integration of AI within the legal profession. It highlights the taskforce's progress and ongoing efforts, underlining the complexity and scope of the work still required. This document serves as a marker of our current understanding and the groundwork laid, pointing towards a comprehensive and more detailed final report. The emphasis is on continued research, collaboration, and thoughtful development in this rapidly evolving landscape. Regulation and technology will both continue to evolve over the course of this work. None of the preliminary thoughts described below should be taken as any formal recommendation, but rather reflect preliminary concepts being considered by the taskforce.

Executive Summary

The TRAIL Interim Report includes a variety of recommendations being considered across different areas of legal practice, with a focus on the ethical and practical integration of AI. These proposals, while still under review and not finalized, cover:

- 1) **Cybersecurity:** encouraging awareness among lawyers about possible risks associated with using AI tools, including third party access to sensitive information
- 2) **Education and Legal Practice:** recommending the inclusion of AI topics in professional education for both lawyers and judges and proposing targeting or increasing attorney's continuing legal education (CLE) hours to include AI and technology issues germane to the practice of law
- 3) **Legislative, Regulatory, and Legal Considerations:** suggesting the review and monitoring of legislation, regulation, and case law relevant to AI in legal practice, and considering the development of AI-focused legislative proposals
- 4) **Ethical and Responsible Use Guidelines:** developing recommendations regarding generative AI use that address compliance with attorney ethics and advertising regulations, and offering guidance on the ethical use of AI in legal practice
- 5) **Access and Equity:** proposing support for legal aid providers in accessing AI technology and potential technologies to enhance individual access to the justice system
- 6) **Privacy and Data Protection:** examining the implications of privacy laws on AI and proposing best practices for handling personal data in AI applications
- 7) **AI Summits and Collaborative Efforts:** suggesting the organization of AI summits for knowledge sharing and collaboration among stakeholders

Mission Statement

The Taskforce for Responsible AI in the Law is focused on educating Texas practitioners and judges about the benefits and risks of AI and fostering the ethical integration of AI within the legal

profession. The mission of the taskforce is to explore the uncharted frontiers of AI in the legal profession, approaching this new world with caution and optimism and ensuring that technology serves the legal community and the public without compromising the values central to our profession. The taskforce will investigate how legal practitioners can leverage AI responsibly to enhance equitable delivery of legal representation in Texas while upholding the integrity of the legal system, and the taskforce will make recommendations to the State Bar's Board of Directors consistent with this goal.

Vision Statement

The taskforce envisions a future where the integration of AI in the legal profession is both innovative and principled. Striving to lead the way in Texas and beyond, our focus is on crafting standards and guidelines that enhance legal practice through AI, without sacrificing the core values of justice, fairness, and trust. In this bold new era, we will lead with care and optimism, ensuring that the transformative power of AI serves the legal community and the public with excellence and integrity.

Purpose of the Report

This report serves as an interim report to the Board of Directors concerning the work of the Taskforce for Responsible AI in the Law, its preliminary findings, recommendations that are under consideration, and proposed future activities of the taskforce.

Scope and Limitations

The material outlined in this interim report are preliminary thoughts, many of which will require additional investigation. The potential recommendations listed are currently under review and consideration by the taskforce and are reported here to give the board an opportunity to consider the possible recommendations and provide the taskforce with feedback and direction for its work. The topic of AI has attracted the attention of the media, academia, and government. It is a broad issue with implications for almost every facet of society. The taskforce's attention, however, is limited to consideration of the ramifications of AI for the practice of law.

Subcommittee Insights

The taskforce began its work by identifying issues in the legal profession that may be affected by AI. A subcommittee was assigned to each issue. The initial reports from the subcommittees are included as appendices to this report, and what follows is a summary of the issues identified by each subcommittee and the tentative recommendations that may be proposed at a later date for action by the State Bar of Texas or by other stakeholders in the legal sphere. These tentative recommendations are only proposals at this stage; the Taskforce has not reached a consensus on these proposals and is not asking the State Bar Board to take any action at this time.

Cybersecurity

Overview of the Issues

All lawyers and clients rely on information technology, the Internet, and cloud computing, which means that we all face exposure to cybercrime. Cybercriminals could use AI to be disruptive, spread malware, spread disinformation, and commit fraud and theft, but AI can also be a tool to help lawyers and clients predict or protect against cybercriminals' behavior in the future.

Potential Recommendations

The State Bar should help lawyers become more aware of the risks associated with cybercriminals and in particular the use of AI to hide cybercriminal behavior. The State Bar may wish to consider:

- 1) including cybersecurity and AI training in CLE events for all lawyers
- 2) creating an AI toolkit on the State Bar’s website
- 3) publishing articles on cybersecurity threats to lawyers and law firms in the State Bar Journal and section publications

The State Bar should team up with the Chief Information Security Officer (CISO) community to learn more about their perspective on cybercriminals’ use of AI.

Cybersecurity Concerns

Here are specific AI cybersecurity concerns that should be addressed:

Malware	Malware is software designed to disrupt, damage, or gain access to a computer system. Often employees unwittingly fall victim to email phishing attacks allowing in disruptive malware. Regular cybersecurity training of employees to prevent them from falling for email phishing attacks is recommended since cybercriminals use AI to fool individuals into opening or responding to fake emails.
Business Email Compromise (“BEC” or “Spearphishing”)	When a cybercriminal sends an email or phone call posing as the CEO and requests that the CFO wire monies to a bank is an example of BEC. Cybercriminals are using AI regularly to hide their behavior, including using generative AI tools to replicate the voice of an executive to further their criminal act. Regular cybersecurity awareness training is also recommended.

Privacy

Overview of the Issues

How Does Privacy Law Apply to AI?

Privacy laws apply broadly to protect personal data, and AI is no exception. U.S. state consumer privacy laws and sectoral privacy laws may apply based on the involvement of personal data in any component of AI. International privacy laws applicable to many U.S.-based companies, by nature of the company processing international personal data, could also apply to AI. Notably, proposed legislation to regulate AI has acknowledged the application of privacy laws.

Where Is Personal Data in AI?

Personal data can be found in the data sets used to train AI. Personal data can also be input into an AI tool (e.g., submitting personal data in a prompt to ChatGPT). AI can also be used to make recommendations or inferences that affect privacy.

Potential Recommendations

The AI and Privacy Committee will continue its study of how privacy laws apply to AI and consider any specific implications for Texas lawyers in order to provide pragmatic recommendations to the Texas Bar. Contingent upon the committee's work, the taskforce may consider recommendations regarding the following:

- 1) how to identify when AI uses personal data
- 2) best practices for protecting personal data involved in AI

Ethics and Responsible Use

Overview of the Issues

The use of AI in the legal profession raises ethical issues that will need to be addressed by the legal profession.

Ethical Lapses and Misuse of Generative AI

Early instances of lawyers using generative AI in drafting have exposed the potential for ethical lapses due to the misuse of generative AI. Notable instances include:

- 1) In *Mata v. Avianca Airlines* lawyers submitted a brief with fabricated judicial decisions, leading to sanctions.
- 2) In *Ex Parte Lee*, a lawyer used a generative AI tool that created nonexistent case citations.
- 3) A Colorado lawyer was suspended for using fictitious cases from ChatGPT in a legal motion.
- 4) A Los Angeles law firm was sanctioned for using ChatGPT to draft briefs that included fabricated cases.

Risk of Ineffective Assistance of Counsel

There's a concern about the quality of legal representation, as evidenced by a case in Washington, D.C., where a defendant cited ineffective assistance due to their attorney using generative AI for a closing argument without disclosing financial ties to the AI's developer.

Violation of Ethical and Professional Conduct Rules

Texas lawyers face the risk of violating various disciplinary rules, including:

- 1) Rule 1.01 on providing competent representation
- 2) rules related to diligence, candor to the tribunal, supervision of work, and protecting client confidentiality
- 3) potential violation of Rule 1.05 regarding safeguarding client information, especially when using confidential data in AI prompts in unsecure environments
- 4) ethical considerations in charging reasonable fees for services enhanced by generative AI tools

Need for Ethical Guidance and Oversight

Ethical guidance and oversight are needed regarding the use of generative AI in legal practices. This includes publishing ethics opinions that address appropriate generative AI use and establish what constitutes reasonable fees and costs in relation to AI use and compliance with ethics and advertising regulations.

Recommendations from Other State Bar Associations

Various bar associations, including those in Florida and California, are proposing guidelines for lawyers using generative AI. These guidelines emphasize the need for lawyers to:

- 1) protect client confidentiality
- 2) provide diligent and competent representation
- 3) supervise both lawyers and nonlawyers in their use of AI
- 4) communicate adequately with clients about AI use
- 5) ensure compliance with relevant laws, including intellectual property law

Potential Recommendations

- 1) Consider having the State Bar of Texas (SBOT) Mandatory Continuing Legal Education (MCLE) Committee promulgate a change to the existing MCLE requirements, making it mandatory that 1.0 hour of an attorney's annual MCLE requirement be in technology.
- 2) Consider requesting that the Professional Ethics Committee of the State Bar of Texas prepare and issue an ethics opinion providing guidance to Texas practitioners on the ethical dimensions of use of generative AI. This might echo the subjects addressed by the Florida and California ethics proposals discussed in this report. In addition, such an opinion might be along the lines of the Professional Ethics Committee's Ethics Opinion 680 in 2018, which addressed attorneys' use of cloud computing technology, and which addressed multiple ethics concerns.
- 3) Consider requesting that Texas Bar CLE include that, for at least the next year, one of the subjects at any Texas Bar CLE program be in the area of generative AI use.
- 4) Consider recommending to the Texas Center for the Judiciary that an educational program on generative AI and its ethical dimensions be added to the center's course offerings for Texas judges. This would provide trial and appellate judges with necessary education on attorney use of generative AI and assist in consideration of potential measures for judicial oversight.
- 5) Consider recommending to the Supreme Court of Texas Rules Committee that it explore Texas Rules of Civil Procedure 13 on the Effect of Signing Pleadings, Motions, and Other Papers and evaluate whether additional language or guidance is necessary to provide Texas lawyers with additional information regarding AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding same.
- 6) Consider increasing Texas lawyers' awareness of the benefits and risks of generative AI by increasing the number of CLE offerings and publications regarding this subject. For example, this might include a special issue of the Texas Bar Journal exploring topics related to generative AI.
- 7) Consider recommending that the State Bar of Texas explore, with one or more AI vendors, a working relationship that would result in a benefit for use by Texas member lawyers. This might, for example, involve discounted access to AI tools, along the lines of the State Bar's previous relationship with Fastcase for legal research.
- 8) Consider recommending that the State Bar of Texas hold an annual or semi-annual "AI Summit," at which stakeholders from multiple State Bar-affiliated entities could gather to learn about generative AI and share best practices regarding its use. Such an event might also involve

reviewing the work of other state bars and/or other AI taskforces around the country and sharing information regarding the same.

Judiciary

Overview of the Issues

The use of AI in the courts raises ethical and practical issues that should be addressed. These issues include the following.

Standing Orders Prohibiting Litigants from Using GenAI tools Is Not Generally Helpful

Because some attorneys have submitted briefs that contain nonexistent cases, some courts have been entering standing orders that require parties to certify whether any generative AI tool has been used and that all arguments, cited cases and exhibits have been reviewed by a human prior to filing. Because many legal research tools will (or already do) incorporate generative AI into their product, these standing orders may result in litigants disclosing their use of Westlaw, Lexis, Grammarly, etc. This is likely an unhelpful feature, and courts already have the ability to appropriately sanction an attorney for filing a motion or brief that contains false statements. It may also discourage the development and adoption of tools that, used properly, could enhance legal services.

Use of Generative AI Tools by Judges, Law Clerks, and Court Staff

The Texas Code of Judicial Conduct is written using broad language. Arguably, a judge relying solely on an AI tool with no subsequent verification would violate Canon 1 of the Texas Code of Judicial Conduct (upholding the integrity and independence of the judiciary).

AI tools may be helpful in drafting rough drafts of any order, but it is advisable that generative AI tools that have been developed for legal use be utilized, rather than generic generative AI tools that may be developed with nonlegal related material and may not be updated regularly with recent cases and statutes.

Confidentiality and Privacy Concerns

If the decision is made to use a nonlegal developed generative AI tool, caution should be exercised to ensure that only public information is entered and that no sealed, personal health information, or sensitive personally identifiable information is inserted into any prompt.

Security Concerns

As with all software or apps that are installed onto court-issued computers, tablets or other devices, it is recommended that any generative AI tools be vetted prior to use. The terms of service of any generative AI tool should be reviewed for industry standard commitments to quality and relevant representations and warranties, including to determine what, if anything, is done with prompts or documents ingested into the tool. How was the tool validated for accuracy and completeness? Are the prompts or documents used to further train the AI tool? Upon the matter's conclusion, how are the prompt histories or documents ingested into the system deleted? What representations are made regarding the AI developer's cybersecurity measures?

Training

Judges should make law clerks and staff aware of what, if any, acceptable use of generative AI tools the judge authorizes. If the judge allows law clerks and staff to use appropriate legal-based

generative AI tools, judges and court personnel should be trained on how to use the tool (i.e., how to adequately create prompts).

Evidentiary Issues

An immediate evidentiary concern emerges from “deepfakes.” Using certain AI platforms, one can alter existing audio or video. Generally, the media is altered to give the appearance that an individual said or did something they did not. The technology has been improving rapidly.

What is more, even in cases that do not involve fake videos, the very existence of deepfakes will complicate the task of authenticating real evidence. The opponent of an authentic video may allege that it is a deepfake in order to try to exclude it from evidence or at least sow doubt in the jury’s minds. Eventually, courts may see a “reverse CSI effect” among jurors. In the age of deepfakes, jurors may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake. More broadly, if juries—entrusted with the crucial role of finders of fact—start to doubt that it is possible to know what is real, their skepticism could undermine the justice system as a whole.

Although technology is now being created to detect deepfakes (with varying degrees of accuracy), and government regulation and consumer warnings may help, no doubt if evidence is challenged as a deepfake, significant costs will be expended in proving or disproving the authenticity of the exhibit through expert testimony.

In cases where a party challenges an exhibit as a deepfake or not authentic, judges should consider holding a pretrial hearing to consider the parties’ arguments and any expert testimony.

Pro Se Litigants and Generative AI

While there has already been substantial publicity about inaccurate ChatGPT outputs and why attorneys must always verify any draft generated by any AI platform, the bench must also consider the impact of the technology on pro se litigants who use the technology to draft and file motions and briefs. No doubt pro se litigants have turned to forms and unreliable internet material for their past filings, but ChatGPT and other such platforms may give pro se litigants unmerited confidence in the strength of their filings and cases, create an increased drain on system resources related to false information and nonexistent citations, and result in an increased volume of litigation filings that courts may be unprepared to handle.

Potential Recommendations

- 1) As nonlawyers, pro se litigants are not subject to the Rules of Professional Conduct, but they remain subject to Tex. R. Civ. P. 13. The current version of Rule 13, however, requires that the pro se litigant arguably know, in advance of the filing of a motion, that the pleading is groundless and false. The Texas Supreme Court Rules Advisory Committee may wish to consider whether Rule 13 should be modified.
- 2) Consider recommending that the State Bar post information for the public on its website about the responsible use of AI by pro se litigants.
- 3) Consider developing a list of “best practices” for the use of AI in the courts.
- 4) Consider developing or providing verified tools to guide constructive use of generative AI for pro se litigants.

Governance

Overview

The governance of AI entails rules and standards surrounding the responsible development and use of AI, and the enforcement of such rules. Industry leaders have acknowledged that AI governance or regulation is important and necessary to protect the public. AI governance also includes “soft law” principles that should be used for the development of technology used for the provision of legal services, in courts, or to increase access to justice.

Current State of AI Governance Initiatives

Since 2022, there has been proposed legislation to regulate the use of AI in numerous jurisdictions across the world. Certain trends in the proposed legislation have arisen.

Defining AI

Some of the proposed definitions of AI attempt to focus on generative AI and large language models. There is concern over definitions that are too broad and include common technology like the calculator or that, conversely, are too narrow and could be outdated before the law goes into effect. For example, older types of AI, such as machine learning, can also present risk in legal practice.

High Risk Use of AI

Proposed legislation tends to focus on a risk-based approach where a high-risk use of AI would result in legally significant or similar effects on the provision or denial of (or access to) employment, education, housing, financial or healthcare services, and other significant goods, services, and rights. Variations of the term “legally significant or similar effects” have spread from the E.U. to the U.S. and appear to be a likely standard of measuring the effects of decisions by AI. Whether humans are involved in the decision making also impacts the level of risk. Governance of AI often turns on separating low, medium, and high-risk use cases and applying rules fit to risk level.

Transparency

Proposed legislation in the U.S. and in other countries often seeks to incorporate obligations on deployers and/or developers to make public disclosures of the training data, personal information collected, decision-making process, and impact of the AI output. Competing concerns include intellectual property rights of developers and deployers.

Assessments

Higher risk uses of AI can trigger obligations to conduct and document risk assessments and pre- and post-launch impact testing. In some high-risk cases, red teaming (adversarial testing) of generative AI may become a standard for developers or potentially deployers.

Other Law

Proposed legislation does not purport to override other existing laws like HIPAA, COPPA, consumer privacy, confidentiality, etc.

Issues for Consideration

It is currently unknown what exactly will be required of lawyers and law firms who utilize AI tools. For example, an assessment of high-risk uses of AI and disclosure of AI-based decisions may be required based on proposed legislation.

It is possible that many attorneys and/or law firms could qualify as a deployer of AI, and the use of AI without meeting the prerequisites imposed by statutory obligations such as making appropriate disclosures and conducting a risk assessment could result in a risk of financial and reputational harm.

Potential Recommendations

The AI and Governance Subcommittee will continue studying any proposed AI legislation and other AI governance initiatives to develop pragmatic recommendations to the Texas Bar. The subcommittee will also consider principles and norms that should guide the development of legal AI tools. Contingent upon this committee's work, the taskforce may consider recommendations regarding the following:

- 1) the tracking and monitoring of legislation and governmental agency regulations for potential publication to Texas attorneys, so that they can use AI in accordance with legal obligations
- 2) identification of governance trends and the possible consideration of AI-focused legislative proposals in Texas
- 3) methods for creating and evaluating values and norms for the use of AI in legal technology, including tools to help ensure that results generated by AI tools are valid and unbiased
- 4) using information gathered in monitoring trends and legislation, provide a sample template allowing attorneys and law firms to evaluate and/or document their use of AI

Employment Law

Overview

Whether you are a Texas lawyer representing Texas employees or Texas employers, or a lawyer litigating on behalf of or against national employers operating in Texas, it is critical to be aware of the many ways in which AI is impacting the modern workplace. Use of AI within law firms for employment or HR purposes can also raise risks and obligations.

Widespread Use of AI in Employment Practices

AI tools are being extensively used by businesses for screening job applicants. AI is also employed in various aspects of human resource management, including recruitment, hiring, training, retention, and evaluating employee performance.

Potential Bias and Discrimination

Despite the potential to eliminate bias, current AI applications might inadvertently perpetuate existing biases, leading to unintentional discrimination. Examples include:

- 1) AI tools rejecting applicants with resume gaps, potentially discriminating against individuals with disabilities or those who took parental leave
- 2) overlooking older workers due to smaller digital footprints on social media and professional platforms

Legislative Responses to AI in Employment

There's an increasing trend in city and state legislatures to introduce AI-focused bills. Notable examples include:

- 1) California's draft AI regulation and legislative proposals to regulate AI's use in employment
- 2) New York City's Local Law 144 requiring bias audits for automated employment decision tools
- 3) proposals in other states like Illinois and Vermont focusing on regulating AI in employment decisions and employee monitoring
- 4) At the federal level, there are proposals like the Artificial Intelligence Research, Innovation, and Accountability Act of 2023 (AIRIA) and the Algorithmic Justice and Online Platform Transparency Act aimed at regulating discriminatory algorithms and allowing government intervention against AI-induced discrimination.

Potential Recommendations

This committee will continue to study what developments may occur in this area. Potential recommendations that the taskforce may later recommend include:

- 1) advising the Labor and Employment Section to list all legislation and regulations that practitioners in this area should be aware of
- 2) inasmuch as lawyers are employers as well, recommending that the State Bar publish a listing of legislation and regulations in this area

Family Law

Overview

Texas family law attorneys tend to be early adopters of technology. Family law is a fast-paced field with a high volume of cases, demanding a high level of professional efficiency.

Digital Evidence in Family Law

With over 85% of Americans using smartphones, digital media such as audio recordings, emails, texts, social media posts, and GPS data have become ubiquitous in family law cases. The handling of these extensive and voluminous personal records is a critical aspect of family law practice.

Misuse of Digital Data

Given the emotionally charged nature of family law and the inherent lack of trust between parties, there's a notable issue with the misuse of digital data.

AI's Role in Enhancing Efficiency

AI has the potential to significantly enhance efficiency in family law, similar to past technological advancements like fax machines, scanners, email, and eFiling. However, AI differs in its autonomy, operating without skilled oversight and ethical constraints, and producing sophisticated results.

Use of AI by Self-Represented Litigants

A majority of Texas family law cases involve litigants without legal counsel. Many of these self-represented litigants turn to free online AI solutions to compensate for their lack of legal knowledge.

Legal Aid and AI

Legal aid associations are developing AI avatars to assist clients with inquiries and court preparation.

AI's Potential for Family Law Cases

Family law attorneys should consider utilizing AI to streamline document management, increase efficiency, and enhance communication with clients, while safeguarding courts against potential misuse and avoiding ethical entanglements.

There are many potential benefits of incorporation of AI systems for family law attorneys:

- 1) **Discovery:** AI document management systems can be used to streamline discovery by proposing and narrowing relevant discovery requests and objections. Voluminous documents can be sorted and scanned to identify responsive records and flag privileged communications that might otherwise escape detection. These systems can eliminate duplication, identify frivolous, repetitious, and bad faith responses, objections, and nonanswers, and then draft requests for sanctions or to compel.
- 2) **Document Management:** AI systems can independently evaluate records, categorizing them and organizing them by content. These systems can summarize the records as a whole or by category, no matter how voluminous, and then retrieve certain records based on natural language descriptors. Rule of Evidence 1006 summaries can be easily generated and readied for submission in court in lieu of offering separate and numerous exhibits.
- 3) **Contracts:** AI systems can draft, review, compare, and summarize contracts and drafts, to facilitate the creation of pre- and post-nuptial agreements, AID's, and other settlement agreements.
- 4) **Improved Communications:** Client hand-holding consumes a significant amount of time for lawyers and staff, particularly in solo and small firms. Online chatbots and virtual assistants can provide simple answers to common client questions, easing the administrative burden on staff, increasing efficiency, and eliminating wasted billable hours. Witness prep for depositions and trial can be bolstered or even replaced with AI training. This is particularly useful for self-represented litigants who have no other source of guidance. Legal Aid services are already implementing online training bots for clients and low income nonclients alike which may soon be made freely available to the general public.
- 5) **Trial Preparation:** By analyzing strengths and weaknesses of claims, AI systems can identify evidentiary gaps and recommend additional discovery requests, responses, and necessary witnesses. These systems can recommend and create demonstrative exhibits that appeal to certain judges or jurors. Trial briefs can be generated during contested hearings for submission during closing argument. Postjudgment motions can be generated from analysis of transcripts, for use as motions for new trial and polished appellate briefs.
- 6) **Tracing:** Successful tracing of separate property requires meticulous record keeping and clear presentation of complex concepts. AI can apply and compare various tracing methods and identify potential gaps that could be fatal to a tracing analysis. It can prepare timelines and summaries to bolster the presentation, possibly eliminating the need for expert testimony in some tracing cases.
- 7) **Social Media:** There is rarely a family law hearing that does not involve social media evidence. Unfortunately, there are many social media platforms, and search features are generally inadequate for sweeping and thorough inspection. AI can continually scan and monitor social

media for useful information about parties or witnesses, or posts indicating bias of potential jurors. This would be of great value in presenting motions to transfer venue under TRCP 257.

Potential Risks

While the potential benefits are numerous, so too are the risks of misuse and abuse. Family law lawyers must be able to anticipate, identify, and respond to these situations.

- 1) **Falsified Records:** Free AI websites can easily create fake, manipulated, forged, and pseudo documents and records that frequently escape detection. Government records (passports, driver's licenses, search warrants, protective orders, deportation orders) and personal records (medical, drug tests, utility bills, real estate documents, bank statements) can be obtained in seconds, for a minimal cost. Fake emails, texts, audio recordings, and social media posts may be indistinguishable to a nonexpert without application of AI detecting software.
- 2) **Medical Lay Opinions:** Parental observation and opinion of their child's medical, mental and emotional condition is commonly admitted in family law hearings. The basis for these opinions is explored on voir dire or during cross examination to test the credibility of the parent's testimony. Parents often report relying on input from the children's treating physicians. However, as AI chatbots replace personal interactions with medical professionals, opinions based on doctor's recommendations may be deemed unreliable. This is exacerbated by the recent trend of AI systems being quietly trained by unsophisticated workers to anthropomorphize communications—emoting to show seemingly real empathy and thus soothe frightened patients. Mimicry of empathy and humanity by AI can manipulate human emotion and sway outcomes in imperceptible ways.
- 3) **Editing of Digital Media:** "Deep fakes" are fictitious digital images and videos. They are created with simple, free apps currently available on both Apple and Android smart phones. With a few clicks or taps, AI can manipulate digital media and create seemingly authentic photos and videos that easily fool unwary recipients. AI detectors flag suspicious files, but they are not foolproof. Attorneys should routinely run all digital photos through AI detectors.
- 4) **Caller ID spoofing:** Spoofing is the falsification of information transmitted to a recipient phone's display that disguises the identity of the caller. The technique enables the user to impersonate others by changing the incoming phone number shown on the receiving phone. In this way, someone can fabricate abusive, repeated, or harassing calls and texts seemingly originating from one spouse, parent, paramour, child, law enforcement or CPS. The perpetrator can create a mountain of false evidence while hiding behind AI anonymity. AI systems can be instructed to inundate a recipient with nonstop harassing messages or calls, without leaving any digital footprint on the perpetrator's phone or computer. By evaluating years of messages and emails, the AI system can mimic the victim's speech and emoji patterns—a key element of admissibility. Further, AI spoofers can be used to fraudulently obtain or circumvent liability for life-long protective orders under Tex. Code Crim. Pro. 7b for stalking by digital harassment. And because these systems do not work through the service provider, third-party discovery from the phone company will appear to confirm that the calls or messages originated from the spoofed number, lending an air of credibility to the ruse.
- 5) **Voice Cloning:** Voice cloning apps and websites allow someone to convincingly spoof the voice of any other person with only a single audio sample of the target. Someone with dozens of voicemails and recorded conversations from years of marriage, or even a recorded deposition, can use these systems to create audio files that require an AI detector or forensic expert to detect.

- 6) **Data Analysis Manipulation:** AI systems can be used to subtly modify large data sets, corrupt legitimate data analysis, and generate false conclusions that appear legitimate and are only detectable by competing expert review. They can fabricate peer review and approval, circumventing the rigorous gatekeeping process that would otherwise be required for admissibility. This allows lay witnesses to present false opinions as verified scientific fact, or as the basis for a law-expert opinion.
- 7) **Dissemination of Misinformation:** As described above, AI can monitor and find useful social media evidence. However, it can also wield the power of social media to maliciously generate false information and evidence. AI can be unleashed to wage a social media disinformation campaign. It can flood various platforms in a reputation manipulation campaign targeting the judge, opposing counsel, parties, or witnesses. It can untraceably tamper with or poison a jury pool, spreading lies or false legal positions and authority. It can significantly damage the reputation of court participants, enabling the other side to provide negative reputation testimony to undermine the credibility of opposing witnesses. And these efforts could create sufficient taint to legitimately support a motion to recuse or venue transfer motion under TRCP 257.
- 8) **Facilitated Hacking:** Hackers use AI systems to breach secure cloud databases and obtain unauthorized access to sensitive personal information. Client's financial, medical, or personal communications, including attorney-client privileged emails, could be surreptitiously obtained. Moreover, hackers can target law firms seeking to break into their secure servers, obtaining access to all privileged records and client files. Lawyers should question the source of such information, so as not to run afoul of criminal prohibitions on use of stolen digital data, such as the Texas Penal Code 16.04. Additionally, these systems can hack dating apps and target unwary spouses for romantic entrapment using AI chatbot baiting.
- 9) **Voluminous Records:** One of the great benefits of AI is the handling of voluminous records: thousands of documents, millions of emails, or decades of bank statements and canceled checks. Through AI analysis, there is the possibility that all could be categorized and summarized, potentially one day without human oversight. However, there remain important questions about the validation of such tools and the ongoing role of human oversight. The committee will explore how to address risks presented by greater use of this technology.
- 10) **Local Rules and Court Practices:** AI systems can analyze a court participant's public life and social media presence, seeking leverage for inappropriate strong-arming and manipulation. In a similar way, the systems can be unleashed on a judge's personal and professional history, determining personal predilections, biases, and likely outcomes. The old saying, "A good lawyer knows the law. A great lawyer knows the judge," takes on new meaning when the knowledge includes a detailed and thorough psychological and historical evaluation of the judge.

Potential Recommendations

- 1) Increase Texas lawyers' awareness of the benefits and risks of AI by expanding the number of CLEs and articles regarding same.
- 2) Consider 1 hour of MCLE per year requirement to meet the technical competency and proficiency requirements of Texas Disciplinary Rules of Professional Conduct, Rule 1.01 Comment 8.
- 3) Examine and review TRCP 13 Effect of Signing Pleadings, Motions, and Other Papers: Sanctions to ensure that trial and appellate courts have adequate remedies regarding AI-generated misinformation or hallucinations.
- 4) Increase and support AI integration for low-income and pro bono legal service providers.

- 5) Annually review AI and its utilization and risk for Texas lawyers.
- 6) Continually review other State Bar and national legal organizations' reviews and recommendations regarding AI and the legal profession.
- 7) Periodically review state and federal laws regarding AI and advise Texas lawyers of any changes that would or could affect the practice of law.
- 8) Ensure that Texas judges are routinely provided with current information regarding the benefits and risks of AI.
- 9) Begin exploring with AI vendors a working relationship for potential use by Texas lawyers, similar to the State Bar's access to Fastcase.
- 10) Update predicate manuals to have enhanced materials and examples for offering or challenging digital evidence.

Healthcare

Overview

Complex Regulation of Medical AI

The U.S. Food and Drug Administration (FDA), U.S. Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), state medical boards and others have overlapping and complementary jurisdiction over AI in healthcare and life sciences. The use of AI in healthcare raises important opportunities for new treatments, improved medical decision making, and access to care and defragmentation of the healthcare system. At the same time, AI in healthcare poses unique risks and challenges to existing regulatory and legal rules such as the learned intermediary and the distinction between devices and practicing medicine. Lawyers in this space will face uncharted territory as the technology evolves.

Dependence on IT, the Internet, and Cloud Computing

Healthcare providers heavily rely on information technology, the Internet, and cloud computing, necessitating the protection of patient data privacy, especially when AI is involved.

HIPAA Compliance and Patient Data Protection

Healthcare providers are bound by the Health Insurance Portability and Accountability Act (HIPAA) to protect patient health information (PHI). They use Electronic Health Record (EHR) systems, such as EPIC and Cerner, where AI is likely utilized to assist healthcare providers and business associates.

Third-Party Software and AI Risks

Given the reliance on cloud computing, it's probable that third-party Software-as-a-Service (SaaS) providers use AI. Large cloud computing providers like Amazon offer AI-as-a-Service (AIaaS) to manage vast data volumes, which healthcare providers and business associates may use. However, the usage of AI by SaaS can pose risks to PHI if healthcare providers do not thoroughly review and negotiate online terms of service, click agreements, and privacy policies.

Complexity of AI in Healthcare

AI is involved in various healthcare aspects, including record keeping, diagnostic imaging, triage, prescription dispensing, billing, staffing, and patient satisfaction evaluation. The integration of AI in healthcare legal departments combines the complexities of healthcare, AI, and the law, necessitating tailored guidance.

Potential Recommendations

- 1) **Engagement with Healthcare IT Professionals:** The State Bar should interact with Chief Legal Officers (CLOs), Chief Information Officers (CIOs), Chief Privacy Officers (CPOs), Chief Information Security Officers (CISOs), and risk management professionals to understand their perspective on AI use in healthcare.
- 2) **Public Information and Awareness:** Provide accessible information to lawyers and the public about AI's current use in healthcare, its impact on patient care, and patient rights.
- 3) **Continuing Legal Education Programs:** Offer CLE programs for lawyers and judges to understand how healthcare providers, device manufacturers, covered entities, business associates, and subcontractors use AI. This understanding is crucial for the protection of safety and efficacy, patient care and rights, physical judgement, and PHI and to assist these entities effectively.

Legal Education

Overview

Importance of Understanding AI in Legal Education

Recognizing the significant influence that AI has on the ethical practice of law and case management in courts, it's essential for law school education to address how AI affects these areas. This understanding is crucial for preparing law students for their future roles as lawyers and judges.

AI as an Educational Tool

AI can be beneficial for law students to better comprehend the practice of law, which would ultimately benefit all lawyers and judges. However, there's a concern that an overreliance on AI could lead to a deficiency in the essential skills and knowledge required for legal and judicial careers.

Experiences with Generative AI in Law Schools

Early experiences with generative AI reflect some of the persistent concerns over its use by law students.

- 1) The University of Michigan Law School prohibited the use of ChatGPT on student application essays.
- 2) The University of California Berkeley School of Law adopted a formal policy on the use of AI by students but did not pass an outright ban.
- 3) In a study analyzing ChatGPT's performance on the bar exam, Chicago-Kent College of Law professor Daniel Katz and Michigan State College of Law professor Michael Bommarito found that the AI got answers of the Multistate Bar Exam correct half of the time, compared to 68% for human test takers.
- 4) Law professors at the University of Minnesota Law School conducted a study which showed ChatGPT performing on average at the level of a C+ student, earning a low but passing grade in four courses. The same researchers authored a follow-up study, *Lawyering in the Age of Artificial Intelligence*, in November 2023. It found that while use of AI led to consistent and significant improvements in the speed of law students' work on common legal tasks (enhancing it by as much as 32%), AI did not really improve the quality of the work.
- 5) Legal writing professors interviewed by the ABA Journal who used ChatGPT in writing classes concluded that the AI tool can model good sentence structure and paragraph structure and aid in summarizing facts.

The use of AI in law schools can present the opportunity for certain efficiencies and familiarize students with technology used in practice, but AI is no substitute for a student’s own analysis.

Potential Recommendations

- 1) **Balancing AI Use with Traditional Learning:** A practical solution suggested is to modify legal education to encourage AI use among law students. At the same time, it is recommended that students be required to orally explain their research papers to ensure they retain critical thinking and understanding skills.
- 2) **Collaboration with Legal Education Institutions:** The State Bar should collaborate with law school deans and law professors to focus on using AI in practical law courses, thereby enhancing the practical aspects of legal education with AI technology.
- 3) **Mandatory Continuing Legal Education (MCLE) on AI:** The recommendation includes the State Bar mandating MCLE courses about the ethical and practical uses of AI for young lawyers, particularly in the first five years following their passing of the bar exam.
- 4) **AI Summit:** Consider recommending that the State Bar of Texas hold an “AI Summit,” to which deans of the ten Texas law schools will be invited and encouraged to bolster technology law offerings to students, including but not limited to generative AI.
- 5) **Mandatory Course on AI for Recent Graduates:** Consider a requirement for recent law school graduates, along the lines of the mandatory Introduction to practice course currently in place, to complete a CLE course on the benefits and risks of generative AI.
- 6) **Ongoing Study:** Consider ongoing review and study of AI-related issues by the State Bar due to its rapid evolution and the advanced rate of adoption within the legal profession. Such ongoing study could include outreach to Texas law schools and providing guest speakers on the subject of generative AI.

The State Bar should encourage law schools to address AI topics in these Law School Courses:

TOPICS	LEGAL EDUCATION POINTS
1L Courses Which Should Include AI	Legal Research Writing Communication & Legal reasoning Foundation of the Legal profession Civil Procedure Legal Analysis & Persuasion
2L & 3L Courses Which Should Include AI	Administrative Law Basic Federal Income Taxation Business Associations Civil Procedure II Comparative Law Constitutional Criminal Procedure Conflict of Laws Estates and Trusts Evidence International Law Law Office Management Professional Responsibility Remedies

Practical Uses

The legal community in Texas would benefit from a consideration of the possible practical uses of artificial intelligence.

Potential Recommendations

- 1) **Educational Outreach:** We recommend the development of a self-service presentation (slide deck) covering practical use cases and examples of responsible uses of AI. Bar members can review the presentation themselves, and we also recommend that it be presented at each bar section meeting at least once in 2024. To incentivize participation, we suggest offering CLE credits to attendees.
- 2) **Bar Magazine Articles:** To ensure that information reaches every member of the bar community, we propose the creation of concise one- or two-page articles that cover similar content to the presentation. These can be disseminated through the bar association's email newsletters or magazines, specifically tailored to cater to a less technical audience. The aim is to provide accessible and digestible insights into the world of AI and its relevance to legal practice.
- 3) **Paralegal Empowerment:** Recognizing the vital role paralegals play in the legal ecosystem, we recommend dedicating a one-page article in the Texas Bar Journal and Texas Paralegal Journal. This content should be tailored to address the unique perspectives and responsibilities of paralegals, making the integration of AI concepts relevant to their daily tasks.
- 4) **Community Building:** Fostering a sense of community and shared learning is crucial. We are considering recommending the creation of an AI affinity group that meets quarterly. This group would serve as a platform for members to share success stories, exchange insights, and collectively navigate the challenges posed by AI in the legal profession.
- 5) **Business Mentor Program:** To bridge the gap between tech-forward lawyers and those seeking guidance, we would like to explore designing a business mentor program for bar members. Experienced lawyers well-versed in technology can mentor another bar member, sharing ideas on how to incorporate tech into their practice. This could be designed in coordination with supporting retiring lawyers who want to transition their practice to the next generation of attorneys.
- 6) **Scholarship Fund for Upskilling:** Acknowledging the financial considerations of adopting AI tools, we propose the establishment of a scholarship fund. Bar members can apply for funds to purchase AI tools or reduce the cost of upskilling during this period of technology transition for the profession. Additionally, exploring potential bar discounts on AI tools would further support this initiative.
- 7) **List of Social Media Resources:** We recommend compiling a list of reputable groups and associated social media accounts on LinkedIn and Facebook so that bar members can continue to learn about AI in bite-size amounts over the course of the next few years.

Justice Gap

Overview

The "Justice Gap" refers to the tremendous unmet need for legal services among low-income persons. The Legal Services Corporation (LSC) 2022 Justice Gap Study revealed that 92% of the civil legal

problems of low-income Americans did not receive any or enough legal help. Nearly three-quarters (74%) of low-income households experienced at least one civil legal problem in the previous year. A third (33%) of low-income Americans had at least one problem they attributed to the COVID-19 Pandemic. (<https://www.lsc.gov/initiatives/justice-gap-research>)

How Might Legal AI Help?

Legal AI technology will impact the justice gap on two fronts. First, by making lawyers more productive and thus allowing them to serve more clients, more quickly. Second, via self-help legal tools, in the form of chatbots, designed to be used directly by consumers.

(<https://www.lawnext.com/2023/09/thoughts-on-promises-and-challenges-of-ai-in-legal-after-yesterdays-ai-summit-at-harvard-law-school.html>)

What Are the Potential Challenges or Pitfalls?

Particularly with respect to consumer self-help legal tools, there will be huge challenges in ensuring that data used in legal AI systems is valid and that legal answers consumers receive can be trusted. The subcommittee will survey Texas legal aid providers regarding how they plan to use AI tools in the provision of client services and also directly to clients in form of chatbots (Texas Legal Services Center is beginning to test chatbot technology as a component of its virtual court kiosks, only for the purpose of helping people use the kiosks (<https://www.tlsc.org/kiosks>)).

Potential Recommendations

The Subcommittee may study and make recommendations regarding the following:

- 1) strategies for ensuring that direct-to-consumer legal AI tools provide valid information that is usable and effective in helping solve legal problems
- 2) how to ensure self-help legal AI tools are accessible to people who may have limited internet access or low proficiency in using computers and mobile devices, or who are non-English speakers
- 3) ideas for supporting Texas legal aid providers as they build out their own legal AI tools
- 4) how to address the potential for unequal access to AI technology; that is, that legal aid providers will be shut out of access to expensive AI tools which may be accessible only by big firms and corporations; encourage legal technology vendors to provide low-cost access to such tools
- 5) the potential for AI technology to help with dispute resolution and dispute avoidance
- 6) ideas for innovative legal services platforms based on AI

Areas for Additional Research

The taskforce identified areas where additional research would be helpful.

- 1) **The Use of AI by Texas Lawyers:** The taskforce proposes to poll members of the Texas Bar to gain insight into how quickly the use of AI is spreading in the legal profession, and what AI tools are being used.
- 2) **The Use of AI by the Judiciary:** The taskforce proposed to poll members of the judiciary to gain insight into how AI is being used by and in the courts.
- 3) **Practical Application of AI:** The taskforce proposes identifying examples of Texas lawyers and judges applying AI to their work.

- 4) **Responses to AI in Other States:** Taskforces or committees in several states are studying the implications of AI in the practice of law. The taskforce is monitoring these efforts and will consider the findings and recommendations that result from them.

Collaboration

As the taskforce identified issues that span the legal profession, it became apparent that these issues impact other interest groups such as the courts, law schools, and legal regulators, to name a few. The taskforce is planning to invite other stakeholders to an AI Summit in the spring of 2024 to continue the discussion on the impact of AI on the legal profession.

Conclusion

In conclusion, the Taskforce for Responsible AI in the Law has begun to navigate the complex intersection of AI and legal practice. This interim report marks an initial step in our journey, outlining key areas of focus and preliminary recommendations. As we proceed, our work remains grounded in a commitment to thorough investigation and careful consideration of AI's implications for the legal profession. Our ongoing efforts aim to responsibly integrate AI, balancing innovation with the profession's foundational values and ethical standards. The taskforce will continue to diligently explore these emerging challenges, ensuring our final recommendations are informed, measured, and aligned with the evolving needs of the legal community.

Glossary of Useful Terms

The following definitions and key terms are helpful in understanding the report of the taskforce:

- 1) **Algorithm:** a step-by-step procedure or set of rules designed to perform a specific task or solve a specific problem
- 2) **Artificial Intelligence (AI):** the simulation of human intelligence in machines, programmed to think and learn like humans
- 3) **Bias in AI:** the tendency of an AI model to make decisions that are systematically prejudiced due to underlying assumptions in the algorithm or biases in the training data
- 4) **Chatbot:** a computer program that simulates human conversation through text or voice interactions, often powered by AI
- 5) **ChatGPT:** a specific type of generative large language model developed by OpenAI, designed to create human-like text based on the input it receives that utilizes deep learning and has been applied in various fields including natural language understanding, content creation, and conversation simulation
- 6) **Data Training:** the process of feeding data into an AI model to teach it specific behaviors and patterns, allowing it to learn and make predictions or decisions
- 7) **Deep Learning:** a subset of machine learning that uses neural networks with three or more layers, allowing for more complex and abstract pattern recognition
- 8) **Ethical AI:** refers to the practice of using AI in a manner that aligns with accepted moral principles and values, especially in terms of fairness, transparency, and accountability
- 9) **Generative AI:** AI models that create new, original content such as text, images, or music, based on the data they have been trained on
- 10) **Large Language Model (LLM):** a type of machine learning model designed to understand and generate human-like text, used in various applications including content creation and natural language understanding
- 11) **Machine Learning (ML):** a subset of AI, where algorithms allow computers to learn and make decisions from data without being explicitly programmed
- 12) **Natural Language Processing (NLP):** a branch of AI focused on the interaction between computers and humans using natural language, enabling machines to read, interpret, and respond to human language
- 13) **Neural Network:** a computational model inspired by the way human brain cells work, used in machine learning to process complex patterns and relationships in data
- 14) **OpenAI:** an artificial intelligence research lab consisting of the for-profit OpenAI LP and its parent company, the non-profit OpenAI Inc. OpenAI is dedicated to advancing digital intelligence and conducts research on various AI topics including machine learning, deep learning, and natural language processing
- 15) **Reinforcement Learning:** a type of machine learning where agents learn to make decisions by receiving rewards or penalties based on the actions they take
- 16) **Supervised Learning:** a type of machine learning where algorithms are trained on a labeled dataset, which means the algorithm has access to an answer key while learning
- 17) **Unsupervised Learning:** a type of machine learning where algorithms are trained without any labeled response data, learning to identify patterns and structures within the input data

Taskforce for Responsible AI in the Law

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Taskforce for Responsible AI in the Law

Report on the 2024 Texas AI and Law Summit

February 26, 2024, Texas Law Center, Austin, Texas

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Recommendations

The Artificial Intelligence (“AI”) Summit Attendees’ discussion resulted in the following recommendations:

- TRAIL should request a formal ethics opinion on the use of AI and generative AI by lawyers, including when it can be used and how to bill for its use. As a result of the discussion during the Summit, TRAIL Chair John Browning sent a request to the Professional Ethics Committee requesting an ethics opinion and has received a letter confirming that the PEC is working on preparing an ethics opinion in response to the request
- For attorneys using AI, Texas Rule of Civil Procedure 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the Texas Civil Practice & Remedies Code (“CPRC”) require reasonable diligence from the filer. The Supreme Court's Rules Committee should clarify the rules without being specific to AI and generative AI.
- The State Bar should educate lawyers and judges about the responsible use of AI and generative AI. This should include educational materials for judges, training on metadata, CLEs on prompting, data privacy, and responsible document sharing. Short-take CLE products and AI topics tailored to specific practice areas could also be effective. Education efforts could involve the Texas Access to Justice Commission (“ATJ”), the State Bar, pro bono groups, and other organizations, with resources provided on the State Bar website.
- A toolkit should be created, focusing on AI and cybersecurity more broadly, written in plain language, and maintained by the State Bar.

Executive Summary

The Taskforce for Responsible AI in the Law held an AI Summit in Austin at the Law Center on February 26, 2024. Members of the Taskforce moderated sessions on several issues identified by the Taskforce as important to lawyers in addressing the risks and opportunities presented by AI and generative AI. Topics included ethical use of AI, addressing AI through legal education, cybersecurity and privacy concerns, use of AI in the courtroom, and AI and access to justice. The Taskforce invited stakeholders from across the legal community to attend the discussion. The group of approximately 40 attendees included Supreme Court Senior Justice Lehrmann, Rules Attorney Nina Hsu, representatives from several Texas Law Schools, a representative from Texas Health Resources, and representatives from State Bar Committees including the CLE Committee, the Court Rules Committee, and the Law Practice Management Committee.

Ethical and Privacy Concerns

The AI Summit discussion focused on how the existing ethics rules apply to AI, and whether the existing rules are adequate in providing guidance to attorneys on how to use AI ethically. The group also considered whether additional ethics rules are necessary to provide attorneys with guidance and to protect clients.

The AI Summit attendees discussed AI broadly instead of focusing only on Generative AI. The AI Summit attendees noted that AI has become so pervasive in most technology applications that it is not feasible for attorneys to eliminate the use of AI, even if that were desirable. It would therefore

not be feasible for an attorney to effectively represent a client without in some way making use of AI.

The AI Summit attendees also noted that ethical and effective representation of a client might require not using AI in some situations and using it judiciously in other situations. The possibility exists that as AI, particularly generative AI, becomes more pervasive, failing to utilize this technology might be unethical in that the attorney is not adequately using the tools available.

2018 Ethics Opinion 680 requires lawyers to understand the technology they use, including cloud services. TRAIL's Interim Report proposed requesting a formal ethics opinion on the use of AI by lawyers, including when it can be used and how to bill for its use. The discussion at the Summit supported this recommendation.

An ethics committee should define due diligence for electronic services, as the level of risk varies among AI applications.

Transparency in AI is expected to improve, and lawyers need to review privacy notices and terms of service. Debate exists on whether increasing the technology CLE requirement is necessary, as market forces may address the issue and lawyers learn about AI risks quickly.

While the AI Summit discussion did not propose drafting additional ethics rules specifically addressing AI, the group did note that any new rules should be AI-agnostic, emphasizing the lawyer's responsibility for the contents of signed documents.

AI in the Courtroom

Discussion by the AI Summit attendees about the role of AI and generative AI tools in the courtroom focused on three areas: the use of AI by pro se litigants, the use of AI by attorneys, and the use of AI by court staff.

Pro se litigants will likely use any available AI tools, especially if they are free and accessible. Courts may want to warn pro se litigants about the risks of AI and legal research, potentially through clerks, standing orders, or pro se and self-help centers. Concerns exist about pro se litigants becoming overconfident in their case due to AI-generated content.

For attorneys using AI, Rule 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the CPRC require reasonable diligence from the filer. The Supreme Court's Rules Committee could clarify the rules without being specific to AI and generative AI. In addition to the risks inherent in using AI, there are potential benefits for attorneys. For instance, a free AI tool that checks citations for hallucinations could benefit good actors.

Nearly a quarter of judges use AI, and while responsible use in drafting opinions is permissible, requiring disclosure of AI use is not recommended. Standing orders educating about AI are encouraged, but those requiring disclosure are not.

Deep fakes and the authenticity of evidence are concerns, and Texas Rule of Evidence 901 should be reexamined in this context.

Recommendations include reviewing educational materials for judges, considering pretrial hearings for evidentiary challenges, and providing training on metadata. Education efforts could involve the ATJ, State Bar, Pro Bono Law Group, and other organizations, with resources provided on the State Bar website.

AI in Legal Education

Law schools should be encouraged to address the challenges and benefits of technology and AI in their curricula. AI education could be embedded in legal writing courses or offered through short CLE presentations. The State Bar can support law schools by clarifying what "professional competence" means concerning AI and offering nuts-and-bolts education for new lawyers.

Law students need to understand the terms of use of AI services, data privacy, and the complexity of de-identification.

CLEs on prompting, data privacy, and responsible document sharing could be helpful. Short-take CLE products and AI topics tailored to specific practice areas could also be effective.

Real-time, AI-driven spoken communication might transform how people learn about AI.

AI and Cybersecurity

AI is being used to create more effective phishing emails and malware, with threat actors patiently collecting information before attacking.

Continuous training is crucial for all staff members, not just attorneys. Cybersecurity issues need to be translated into plain language for better understanding. Solo and small firm attorneys need resources and toolkits, particularly regarding cyber insurance.

The State Bar could remind attorneys about the availability of cybersecurity insurance and resources. Cyber insurance requires affirmative steps to protect data and may not cover all potential problems.

Lawyers should understand where their data resides and take advantage of free resources for training and risk assessments.

A toolkit should be created, focusing on AI and cybersecurity more broadly, written in plain language, and maintained by the State Bar.

AI and Access to Justice

The AI Summit attendees discussed the potential benefits of AI and generative AI for increasing access to justice. However, many attendees also expressed concern that AI and generative AI is not an adequate substitute for qualified legal assistance. Concerns were raised about over-reliance on AI and generative AI as a method of providing low-cost legal services. Some members of the group

proposed considering safe harbors or coverage for attorneys doing pro bono work with AI, while some members opposed this proposal.

Other proposals included increasing support and funding for legal aid to serve as a testing ground for AI adoption and exploring the use of AI, including AI and generative AI videos, to create more educational and empathetic resources for pro se litigants.

Tab HH

Memo

To: Texas Supreme Court Advisory Committee

From: Subcommittee on Rules 1-14c

Date: August 8, 2024

Subject: Review of Potential Rule Amendments to Address Artificial Intelligence

On July 17, 2024, the Texas Supreme Court referred the following topic to the Texas Supreme Court Advisory Committee:

Artificial Intelligence. The State Bar of Texas’s Taskforce for Responsible AI in the Law has issued the attached interim report recommending potential changes to the Texas Rule of Civil Procedure 13 and Texas Rule of Evidence 901. The Committee should review, advise whether such amendments are necessary or desirable to account for artificial intelligence, and draft any recommended amendments.

This referral was assigned to the Rules 1-14c Subcommittee Chaired by Judge Harvey Brown. The following is the Report of the Subcommittee.

I. Introduction and Summary of Recommendations

In this Memo,¹ the Subcommittee describes some of the unique risks and concerns for our courts and legal system sparked by the rapid development of AI. The Subcommittee also reviews how other states and federal courts have responded through standing orders, rulemaking and ethics opinions. The Subcommittee discusses the Interim Report of the Texas State Bar Taskforce for Responsible AI in the Law (Taskforce) and its 2023-24 Year-End Report and recommendations that pertain to potential rulemaking. Appendix A is a brief overview of AI and the transformative impacts of Generative AI and Large Language Models and resources on AI and federal and state court rules addressing AI.

A. Recommendation on Amending TRCP 13

The Subcommittee reviewed the Taskforce’s recommendations (both in its Interim Report and 2023-24 Year-End Report) suggesting that the Advisory Committee should consider amending Rule 13 to highlight the duty of both attorneys and self-represented litigants regarding the use of AI in connection with pleadings, motions and other papers. Notwithstanding the Taskforce’s suggestions, the Subcommittee concludes that amending Rule 13 is unnecessary because self-represented litigants are unlikely to focus on revised language in Rule 13 and attorneys practicing in Texas understand their duty to be competent in the use of technology (and the Subcommittee anticipates that the Texas Committee

¹ Note that this memo was prepared with the assistance of Generative AI (CoPilot).

on Professional Ethics will follow the Taskforce's recommendation to issue a more specific Ethics Opinion on the ethical considerations related to attorneys' use of AI).

To the extent the Committee concludes an amendment to Rule 13 is advised, the Subcommittee recommends the following language:

RULE 13. EFFECT OF SIGNING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. The use of generative Artificial Intelligence in connection with any signed pleading, motion, or other paper must comply with this Rule. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or act and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

Notes and Comments

Comment to 1990 change: To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day "grace" period provided in the former version of the rule.

Comment to 2024 change: Attorneys and parties (including self-represented parties) should understand that pleadings, motions or other papers that include content from generative Artificial Intelligence tools are subject to the certification obligation of this rule.

The Subcommittee suggests that if there is a consensus to amend Rule 13, the reference to AI should be included in a new Comment to the Rule (in the format above), instead of amending the text of the Rule.

B. Recommendation on Amending the Rules of Evidence

The Subcommittee recommends that the Advisory Committee review and consider amending Rules of Evidence 901 and 902 on authentication of evidence created or altered by generative AI tools.² Potential changes to Rule 901(b)(9) would include additional authentication steps if a party seeks to introduce AI created records into evidence. The Subcommittee also recommends evaluation of inserting a new Rule 901(c) to set out a procedure for a party to challenge the authenticity of computer-generated or other electronic evidence. This change is due to the risk of falsification or modification of photographs, videos and recordings using AI tools without any indication that the item is not genuine.

The Subcommittee also recommends that the Advisory Committee consider amending Rule 902(10) which details the language required for a Business Records Affidavit used for Self-Authenticating evidence under TRE 902.

C. Recommendation on Amending TRCP 226a

Although not referenced in the Supreme Court's Referral, the Subcommittee also suggests that the Advisory Committee consider and refer to the Rules 216-299a Subcommittee whether to amend the TRCP 226a Instructions to Jury Panel and Jury to direct that potential jurors and empaneled jurors should not access AI tools to investigate information or other resources regarding the case before them. It also recommends updating the language to reflect changes in technology.

II. AI use in the Legal Profession

Chief Justice John Roberts in his 2023 Year-End Report on the Federal Judiciary commented on the potential that technology and particularly AI will have on the practice of law. "As 2023 draws to a close with breathless predictions about the future of Artificial Intelligence, some may wonder whether judges are about to become obsolete. I am sure we are not—but equally confident that technological changes will continue to transform our work."³ The legal community has long relied on computer applications that incorporate some forms of artificial intelligence, including writing tools such as Grammarly® and legal research tools Westlaw® and Lexis®.

Attorneys were very quick to realize the potential of Generative AI in the legal profession and Generative AI will transform the practice of law. Examples include using AI to review and assess contract terms and potentially suggesting additional clauses, analyzing large volumes of data, streamlining the discovery process, automating due diligence reviews, quickly summarizing depositions and recording transcripts and suggesting well-crafted arguments. "Attorneys could spend more time on client relations than contract drafting. Courts could identify better ways to help individuals through the legal system and resolve disputes. Self-represented litigants could navigate some legal problems without

² The Subcommittee anticipates that the input of the Texas State Bar Evidence Committee will be requested prior to any final recommendation by the Committee.

³ <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>

having to pay for an attorney. However, along with the extraordinary potential of generative AI, we should not lose sight of the extraordinary risks it poses.”⁴

The risks of AI in the legal profession were manifested quite quickly when a litigation attorney used ChatGPT to research supportive case precedent when drafting a brief in support of the plaintiff’s opposition to a motion to dismiss in a case pending in the U.S. District Court for the Southern District of New York, *Mata v. Avianca*; (1:22-cv-01461). The attorney did not realize that ChatGPT’s suggested cases and holdings were completely fabricated to resemble actual decisions. Unfortunately, the attorney did not check whether the citations were real before filing his response. The fake cases were soon discovered and the lawyer filing the motion was sanctioned by the court. He also endured public humiliation.⁵

An interesting and thoughtful initiative on AI and the legal system was formed at Duke University Law School called Responsible AI in Legal Services, or [RAILS](#). The initiative describes its mission as follows: “[To] [b]ring together a cross-industry group of leaders (judiciary, corporations, law firms, tech providers, access to justice orgs, etc.) to support the responsible, ethical, and safe use of AI to advance the practice of law and delivery of legal services to all.”⁶ The Steering Committee includes Paul Grimm, former U.S. District Judge and Director of Duke’s Bolch Judicial Institute. The National Center for State Courts (NCSC) also has initiated the exploration of judicial and legal ethics issues involved with AI and the Courts.⁷

A. Impact of AI in Litigation

The risks and concerns triggered by AI, particularly those impacting the legal profession and the justice system, quickly became apparent and will take time to work through courts and rulemaking bodies. A December article in the Duke Law School’s Law & Technology Review described some of the issues and challenges to law and the legal system because of Generative AI:

Generative AI (“GenAI”) systems such as ChatGPT recently have developed to the point where they are capable of producing computer-generated text and images that are difficult to differentiate from human-generated text and images. Similarly, evidentiary materials such as documents, videos and audio recordings that are AI-generated are becoming increasingly difficult to differentiate from those that are not AI-generated. These technological advancements present significant challenges to parties, their counsel, and the courts in determining whether evidence is authentic or fake. Moreover, the explosive proliferation and use of GenAI applications raises concerns about whether litigation costs will dramatically increase as parties are forced to hire forensic experts to address AI generated evidence, the

⁴ Griffin, Laskowski and Thumma, [How to Harness AI for Justice | Judicature \(duke.edu\)](#) 108 *Judicature* 1, 2024

⁵ [Lawyer cited 6 fake cases made up by ChatGPT; judge calls it “unprecedented” | Ars Technica](#). (‘Adding insult to injury’, the plaintiff’s case was dismissed by the trial court.)

⁶ [About RAILS | Responsible AI in Legal Services](#)

⁷ [AI and the Courts: Judicial and Legal Ethics Issues \(ncsc.org\)](#)

ability of juries to discern authentic from fake evidence, and whether GenAI will overwhelm the courts with AI-generated lawsuits, whether vexatious or otherwise. GenAI systems have the potential to challenge existing substantive intellectual property (“IP”) law by producing content that is machine, not human, generated, but that also relies on human-generated content in potentially infringing ways. Finally, GenAI threatens to alter the way in which lawyers litigate and judges decide cases.⁸

In the preparation of this report, CoPilot was asked the following: What are potential risks to our court system because of AI? This was CoPilot’s response:

The integration of AI into our court system brings several potential risks:

1. **Over-reliance on AI:** There’s a risk of over-reliance on AI without assessing its quality and reliability. AI systems are not infallible and their outputs should be scrutinized for accuracy.
2. **Inaccurate or biased information:** AI systems can provide inaccurate or biased information. Biased data sets can lead to skewed outcomes or prejudice against improperly represented groups.
3. **Potential for fraudulent practices:** The use of AI opens up new avenues for fraudulent practices.
4. **Influence of commercial actors:** There’s a risk of commercial actors influencing public interest.
5. **Lack of empathy or human support:** AI systems lack the ability to provide empathy or human support, which is often crucial in legal proceedings.
6. **Reinforcing existing biases:** AI systems can reinforce existing biases if they’re trained on biased data.
7. **Unequal access to AI tools:** Not everyone has equal access to AI tools, which could lead to inequality in the legal system.
8. **Security risks:** AI systems in the judiciary can become a weak point for criminals, terrorist groups, and governments with malicious intent to take advantage of.
9. **Decrease in the number of civil servants:** The digitalization of legal services could cause a decrease in the number of civil servants.
10. **Threats to personal privacy:** The accumulation of massive amounts of personal information in the hands of a few, unregulated big-tech companies with unabashedly selfish commercial interests.

These risks highlight the need for careful consideration and regulation as we integrate AI into our legal systems. It’s important to ensure that the use of AI in the court system is transparent, fair, and doesn’t compromise the rights of individuals.⁹

⁸ Grossman, Grimm, Brown and Zu, [The ChatGPT Judge: Justice in a Generative AI World](#), 23 Duke Law & Technology Review, 1 (October 2023)

⁹ CoPilot query August 1, 2024 (Ironically, the Bluebook has not yet issued guidance on how to cite to AI generated content, underscoring one of the many challenges with the use of AI in legal proceedings.)

B. AI Issues that Will Need to Be Addressed by Courts

Generative AI and its impact on courts and litigants include the following considerations:

- Accuracy, reliability and authenticity of AI Generated information, including whether the output can be repeated
- The potential that uses of AI could compromise proprietary information as well as personal health and personally identifying information
- Does the attorney client privilege/work product doctrine apply to AI prompts from counsel and the Tool’s responses?
- Are prompts (questions posed in AI) and output subject to legal holds?
- What is the ‘chain of custody’ with respect to AI output?
- Who owns output generated by AI tools and is an AI inquiry or answer a declarative statement (that could be held against interest)?
- Jurors independently asking Generative AI tools for information related to the case they are adjudicating.
- Confidentiality of Information inputted into LLMs
- Is an AI generated response hearsay and if so, can it be considered a business record?
- How is AI output authenticated?
- Can AI output be considered as ‘expert’ testimony?

III. AI Rulemaking by State and Federal Courts

Court systems around the U.S. have quickly responded to the AI revolution by implementing local rules, standing orders, and ethics rules to address perceived risks triggered by the technology.¹⁰ As noted below, some of the early orders requiring disclosure of the use of AI have proven to be ineffective.

A. Standing Orders Requiring Disclosure of the Use of AI

Following the press stories on the *Mata v. Avianca* pleading debacle described above, many courts (state and federal) adopted local standing rules requiring disclosure of the use of AI in pleadings. An example of a standing order is the version adopted by Federal Judge Michael Baylson of the U.S. District Court for the Eastern District of Pennsylvania. His standing order requires:

If any attorney for a party, or a pro se party, has used Artificial Intelligence (“AI”) in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court and assigned to Judge Michael M. Baylson, they MUST, in a clear and plain factual statement,

¹⁰ Two very useful tools to track AI rulemaking in state and federal courts includes [Generative Artificial Intelligence \(AI\) Federal and State Court Rules Tracker \(lexis.com\)](#) and RAILS dynamic list of over 58 [State and Federal Court Orders and Ethical Rules related to AI](#).

disclose that AI has been used in any way in the preparation of the filing and CERTIFY that each and every citation to the law, or the record in the paper, has been verified as accurate.

U.S.D.J. Araceli Martinez-Olguin of the N.D. of California requires a similar duty of disclosure for lawyers and pro se parties practicing in her court: “Any submission containing AI-generated content must include a certification that you have personally verified the content's accuracy. You are responsible for maintaining records of all prompts or inquiries submitted to any generative AI tools in the event those records become relevant at any point.”¹¹

U.S.D.J. S. Kato Crews, (D. Colorado) requires a statement on whether AI was used for every paper filing:

[E]very motion filed pursuant to Fed. R. Civ. P. 12, Fed. R. Civ. P. 56, and any opposed motion (to include the corresponding response and reply), shall contain a Certification regarding the use, or non-use, of generative artificial intelligence (AI) (such as ChatGPT, Harvey.AI, Google Bard, etc.) in preparing the filing. The preparer of the filing must certify either that (a) no portion of the filing was drafted by AI, or that (b) any language drafted by AI (even if later edited by a human being) was personally reviewed by the filer or another human being for accuracy using print reporters or traditional legal databases and attesting that the legal citations are to actual existing cases or cited authority. The Court will strike any filing from a party who fails to include this certification in the above-mentioned motions. The AI Certification does not count against any page limitations.¹²

In an interesting development on the trend of local rules mandating disclosure of the use of Generative AI, on November 22, 2023, the Fifth Circuit Court of Appeals proposed the amendment of its Rule 32.3 and Form 6 which would require the following certification:

Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.¹³

On June 12, 2024, the Fifth Circuit announced that it would not implement the proposed rule, announcing:

The court, having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, has decided not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time. Parties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B). Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. “I used AI” will not be an excuse for an otherwise sanctionable offense.¹⁴

¹¹ <https://www.cand.uscourts.gov/wp-content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf>

¹² [SKC Standing Order Civil Cases.pdf \(uscourts.gov\)](#) at 5.

¹³ See [5th Circuit Notice of Proposed Amendment to 5th Circ. R. 32.2, Nov. 22, 2023](#)

¹⁴ [5th Circuit Notice of Decision on Proposed Rule, June 12, 2024](#)

Notwithstanding the early trend of Courts to adopt rules on mandatory disclosure of the use of AI tools in court pleadings, the recent trend suggests that these rules are not practical and not particularly helpful to courts.

B. Local Rules Prohibiting the Use of AI

The Eastern District of Missouri has expressly prohibited Self-Represented Litigants (SRL) from using any form of generative AI in preparing any pleading: “No portion of any pleading, written motion, or other paper may be drafted by any form of generative artificial intelligence. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, self-represented parties and attorneys acknowledge they will be held responsible for its contents. See Fed. R. Civ. P. 11(b).¹⁵” U.S.D.J. Donald W. Molloy of the D. Mont. also has entered case specific orders prohibiting the use of generative AI in connection with the case.¹⁶

C. Standing Orders on AI that Do Not Require Disclosure of AI

Commentators have suggested that mandatory AI disclosure rules are fraught with problems and are counterproductive. An article in Judicature Magazine noted: “[w]hile the impulse underlying the imposition of these standing orders is understandable – even commendable – real disadvantages can result.” The authors instead propose that the better alternative is consistent, court-wide rules that are enacted following publication and public comment.¹⁷

The United States District Court for the Northern District of Illinois adopted a local rule for all matters in the District that explains its methodology and implements the Judicature article’s recommendation:

Some of the Court's standing orders address the Court's idiosyncrasies, such as its procedures for filing summary judgment motions. But other standing orders—which are unfortunately necessary—are often terse reminders that *all filers* need to follow statutes, the Federal Rules of Civil Procedure, and the Local Rules for the U.S. District Court for the Northern District of Illinois. The Court believes that a reasonable standing order on the use of artificial intelligence (AI) would fall into the latter category. So here's this Court's standing order on AI: Anyone—counsel and unrepresented parties alike—using AI in connection with the filing of a pleading, motion, or paper in this Court or the serving/delivering of a request, response, or objection to discovery must comply with Rule 11(b) and Rule 26(g) of the Federal Rules of Civil Procedure, and any other relevant rule, including any applicable ethical rule.¹⁸

U.S. District Court Judge Rita Lin (also of the N.D. California) follows a somewhat similar approach to the N.D. Illinois; It does not require certification but counsel have an ethical duty in connection with any filing:

Counsel is responsible for providing the Court with complete and accurate representations of the record, procedural history, and cited legal authorities. Use of ChatGPT or other such generative artificial intelligence tools is not prohibited, but counsel must personally confirm for

¹⁵ [Self-Represented Litigants \(SRL\) | Eastern District of Missouri | United States District Court \(uscourts.gov\)](#)

¹⁶ See e.g. [Belenzon v. Paws Up Ranch, LLC, Case No. 9:23-CV-69, Dkt. No. 8](#)

¹⁷ Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, [Is Disclosure and Certification of the Use of Generative AI Really Necessary?](#), 107 Judicature 68 (2023)

¹⁸ <https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=1409> (emphasis added)

themselves the accuracy of any research conducted by these means, and counsel alone bears ethical responsibility for all statements made in filings.¹⁹

Other Federal Court Judges, including District Judge James Soto (U.S. Dist. Ct., Arizona) reminded the parties and their counsel in a specific case regarding the risks of the use of AI:

If any portion of a pleading or other document filed on this Court's docket has been drafted (in whole or in part) using generative artificial intelligence, including, but not limited to ChatGPT, Harvey.AI, or Google Bard, all attorneys and pro se litigants filing such pleadings or other documents shall verify that any language that was generated in any form by AI was checked for accuracy by using print reporters, traditional legal databases, or other reliable means by a human being.²⁰

D. Adoption of Ethical Rules related to the Use of AI

Bar organizations also have raised numerous ethical issues arising out of the use of AI. On July 29, 2024, the ABA issued [Formal Opinion 512](#)²¹ that describes the ethical duties under Model Rule 1.1, including the expectation that attorneys are knowledgeable of AI technology and how it can be used and abused:

Under Model Rule 1.1 (Competent Representation), you have an ethical obligation to understand the benefits and risks of any generative AI you use. Using generative AI might also implicate other duties under the Rules of Professional Conduct, like communicating with the client or charging reasonable fees.

As generative AI tools continue to develop, you may need to use them to provide competent legal services to your clients. However, you must evaluate the risks of client confidential information being disclosed or accessed by others when using generative AI tools. If your client specifically asks about your generative AI practices, you should disclose how you are using the technology in your representation.

The amount of review or verification you must do to meet your ethical obligation depends on the generative AI tool and the task being performed. Consider doing the following:

- Reading about generative AI targeted at the legal profession
- Attending relevant continuing legal education programs –and–
- Consulting others who are proficient in generative AI technology

The Washington DC Bar Association also issued an Ethics Opinion on AI²² that includes the following guidance:

¹⁹ [2024-05-17-Civil-Standing-Order.pdf \(uscourts.gov\)](#)

²⁰ [Cowan v. Bd. Of Immigration Appeals, Case No. 4:23-cv-00327-JAS, Dkt. No. 15.](#)

²¹ [Formal Opinion 512 \(americanbar.org\)](#), July 29, 2024.

²² [DC Bar - Ethics Opinion 388](#)

- You should have a reasonable and current understanding of generative AI works and what it does, including (a) its potential dangers such as risk of "hallucinations", misuse, or exposure of client confidential information; (b) its limitations, including whether it uses a narrow dataset that could generate incomplete, out-of-date, or inaccurate results; and (c) its cost
- You must review and validate AI generated content before incorporating it in your work product for clients or relying on it in support of a legal proceeding
- You must ensure the confidentiality of the information provided to the generative AI tool
- You should take appropriate steps to ensure that any use of generative AI is consistent with the Rules of Professional Conduct
- In litigation or arbitration, you must confirm that any generative AI outputs do not contain misrepresentations of facts or law, or provide fake citations
- If you intend to bill your client for your use of generative AI for which there is an out-of-pocket cost, you should communicate that expected expense to your client
- You can only bill for the time you actually spent on a matter, not the time you would have spent absent using generative AI
- Consider whether specific interactions with generative AI in connection with a client matter should be retained as part of the client file

The California State Bar Committee on Professional Responsibility and Conduct (COPRAC) made a similar recommendation to adopt an ethical standard for the use of AI: "When using generative AI tools, lawyers must ensure, among other things, client confidentiality, competent use of AI tools, supervision of lawyers and non-lawyers when using generative AI, and candor with the court and clients."²³

The New York State Bar Association Taskforce on AI recommended NY adopt ethical rules on AI, including the recommendation that attorneys should alert their clients when using AI tools: "When using AI tools in your case, you should advise clients of this usage and ensure legal staff, including paralegals, are properly trained and handling AI tools properly. Also consider responsibly using AI tools to aid in effectiveness in representing clients. However, you should periodically monitor the AI tool provider to learn about any changes that might compromise client confidentiality."²⁴

The Michigan Bar issued an ethics opinion focused on judges rather than litigants.

Judges have an ethical obligation to understand technology, including AI, "and take reasonable steps to ensure AI tools on which their judgment will be based are used properly." Further, judges "have an ethical duty to maintain technological competence and understand AI's ethical implications to ensure efficiency and quality of justice."²⁵

²³ <https://s3.documentcloud.org/documents/24166448/recommendations-from-committee-on-professional-responsibility-and-conduct-on-regulation-of-use-of-generative-ai-by-licensees-1.pdf>

²⁴ [NYSBA Task Force on AI Recommendations \(nysba.org\)](https://www.nysba.org/press-releases/nysba-task-force-on-ai-recommendations)

²⁵ State Bar of Michigan's Standing Committee on Judicial Ethics: [Ethics Opinion JI-155](#)

IV. Texas Taskforce on AI and the Courts

On August 25, 2023, then Texas State Bar President Cindy Tisdale created The Texas Bar Taskforce for Responsible AI in the Law (TRAIL or Taskforce). The Taskforce issued an [Interim Report](#)²⁶ on January 26, 2024 and followed up in June 2024 with its [2023-24 Year-End Report](#)²⁷ with more detailed recommendations. (The Taskforce also met on February 26, 2024, in a Summit and issued a Report [Summit Report](#).)²⁸

The Taskforce in its Year-End Report described its work as follows: “This report represents an initial step in understanding the integration of AI within the legal profession. This report identifies the areas in which AI is already changing the practice of law and outlines recommended steps as this technology evolves. These recommendations are broad, reflecting the way that AI has touched nearly every area of legal practice.”²⁹

The 2023-24 Year-End Report set out 15 Substantive Recommendations, including the following two related to potential amendments to rules:

5. Review of Texas Rule of Civil Procedure 13. The Supreme Court of Texas Rules Advisory Committee and the State Bar of Texas Court Rules Committee should explore Texas Rules of Civil Procedure 13, “Effect of Signing Pleadings, Motions and Other Papers; Sanctions,” and evaluate whether additional language or guidance is necessary for Texas lawyers and self-represented litigants regarding the need to verify the accuracy of all filings and an obligation to avoid AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding the same.

6. Rules of Evidence. The Rules Advisory Committee and Court Rules Committee should also address whether changes to the Texas Rules of Evidence are needed to address deep fakes and AI-manipulated evidence.³⁰

These recommendations were also discussed in the Taskforce’s Interim Report at page 5 (recommended review of changes to Rule 13) and page 7 (discussion of evidentiary issues involving deepfakes).³¹

The Summit Report’s section on AI in the Courtroom is particularly instructive to the Advisory Committee and is set out below in full (emphasis added):

²⁶[Interim Report to the Board -- Taskforce for Responsible AI in the Law \(texasbar.com\)](#)

²⁷[TRAIL 2023-24 Year-End Report](#)

²⁸[Taskforce for Responsible AI in the Law, Summit Report February 26, 2024](#)

²⁹ TRAIL 2023-24 Year-End Report at 4

³⁰ *Id.* at 7.

³¹ Interim Report at 5 and 7.

AI in the Courtroom

Discussion by the AI Summit attendees about the role of AI and generative AI tools in the courtroom focused on three areas: the use of AI by pro se litigants, the use of AI by attorneys, and the use of AI by court staff.

Pro se litigants will likely use any available AI tools, especially if they are free and accessible. Courts may want to warn pro se litigants about the risks of AI and legal research, potentially through clerks, standing orders, or pro se and self-help centers. Concerns exist about pro se litigants becoming overconfident in their case due to AI-generated content.³²

For attorneys using AI, Rule 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the CPRC require reasonable diligence from the filer. The Supreme Court's Rules Committee could clarify the rules without being specific to AI and generative AI. In addition to the risks inherent in using AI, there are potential benefits for attorneys. For instance, a free AI tool that checks citations for hallucinations could benefit good actors.

Nearly a quarter of judges use AI, and while responsible use in drafting opinions is permissible, requiring disclosure of AI use is not recommended. Standing orders educating about AI are encouraged, but those requiring disclosure are not.³³

Deep fakes and the authenticity of evidence are concerns, and Texas Rule of Evidence 901 should be reexamined in this context.

Recommendations include reviewing educational materials for judges, considering pretrial hearings for evidentiary challenges, and providing training on metadata. Education efforts could

³² The Interim Report elaborated on this point: “While there has already been substantial publicity about inaccurate ChatGPT outputs and why attorneys must always verify any draft generated by any AI platform, the bench must also consider the impact of the technology on pro se litigants who use the technology to draft and file motions and briefs. No doubt pro se litigants have turned to forms and unreliable internet material for their past filings, but ChatGPT and other such platforms may give pro se litigants unmerited confidence in the strength of their filings and cases, create an increased drain on system resources related to false information and nonexistent citations, and result in an increased volume of litigation filings that courts may be unprepared to handle.” Interim Report at 7.

³³ The Interim Report explained this conclusion in more detail: “Because many legal research tools will (or already do) incorporate generative AI into their product, these standing orders may result in litigants disclosing their use of Westlaw, Lexis, Grammarly, etc. This is likely an unhelpful feature, and courts already have the ability to appropriately sanction an attorney for filing a motion or brief that contains false statements. It may also discourage the development and adoption of tools that, used properly, could enhance legal services.” Interim Report at 6.

involve the ATJ, State Bar, Pro Bono Law Group, and other organizations, with resources provided on the State Bar website.³⁴

Following up its discussion in the Summit Report suggesting the issuance of a Texas ethics opinion on the responsible use of AI to bolster the 2018 Ethics Opinion 680 on lawyers' obligation to understand technology, the Taskforce formally submitted a request to the Texas Professional Ethics Committee, seeking "guidance on applying Texas Disciplinary Rules of Professional Conduct to the use of AI, including the lawyer's:

- duty to provide competent representation (tech competence),
- duty of confidentiality,
- duty to safeguard client communications and property,
- duty of supervision (both to other lawyers and to nonlawyer or virtual assistants),
- duty of candor to the tribunal, and
- duty to charge a reasonable fee."³⁵

(Notably, the Summit Report included a recommendation that the ethics committee should "define due diligence for electronic services, as the level of risk varies among AI applications.")³⁶

V. Proposed Amendment of TRCP 13

A. Discussions on Whether to amend FRCP 11

In evaluating whether to amend TRCP 13, it is initially instructive to explore the equivalent provision(s) in the Federal Rules of Civil Procedure and whether commentators believe Rule 11 is sufficient to empower judges deal with abuses arising out of the use of Generative AI.³⁷ Judge Grimm, Professors Grossman and Brown suggest that Federal Rules of Civil Procedure 11 (pleadings) and 26(g) (Discovery), together with attorneys' ethical obligations, sufficiently empower Federal Judges to address misuse of AI:

Accordingly, lawyers or parties who violate Rules 11 and 26(g) in connection with their use of GenAI in civil litigation are already subject to sanctions that can be strong medicine — depending on the extent of the violation — regardless of whether the presiding judge has issued their own standing order concerning the use of GenAI. Moreover, if widespread public humiliation over being sanctioned by a court for committing this kind of error is insufficient disincentive, the Rules of Professional Conduct also impose independent ethical obligations to

³⁴ [Summit Report](#) at 3-4.

³⁵ TRAIL 2023-24 Year-End Report at 5.

³⁶ Summit Report at 3. Notably, the Taskforce made the following observation: "The AI Summit attendees also noted that ethical and effective representation of a client might require not using AI in some situations and using it judiciously in other situations. The possibility exists that as AI, particularly generative AI, becomes more pervasive, failing to utilize this technology might be unethical in that the attorney is not adequately using the tools available."

³⁷ See e.g. [Is Disclosure and Certification of the Use of Generative AI Really Necessary? | Judicature \(duke.edu\)](#)

refrain from the types of misconduct that have led courts to adopt standing orders prohibiting or regulating the use of GenAI applications.³⁸

B. TRCP 13 – No Amendment Needed

Texas Rule 13 includes a requirement that attorneys or parties sign pleadings, motions and other papers and by doing are certifying that “they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.” (Federal Rule of Civil Procedure 11 which has a similar certification consequence only applies to filed pleadings and motions.)

Sanctions for violations of Rule 13 as well as violations of discovery and disclosure rules are available under Texas Rule of Civil Procedure 215.2b. Additionally, Texas Rule of Civil Procedure 191.3(b) (effect of signature on disclosures) and 191.3(c) (effect of signature on discovery request notice response or objection) also provide for sanctions for violations.

The Taskforce’s suggestion that this Committee “evaluate whether additional language or guidance is necessary for Texas lawyers and self- represented litigants regarding the need to verify the accuracy of all filings and an obligation to avoid AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding the same.” This suggestion was prompted by the fact that while Texas attorneys likely have an ethical duty regarding the use of AI, self- represented parties do not have any ethical duties. Thus, the duties of pro se litigants could be articulated in Rule 13. “The current version of Rule 13, however, requires that the pro se litigant arguably know, in advance of the filing of a motion, that the pleading is groundless and false. The Texas Supreme Court Rules Advisory Committee may wish to consider whether Rule 13 should be modified.”³⁹ The Taskforce did not propose specific language amending Texas Rule of Civil Procedure 13.

The Subcommittee recommends that the Advisory Committee decline to amend Rule 13 to add a reference to AI. As reflected in the discussion above regarding courts’ rush to add local rules requiring the disclosure of the use of AI which quickly proved to be impractical, amending Rule 13 will not ensure that self-represented litigants understand their duties to the court – importantly because self- represented litigants often do not review the Rules of Civil Procedure.

The Subcommittee proposes that the Advisory Committee recommend that a form be prepared for Self-Represented litigants in Texas that will be provided to the parties when filing their action or answer. This form should include general guidance and in addition information on the potential hazards related to AI technology. This will alert litigants of their duties and other important considerations in bringing civil litigation.

If the Advisory Committee disagrees and determines that Rule 13 should be amended, the following is a proposed approach to address AI:

³⁸ *Id.*

³⁹ Interim Report at 7.

Proposed Amendment to Texas Rule of Civil Procedure 13

RULE 13. EFFECT OF SIGNING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. The use of generative Artificial Intelligence in connection with any signed pleading, motion, or other paper must comply with this Rule. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or act and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

Notes and Comments

Comment to 1990 change: To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day "grace" period provided in the former version of the rule.

Comment to 2024 change: To highlight to attorneys and parties (including self-represented parties) that pleadings, motions or other papers that include content from generative Artificial Intelligence tools are subject to the certification obligation of this rule.

Alternatively, the proposed language could instead be added into the Notes and Comments section to advise attorneys and self-represented litigants that they are responsible for information obtained from Generative AI tools.

C. Is AI Subject to Disclosure under Texas Discovery Rules?

Although not the subject of the Supreme Court's referral, the Subcommittee notes that an open and interesting question is raised as to whether the existence of AI tools that were used to generate evidence in the dispute must be disclosed in response to Requests for Disclosure under TRCP 194.2. A similar question is prompted regarding whether AI tools themselves must be made available for inspection if these tools were used in connection with the expert's anticipated testimony or report.

Currently, TRCP 194.2(f)(4) reads as follows: “all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony.” TRCP 194.2(f)(4) (emphasis added). Although this issue is likely to be the subject of future case law, it is not within the ambit of the Supreme Court’s referral to this Committee and the Subcommittee does not believe that the Texas Rules should be amended at this time to resolve the issue.

VI. Amending the Rules of Evidence

The current Texas Rules of Evidence, particularly rules related to authentication of evidence, do not account for unique aspects of information produced or influenced by AI tools. These considerations include determining the accuracy and reliability of AI generated content, authentication and chain of custody questions of AI as well the significant risks related to deepfakes and manipulation of data using AI. The Texas Rules of Evidence fail to consider these unprecedented factors and therefore the Subcommittee recommends that potential amendments to Rules 901 and 902 should be provided to the Texas State Bar Evidence Committee for comment before final consideration by the Advisory Committee.

A. Rule 901 Authentication and AI

The Federal Rules of Evidence Advisory Committee recently initiated discussions on whether the Federal Rules of Evidence should be amended to reflect the unique impact of AI.⁴⁰ Because key Texas Rules of Evidence mirror the Federal Rules of Evidence (or have similar provisions), a review of these discussions is instructive.

A helpful overview of how Artificial Intelligence as evidence is complex and challenging is described in a 2021 article by Judge Paul Grimm and Professors Maura Grossman and Gordon Cormack, *Artificial Intelligence as Evidence*.⁴¹

Under FRE 901(a), “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” A proponent of this evidence can satisfy the low burden of authenticating by providing evidence to show that the item is what the proponent claims it is. The Federal Rules of Evidence Advisory Committee discussions include consideration of how this low burden might not be sufficient to address admission of AI.

Rule 901(b) sets out a non-exhaustive list of examples of how a proponent can demonstrate that the 901(a) showing is met. “The examples that most readily lend themselves to authenticating AI evidence are: Rule 901(b)(1) (testimony of a witness with knowledge that an item is what it is claimed to be); and Rule 901(b)(9) (evidence describing a process or system and showing that it produces an accurate result).”⁴²

⁴⁰ See, [Federal Rules of Evidence Advisory Committee October 10, 2023 Agenda Book\(Agenda Book\)](#) at 84

⁴¹ Grimm, Grossman and Cormack, [Artificial Intelligence as Evidence](#), 19 Nw. J. Tech. & Intellectual Property 9 (December, 2021)

⁴² *Id* at26.

A witness called to authenticate AI evidence under Rule 901(b)(1) must also comply with other applicable rules, including Rule 602 that requires the authenticating witness to have personal knowledge of how the AI technology functions.⁴³ Due to the often-opaque nature of AI tools deployed in a business setting, it could be quite difficult for a witness to demonstrate personal knowledge.

. . . AI applications seldom are the product of a single person possessing personal knowledge of all the facts that are needed to demonstrate that the technology and its output are what its proponent claims them to be. Data scientists may be required to describe the data used to train the AI system. Developers may be required to explain the features and weights that were chosen for the machine-learning algorithm. Technicians knowledgeable about how to operate the AI system may be needed to explain what they did when they used the tool, and the results that they obtained. These technicians, however, may be entirely at sea when asked to explain how the data was collected or cleansed, how the algorithm that underlies the AI system was programmed, or how the system was tested to show that it produces valid and reliable results.⁴⁴

AI evidence could also be authenticated under Rule 901(b)(1) through the testimony of an expert qualified under Rules 702 and 703.

Authentication under Rule 901(b)(9) faces the same challenges as Rule 901(b)(1) regarding a witness who can testify either through personal knowledge or expert credentials to satisfy the requirement of Rule subsection (9).⁴⁵

The Grimm, Grossman and Cormack article accurately describes the unique challenges with admitting AI evidence:

An important feature of authentication needs careful consideration in connection with admitting AI evidence. Normally, a party has fulfilled its obligation to authenticate non-testimonial evidence by producing facts that are sufficient for a reasonable factfinder to conclude that the evidence more likely than not is what the proponent claims it is. In other words, by a mere preponderance. This is a relatively low threshold--51%, or slightly better than a coin toss. However, as we have shown in this paper, not all AI evidence is created equal. Some AI systems have been tested and shown to be valid and reliable. Others have not, when, for

⁴³ *Id* at 26-27.

⁴⁴ *Id* at 27.

⁴⁵ "There are two additional rules of evidence that may be used to authenticate AI evidence that are closely related to Rules 901(b)(1) and 901(b)(9). They are Fed. R. Evid. 902(13), which allows authentication of "[a] record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person"; and Fed. R. Evid. 902(14), which allows authentication of "[d]ata copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person." Rules 902(13) and (14) would allow the proponent of AI evidence to authenticate it by substituting the certificate of a qualified witness for their live testimony. But it must be stressed that the qualifications of the certifying witness and the details of the certification that the evidence produces an accurate and reliable result must be the same as would be required by the in-court testimony of a similarly qualified witness. Rules 902(13) and (14) are not invitations for boilerplate or conclusory assertions of validity and reliability and should not be allowed to circumvent the need to demonstrate, not simply proclaim, the accuracy and reliability of the system or process." *Id.* at Footnote 362. Texas does not have an analogous version of FRE 901(13) and (14), but Texas does have a similar method to self-authenticate business records (which conceptually include Gen AI output) through a Business Records Affidavit.

example, efforts to determine their validity and reliability have been blocked by claims of proprietary information or trade secret. Furthermore, some of the tasks for which AI technology has been put to use can have serious adverse consequences if it does not perform as promised--such as arresting and criminally charging a person based on flawed facial recognition technology or sentencing a defendant to a long term of imprisonment based on an AI system that has been trained using biased or incomplete data that inaccurately or differentially predicts the likelihood that the defendant will reoffend.⁴⁶

B. Deep-Fakes

In addition to the Federal Evidence Advisory Committee's focus on the relatively low burden of authentication of evidence is their concern that AI tools can be used to alter photographs, videos and other forms of evidence – often referred to as “Deep-Fakes”.⁴⁷ The Reporter for the Evidence Advisory Committee, Professor Dan Capra, laid-out the challenges of Deep-Fakes and the potential gap in the Federal Rules of Evidence to enable trial court judges to determine whether certain offered evidence is authentic, particularly because “AI make deepfakes much more difficult to detect.”⁴⁸

Professor Capra further described the limitations of authentication of photos that might be altered under Rule 901(a):

Under Rule 901(a), the standards of authenticity are low. The proponent must only “produce evidence sufficient to support a finding that the item is what the proponent claims it is. . . . The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be⁴⁹

Professor Capra explained the process of authentication of evidence under the Rule:

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity—enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides certain situations in which the proffered item will be considered self-authenticating—no reference to any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.⁵⁰

⁴⁶ *Id* at 28.

⁴⁷ See Dixon, Judge Herbert B. Jr., *The “Deepfake Defense”: An Evidentiary Conundrum*, [ABA Journal](#), June 11, 2024. [The “Deepfake Defense”: An Evidentiary Conundrum \(americanbar.org\)](#)

⁴⁸ [2023-10 evidence rules agenda book final 10-5.pdf \(uscourts.gov\)](#) at 85

⁴⁹ *Id* at 87.

⁵⁰ *Id* at 87.

He noted the unique problem raised by the potential for deepfakes: “Applying the current authentication rules to deepfakes raises at least two concerns: 1. Because deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity; and 2. On the other hand, the prevalence of deep fakes will lead to blanket claims of forgery, requiring courts to have an authenticity hearing for virtually every proffered video.”

In its May 15, 2024 [Report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States \(the Standing Committee\)](#)⁵¹, the Advisory Committee on Evidence offered the following takeaways from its Panel Discussion on AI and Machine Learning:

1. Consideration should be given to a rule covering machine-learning output when it is not accompanied by an expert witness. One possibility is a new rule applying the Rule 702 reliability standards to such machine-learning data. The problems posed by machine learning data are not ones of authenticity but rather of reliability. One challenge, however, is to draft a rule on machine-learning evidence that will not cover basic, well-established machine-based data such as thermometers, radar guns, etc.
2. The problem of deepfakes is really one of forgery --- a problem that courts have dealt with under the existing rules for many years. This cautions against a special rule on deepfakes --- with the proviso that traditional means of authentication such as familiarity with a voice, and personal knowledge, might need to be tweaked because the authenticating witness may not be able to detect a deepfake.
3. An opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The question is whether a rule is necessary to establish the requirement of an initial showing of fakery. Courts currently require some kind of showing before inquiring into whether digital and social media evidence have been subject to hacking; it is not enough for an opponent to contend that the item is inauthentic because, you never know, it might have been hacked. And courts have imposed that initial requirement on the opponent without relying on a specific rule. The question for the Committee is whether a procedural rule to impose a burden of going forward on the opponent is necessary when it comes to deepfakes. Such a rule might be added to Rule 901 as a new Rule 901(c). Former Judge Paul Grimm and Dr. Maura Grossman proposed a Rule 901(c) that the Committee considered at the meeting. The Committee agreed that the proposal could not be adopted in its present form, because it required the opponent to show that it was more likely than not a fake, which seems too high for an initial burden. The Committee remains open to considering a rule that would impose on the opponent a burden of going forward when an item is challenged as a deepfake.
4. It may be that the admissibility of machine-learning evidence could be dependent on validation studies, without the necessity of courts and litigants inquiring into source codes, algorithms, etc. Thought must be given, however, to how such validation studies

⁵¹ [Standing Committee June 21, 2024 Agenda Book](#) at 96

can be conducted, and how they are to be reviewed by courts.

C. Potential Amendments to T.R.E. 901 to Address AI

The Subcommittee suggests that the Texas State Bar Evidence Committee should discuss whether the current Texas Rules of Evidence on authentication appropriately account for AI generated information, particularly the risk that deep-fake evidence could be offered as evidence without any inquiry as to whether the information is what it appears to be. As described above, the structure of Rule 901 sets a relatively low hurdle for the proponent of evidence to meet authenticity requirements and does not clearly enable another party to challenge whether the evidence could have been altered by means of AI technology. Amending Rule 901(b)(9) as well as adding a new 901(c) arguably will impose a minor but important additional step to prove-up evidence that was generated by AI and further will enable litigants to bring challenges to the authenticity of any electronic evidence that could have been fabricated or altered.

The Subcommittee recommends that the Advisory Committee consider the Grimm and Grossman proposals to amend Rule 901(b)(9) and add Rule 901(c) enabling a challenge to authenticity of electronic evidence.⁵²

Rule 901

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

...

(9) Evidence About a Process or System.

(A) Evidence describing a process or system and showing that it produces an accurate and reliable result and

(B) if the proponent concedes that the item was generated by artificial intelligence, additional evidence that:

_____ (i) describes the software or program that was used; and

_____ (ii) shows that it produced valid and reliable results in this instance.

...

901(c): Potentially Fabricated or altered electronic evidence.

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent

⁵² See Appendix B, Judge Paul Grimm and Professor Maura Grossman: Proposed Modification of Current Rule 901(b)(9) for AI evidence and Proposed New Rule 901(c) for “Deepfake” Evidence (attached) and referenced in the Evidence Advisory Committee takeaways described above.

demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

D. Rule 902(10) Business Records Affidavit and AI

Although not within the subject matter of the Court's Referral, the Subcommittee suggests that the State Bar Evidence Committee should consider whether Texas Rule of Evidence 902(10), Business Records Accompanied by Affidavit should be amended to reflect AI generated records because Business Records Affidavits could be used to authenticate AI generated records that generally would not meet the requirements for authenticity and reliability. As noted above in the discussion pertaining to Rule 901, AI generated records could be unreliable or falsified and otherwise might not be subject to authentication under Rule 901. However, use of a Business Records Affidavit to self-prove admissibility, by-passing evidence of authenticity could result in admission into evidence of AI generated content that is neither reliable nor authentic.

The Subcommittee recommends that the State Bar's Evidence Committee discuss amending Rule 902(10) to either exclude AI generated content from a Business Records Affidavit and instead follow the amended procedures for authentication of evidence under 901(b)(9).

VII. TRCP 226a Should be Amended and Updated

Texas Rule of Civil Procedure 226a sets out the instructions to be given to potential jurors when assigned to a jury venire as well as additional instructions given to jurors when they are seated on a jury. The Instructions were last updated in 2005 and include references to defunct technology. The Subcommittee suggests that the Rules 216-299a Subcommittee consider updating the instructions to reflect current technology as well as reference Generative AI.

Paragraph 3 of the Venire instructions and Paragraph 4 of the instructions to empaneled jurors are the same and could be updated as follows:

Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including ~~by~~ but not limited to phone, text message, email, ~~message~~, chat ~~room~~, , blog, or social networking electronic platforms and websites including apps such as Facebook, X (Twitter), Instagram, WhatsApp, Tik-Tok, or Slack ~~or Myspace~~]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

Paragraph 1 of the instructions for seated jurors should also be revised as follows:

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email, message, chat ~~room~~, blog, or social networking websites such as Facebook, Instagram, WhatsApp, Tik-Tok, or Slack X (Twitter), Instagram, WhatsApp, Tik-Tok, or Slack ~~or Myspace~~][I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on

the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Additionally, Paragraph 6 of the instructions for seated jurors should be revised

6. Do not investigate this case on your own. For example, do not:

- a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;
- b. go to places mentioned in the case to inspect the places;
- c. inspect items mentioned in this case unless they are presented as evidence in court;
- d. look anything up in a law book, dictionary, or public record to try to learn more about the case;
- e. look anything up on the Internet or by using generative artificial intelligence tools to try to learn more about the case; or
- f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet or generative artificial intelligence tools, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

Appendix A

Backgrounder on AI and Resources

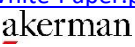
AI is a broad term that includes different elements of computer technology that is used to simulate or create intelligent behavior or thought in a computer. Definitions vary, but the definition from the Organization for Economic Co-operation and Development (OECD) has gained traction: “An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.”⁵³ Recent rapid-fire developments in the AI landscape, particularly tools such as ChatGPT, have materially changed the potential uses and opportunities to abuse AI tools. AI is now becoming a tool used by businesses to improve efficiency and assist in decision-making. AI supported tools perform detailed analytics and even create computer programming. The ostensible purpose of AI technologies is to enhance our collective efficiency. Just as the Industrial Revolution heralded the replacement of human labor with automation, an AI-led transformation using powerful algorithms could save millions of hours of cognitive processing time.⁵⁴

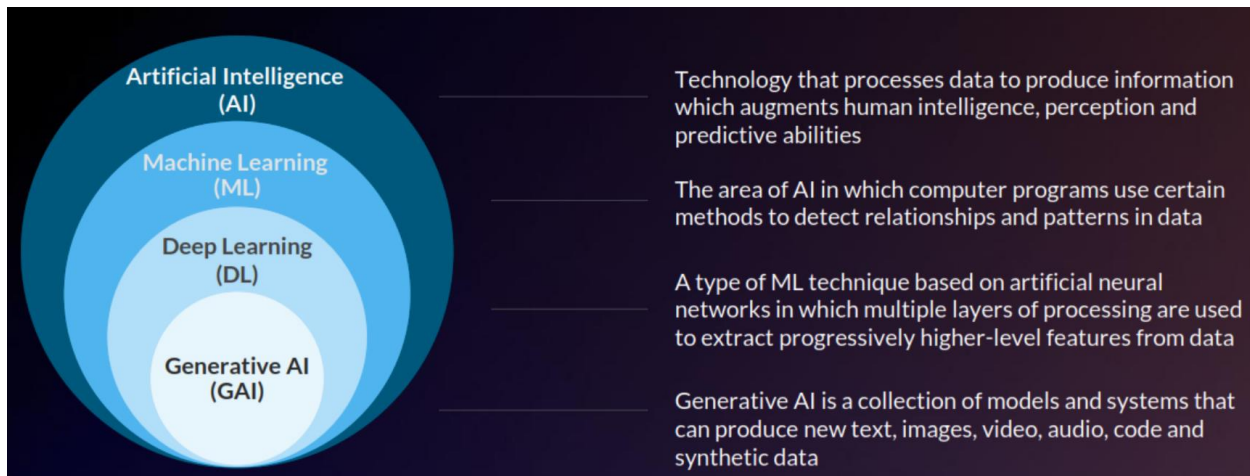
Many forms of AI have been in use for over 35 years, including the IBM Watson computer that played chess against masters. The AI landscape materially changed however on November 30, 2022, when ChatGPT was released to the public. Over 1 million users used the tool within the first 5 days and within the first three months, over 100,000,000 users across the globe were actively using the tool.

To understand the landscape of potential uses of AI, it is important to describe the different types of AI tools and their use cases. This chart⁵⁵ describes the progression of AI toolsets.

⁵³ [What is AI? Can you make a clear distinction between AI and non-AI systems? - OECD.AI](#)

⁵⁴ [AI-and-Access-to-Justice-Final-White-Paper.pdf \(nacmnet.org\)](#) at 1.

⁵⁵ Courtesy of Christy Hawkins, 



Generative AI tools are often powered by Large Language Models (called LLMs) which are composed of huge volumes of data resources that are used by the engine to learn and respond to inputs. ChatGPT reportedly was trained on a dataset of over 300 billion words with a total data size of approximately 570 gigabytes of information. Another measure of the power of a LLM is the number of parameters created in the tool from learned information in the data set. ChatGPT is estimated to currently have hundreds of billions of parameters and growing.

Generative AI raises particularly unique concerns as it creates context, including text and images, without any human interaction. A Large Language Model is reliable only to the extent of the validity of the sourced data set; LLMs do not have the inherent ability to discern whether its source data is reliable or factually accurate. If the LLM does not have full access to all available information (for example if certain news sites are not included in the LLM), the output could be incomplete. Additionally, LLMs are also subject to the biases of the feedback provided by the developers who provide training data; some LLMs can be more prone to offer output consistent with the views (including subconscious biases) of its programmers. A more pernicious problem is that Generative AI is subject to ‘hallucinations’ which are inaccurate sentences or phrases contained in AI responses to queries.⁵⁶ “[G]enerative A.I. . . . relies on a complex algorithm that analyzes the way humans put words together on the internet. It does not decide what is true and what is not. . . . The tech industry often refers to the inaccuracies as ‘hallucinations.’”⁵⁷ There is no technology currently available that can eliminate this risk.⁵⁸

⁵⁶ See Karen Weise & Cade Metz, When A.I. Chatbots Hallucinate, N.Y. Times (last updated May 9, 2023) <https://www.nytimes.com/2023/05/01/business/ai-chatbots-hallucination.html>

⁵⁷ *Id.*

⁵⁸ *Id.*

Appendix B

Proposed Modification of Current Rule 901(b)(9) for AI evidence and Proposed New Rule 901(c) for “Deepfake “Evidence

By Paul W. Grimm & Maura R. Grossman

[901](b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]:

(9) *Evidence about a Process or System.* For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a reliable** result; and

(B) if the proponent concedes that the item was generated by artificial intelligence, additional evidence that:

(i) describes the software or program that was used; and

(ii) shows that it produced valid and reliable results in this instance.

Proposed New Rule 901(c) to address “Deepfakes”

901(c): Potentially Fabricated or altered electronic evidence.

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

Rationale:

Given the complexities and challenges presented by artificial intelligence generated evidence, a new rule that sets a standard for what is sufficient to authenticate such evidence would be extremely helpful. Because AI generated evidence is, by definition, evidence produced by a system or process, the proposal is to add a subsection (B) to existing 901(b)(9) to set a standard for authenticating evidence that the proponent acknowledges is AI generated. The proposed revision substitutes the word “reliable” for “accurate” in existing rule 901(b)(9), because evidence can be “accurate” in some instances but inaccurate in others (such as a broken watch, which “accurately” tells the time twice a day but is not a reliable means of checking the time otherwise).

For acknowledged AI generated evidence, the proposed new rule would identify a sufficient means for authentication of AI generated evidence. It requires the proponent to (i) describe the software or program that was used to create the evidence, and (ii) show that it produced *valid* and *reliable* results in the particular case in which it is being offered. Valid evidence is evidence that produces accurate

results, reliable evidence is that which produces consistently accurate results when applied to similar facts and circumstances. Both are required to ensure authenticity of AI generated evidence.

A separate rule is required to address the relatively recent phenomenon of AI generated “deepfakes”, which, due to rapidly improving generative AI software applications, are capable of producing fabricated (or altering existing) photographs, audio recordings, and audio-visual recordings that are so realistic that it is becoming very difficult to differentiate between authentic evidence and fabricated/altere d evidence. A separate rule is needed for such fake evidence, because when it is offered the parties disagree about the nature of the evidence. The opposing party challenges the authenticity of the evidence and claims that it is AI generated fakery, while the proponent insists that it is not AI generated, but instead that it is simply an electronic photograph (for example, one taken on a “smart phone”), or a voice recording (such as one left on voice mail) or audio-visual recording (such as one taken with a “smart phone” or digital camera). Because the parties fundamentally disagree about the very nature of the evidence, the proposed rule for authenticating acknowledged AI generated evidence will not work. A separate rule is required.

The proposed new rule creates a new rule 901(c). That is because the proponent of evidence challenged as AI generated fakery may be authenticated by many means other than Rule 901(b)(9), which focuses on evidence generated by a “system or process”. The proponent might choose to authenticate an audio recording under Rule 901(b)(5) (opinion as to voice) or Rule 901(b)(3) (comparison of evidence known to be authentic with other evidence the authenticity of which is questioned).

The proposed rule does not use the word “deepfake”, because it is not a technical term, but instead describes the evidence as being either computer-generated (which encompasses AI-generated evidence) or electronic evidence, which encompasses other forms of electronic evidence that may not be AI generated (such as digital photographs, or digital recordings).

The proposed rule puts the initial burden on the party challenging the authenticity of computer generated/electronic evidence as AI generated fakery to make a showing to the court that a jury reasonably could find (but is not required to find) that it is more likely than not either fabricated or altered in whole or part. This approach recognizes that the facts underlying whether the evidence is authentic or fake may be challenged, in which case the judge’s role under Rule 104(a) is limited to preliminarily evaluating the evidence supporting and challenging authenticity, and determining whether a reasonable jury could find more likely than not that the challenged evidence is fake. If the answer is “yes” then, pursuant to Rule 104(b), the judge ordinarily would be required to submit the evidence to the jury under the doctrine of relevance conditioned upon a finding of fact, Rule 104(b).

But deepfakes increasingly are getting so hard to detect, and often can be so graphic or have such impact that the jury may be unable to “ignore” the content of generative AI (GAI) shown to be fake once they have seen it. See generally Taurus Myhand, *Once The Jury Sees It, The Jury Can’t Unsee It: The Challenge Trial Judges Face When Authenticating Video Evidence in The Age of Deepfakes*, 29 Widener L. Rev. 171, 174-5, 2023 (“The dangerousness of deepfake videos lie in the incomparable impact these videos have on human perception. Videos are not merely illustrative of a witnesses’ testimony, but often serve as independent sources of substantive information for the trier of fact. Since people tend to believe what they see, ‘images and other forms of digital media are often accepted at face value.’ ‘Regardless of what a person says, the ability to visualize something is uniquely believable’. Video evidence is more cognitively and emotionally arousing to the trier of fact, giving the impression that they are observing activity or events more directly.” Internal citations omitted).

If the judge is required by Rule 104(b) to let the jury decide if audio, visual, audiovisual, or pictorial evidence is genuine or fake when there is evidence supporting each outcome, they are then in danger of being exposed to evidence that they cannot “unremember” even if they doubt that it is fake. This presents an issue of potential prejudice that ordinarily would be addressed under Rule 403. But Rule 403 assumes that the evidence is “relevant” in the first instance, and only then can the judge weigh its probative value against the danger of unfair prejudice. But when the very question of relevance turns on resolving disputed evidence, the current rules of evidence create an evidentiary “Catch 22”—the judge must let the jury see the disputed evidence on authenticity for their resolution of the authenticity challenge, but that exposes them to a new type of evidence that may irrevocably alter their perception of the case even if they find it to be inauthentic.

The proposed new rule 901(c) solves the “Catch 22” problem. It requires the party challenging the evidence as fake to demonstrate to the judge that a reasonable jury could find that the challenged evidence more likely than not is fake. The judge is not required to make the finding that it is, only that a reasonable jury could so find by a preponderance of evidence. This is similar to the approach that the Supreme Court approved regarding Rule 404(b) evidence in *Huddleston v. U.S.*, [cite], and the Third Circuit approved regarding Rule 415 evidence in *Johnson v. Elk Lake School District*. [cite].

Under the proposed new rule, if the judge makes this preliminary finding, it then they would be permitted to exclude it (without sending it to the jury) if the proponent of the evidence cannot show that its probative value exceeds its prejudicial impact. This is a fairer balancing test than Rule 403, which leans strongly towards admissibility. Further, the proposed new balancing test already is recognized as an appropriate in other circumstances. See, e.g. Rule 609(a)(1)(B).

The proposed new rule has other advantages as well. While it requires the party challenging the evidence as a deepfake to demonstrate facts (not conclusory or speculative arguments) from which the judge could find that a reasonable jury *could* more likely than not find it to be fake, this does not require them to persuade the judge that it actually is fake, which lessens the burden on the challenging party to make a sufficient initial challenge. Under an approach already recognized in *Huddleston* and *Johnson*, the proposed new rule only requires the judge to determine whether a jury reasonably could find it to be fake, at which time the proponent would be required to show that the probative value of the evidence was greater than its prejudicial impact. This determination would be made by the judge, as Rule 609(a)(1)(B) already permits.

The proposed rule also has the benefit of not imposing any initial obligation on the proponent of the evidence to authenticate it in any particular way. The proponent can choose from any authentication methods illustrated by Rules 901(b) and 902, or any other means of showing that it is what it purports to be. If, under the proposed rule, the party challenging the evidence as a deepfake then succeeds in showing the judge that a jury reasonably could find the challenged evidence to be fake, the proponent would have the opportunity to bolster the authenticating evidence, and the judge would then apply the new balancing test. This fairly allocates the initial burden on the challenging party, the responding burden of the proponent, and the role of the judge in screening for unfair prejudice without the need to send the disputed facts to the jury.

Appendix C

Artificial Intelligence Resources

State Court Orders, Rules, and AI Rules Trackers

[Texas House Bill 2060 \(88R\)](#) that created the [Artificial Intelligence Advisory Council](#) which is co-chaired by Senator Tan Parker and Representative Gio Capriglione.

[Texas - TX R BEXAR CTY LOC RULES DIST CT Rule 3 - Nonjury Docket](#)

[Connecticut Judicial Branch -The Judicial Branch’s Policies and Procedures Concerning Artificial Intelligence](#)

[Statement of Principles for the New Jersey Judiciary’s Ongoing Use of Artificial Intelligence, Including Generative Artificial Intelligence](#)

[Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers](#)

[Utah, Interim Rules on the Use of Generative AI, October 25, 2023](#)

[Kansas Office of Information Technology Services, Generative Artificial Intelligence Policy](#)

[National Conference of State Legislatures - Artificial Intelligence 2023 Legislation](#)

Eastern District of Texas [GO 23-11 Amending Local Rules Effective December 1, 2023.pdf \(uscourts.gov\)](#)

Legal Research

[Artificial Intelligence Court Rules | Westlaw Edge](#)

[ARTICLE: Rule 11 Is No Match for Generative AI, 27 Stan. Tech. L. Rev. P308](#)

[Resource: AI Orders | Responsible AI in Legal Services \(rails.legal\)](#) [Court Rules Tracker - Federal and State Courts](#)

Tab I

MEMORANDUM

TO: Richard Orsinger, Chair of SCAC Subcommittee on Rules 15-165A
Judge Ana Estevez, 251st District Court of Potter County, Texas

FROM: Executive Committee, Family Law Council

SUBJECT: Proposed Rule Changes to Texas Rule of Civil Procedure 13 & Texas Rule of Evidence 901

DATE: August 6, 2024

I SUMMARY

The Texas Supreme Court is charged with addressing changes to the Texas Rules of Civil Procedure 13 and Texas Rule of Evidence 901. It has asked the Supreme Court Advisory Committee (SCAC) to examine the existing rule and suggest recommendations. At the request of Richard Orsinger, Chair of the SCAC Subcommittee on Rules 15-165a, the Family Law Council has reviewed this matter and provides the comments in this Memorandum for the benefit of his committee and SCAC as a whole.

II COMMENTS

It seems that many of the problems arising from the implementation of artificial intelligence in the legal system relate directly to the issues of education and training. Education, training, and lawyer competency will go a long way toward solving these issues. In contrast to past precedence, a problem appears to be developing in that solo and small-firm practitioners are not adopting the AI technology as they have with other innovative technologies. Further, most lawyers are afraid of the technology. This does not begin to address how the public will use the technology, as we are still at the early adopter stage. We are learning and adopting as we implement the technology, so a review of these rules is warranted. We have been educated that Model Rule 1.1 obligates lawyers to provide competent representation to clients. MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012). This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.

With the ability to quickly create new, human-crafted content in response to user prompts, Generative Artificial Intelligence (GAI) tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must also recognize inherent risks with the technology. It may combine otherwise accurate information in unexpected ways to yield false or inaccurate results. Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023). Some GAI tools are also prone to “hallucinations,” providing ostensibly plausible responses that have no basis in fact or reality. Ivan Moreno, *AI Practices Law ‘At the Speed of Machines.’ Is it Worth It?*, LAW360 (June 7, 2023); See Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), available at https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies’ GAI systems “hallucinate between 17% and 33% of the time”).

ISSUE ONE: Should Texas Rule 13 be amended to account for the use and misuse of artificial intelligence technology?

DISCUSSION:

The State Bar of Texas’s Taskforce for Responsible AI in Law (TRAIL) issued an interim report recommending potential changes to the Texas Rules of Civil Procedure 13. It should be noted that while issues are identified, the report does not give specific and identifiable changes in the rule itself. The report notes that Texas Rule of Civil Procedure 13 would be evaluated to determine whether additional language or guidance is necessary to provide Texas lawyers with additional information regarding AI-generated misinformation or hallucinations, and to provide Texas Judges with adequate remedies regarding the same.

One concern is that non-lawyer, pro se litigants are not subject to the Rules of Professional Conduct, but they remain subject to Tex. R. Civ. P. 13. The current version of Rule 13 requires that the pro se litigant certify, to the best of his/her knowledge, that the pleading is groundless and false in advance of the filing of a motion. The Texas Supreme Court Rules Advisory Committee may wish to consider whether Rule 13 should be modified.

Texas Rule of Civil Procedure 13 provides:

Rule 13 Effect of Signing of Pleadings, Motions and Other Papers; Sanctions

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties

who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215,¹ upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. “Groundless” for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

COMMENTS:

First, for the lawyers, while we await the ethics opinion from the Committee on Professional Responsibility in Texas, the American Bar Association issued Formal Ethics Opinion 512 on July 29, 2024 which may offer some guidance. Likewise, the 5th Circuit Federal Court of Appeals has also recently grappled with this issue. ABA Opinion 512 explains, “Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous.” Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.⁴⁵ Rule 8.4(c) provides that a lawyer shall not engage in “conduct involving dishonesty, fraud, deceit or misrepresentation.” Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false. Issues that have arisen to date with lawyers’ use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments. Some courts have responded by requiring lawyers to disclose their use of GAI. As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.” Am. Bar Ass’n Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 512 (2024).

Previously the 5th Circuit sought to address this issue by considering the following proposed amendment to 5th Cir. R. 32.3.:

Fifth Circuit Rule 32.3 32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. Additionally, counsel and unrepresented filers must further

certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.

There was also a proposal to change the certificate of compliance to add:

3. This document complies with the AI usage reporting requirement of 5th Cir. R. 32.3 because: no generative artificial intelligence program was used in the drafting of this document, or a generative artificial intelligence program was used in the drafting of this document and all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.

The court sought comments through January 4, 2024. In June 2024, the Court decided not to adopt a special rule saying:

United States Court of Appeals FIFTH JUDICIAL CIRCUIT

Court Decision on Proposed Rule

“The court, having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, has decided not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time. Parties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B). Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. “I used AI” will not be an excuse for an otherwise sanctionable offense.” U.S. Court of Appeals for the 5th Circuit, Court Decision on Proposed Rule Change (2024), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d_2.

“If the rule had been adopted, the Fifth Circuit would’ve been the first US appeals court to create a special rule on AI. Some US district judges, including a few within the Fifth Circuit’s jurisdiction, have issued their own rules about lawyers using AI in their courts. US District Judge Brantley Starr in the Northern District of Texas appeared to be the first to issue such an order last year, warning that the platforms are currently “prone to hallucinations and bias.” At an April panel, Starr said he’d be willing to roll back his standing order if the flaws of AI are more generally known.” Jacqueline Thomsen, Fifth Circuit Won’t Adopt AI Rule After Attorney Pushback, Bloomberg Law (June 11, 2024, 9:19 AM CDT), <https://news.bloomberglaw.com/us-law-week/fifth-circuit-wont-adopt-ai-rule-after-attorney-pushback>.

“But I do think there will be a point in time in which maybe my certification isn’t needed,” the judge said at the time. “Maybe if we all generally know about AI and bias and

hallucination, and know what we should use it for and what we shouldn't, then I'll peel my certification back." Id.

The problem is that, while lawyers are covered under the rules of ethics, pro-se parties are not. Therefore, the phrase "to the best of their knowledge" becomes problematic. A non-represented person may say that, to the best of their knowledge, they relied on a third-party Generative AI tool. A solution would be to add a clarification to the current Rule 13.

One suggestion would be the following:

Rule 13 Effect of Signing of Pleadings, Motions and Other Papers; Sanctions

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215,¹ upon the person who signed it, a represented party, or both. ***The use of Artificial Intelligence or a Generative Artificial Intelligence Tool will not be an excuse for an otherwise sanctionable offense.*** Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

This clarification, along with increased continuing education for attorneys regarding the dangers and risks associated with the technology, and a statement such as the one from the 5th Circuit educating the public, will be a good start to essentially updating the rule for the current technology. It also serves as a reminder that truthfulness in the court system and justice are not just goals but requirements.

ISSUE TWO: Texas Rule of Civil Procedure 13 places the burden of proof on the filer, while Chapters 9 and 10 of the Texas Civil Practices & Remedies Code require reasonable

diligence from the filer. Should the rules be clarified in light of the advent of artificial intelligence technology?

DISCUSSION:

The Taskforce for Responsible AI in Law Report references that the Artificial Intelligence (“AI”) Summit Attendees discussion resulted in the following recommendation:

For attorneys using AI, Texas Rule of Civil Procedure 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the Texas Civil Practice & Remedies Code (“CPRC”) require reasonable diligence from the filer. The Supreme Court's Rules Committee should clarify the rules without being specific to AI and GAI. The Rules provide the following:

§ 9.011. Signing of Pleadings

The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:

- (1) groundless and brought in bad faith;
- (2) groundless and brought for the purpose of harassment; or
- (3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

§ 9.012. Violation;

(a) At the trial of the action or at any hearing inquiring into the facts and law of the action, after reasonable notice to the parties, the court may on its own motion, or shall on the motion of any party to the action, determine if a pleading has been signed in violation of any one of the standards prescribed by Section 9.011.

(b) In making its determination of whether a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall take into account:

- (1) the multiplicity of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the party to investigate and conduct discovery; and
- (4) affidavits, depositions, and any other relevant matter.

(c) If the court determines that a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall, not earlier than 90 days after the date of the determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an appropriate sanction on the signatory, a represented party, or both.

(d) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if, before the 90th day after the court makes a determination under Subsection (a), the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading.

(e) The sanction may include one or more of the following:

(1) the striking of a pleading or the offending portion thereof;

(2) the dismissal of a party; or

(3) an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.

(f) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if the court has, with respect to the same subject matter, imposed sanctions on the party who stands in opposition to the offending pleading under the Texas Rules of Civil Procedure.

(g) All determinations and orders pursuant to this chapter are solely for purposes of this chapter and shall not be the basis of any liability, sanction, or grievance other than as expressly provided in this chapter.

(h) This section does not apply to any proceeding to which Section 10.004 or Rule 13, Texas Rules of Civil Procedure, applies

§ 10.001. Signing of Pleadings and Motions

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

COMMENTS:

As in the discussion of Rule 13, the concern is the vagueness of the phrase "best knowledge, information, belief, and after reasonable inquiry." Will a lawyer or a member of the public say that they used a Generative Artificial Intelligence tool and, therefore, their work was to their best knowledge and belief?

Texas Rule 9.012 could be clarified to add: *The use of Artificial Intelligence or a Generative Artificial Intelligence Tool will not be an excuse for an otherwise sanctionable offense.*

ISSUE THREE: Should Texas Rule of Evidence 901 be amended in light of concerns about the authenticity of evidence, specifically referring to deep fakes or AI-generated audio or video technology?

DISCUSSION:

As explained in the TRAIL report, Texas family law attorneys tend to be early adopters of technology due to the fast-paced nature of their field and the high volume of cases requiring professional efficiency. With over 85% of Americans using smartphones, digital media such as audio recordings, emails, texts, social media posts, and GPS data have become essential in family law cases. Handling these extensive and voluminous personal records is a critical aspect of family law practice.

However, the emotionally charged nature of family law and the inherent lack of trust between parties lead to the misuse of digital data. A significant evidentiary concern arises from "deepfakes," where AI platforms alter existing audio or video to make it appear as though an individual said or did something they did not. This rapidly improving technology complicates authenticating real evidence. Opponents of authentic videos may allege that they are deepfakes to exclude them from evidence or to sow doubt in the jury's minds.

This situation may lead to a "reverse CSI effect," where jurors expect sophisticated technology to prove the authenticity of a video. If juries begin to doubt the ability to determine what is real, their skepticism could undermine the justice system. Although technology to detect deepfakes is being developed, and government regulation and consumer warnings may help, proving or disproving the authenticity of evidence through expert testimony will incur significant costs.

In cases where a party challenges an exhibit as a deepfake or inauthentic, judges should consider holding a pretrial hearing to evaluate the parties' arguments and any expert testimony.

The TRAIL report also detailed the concerns with evidence in the digital age.

Potential Risks While the potential benefits are numerous, so too are the risks of misuse and abuse. Family law lawyers must be able to anticipate, identify, and respond to these situations.

1. **Falsified Records:** Free AI websites can easily create fake, manipulated, forged, and pseudo documents and records that frequently escape detection. Government records (passports, driver's licenses, search warrants, protective orders, deportation orders) and personal records (medical, drug tests, utility bills, real estate documents, bank statements) can be obtained in seconds, for a minimal cost. Fake emails, texts, audio recordings, and social media posts may be indistinguishable to a nonexpert without the application of AI-detecting software.
2. **Medical Lay Opinions:** Parental observation and opinion of their child's medical, mental, and emotional condition are commonly admitted in family law hearings. The basis for these opinions is explored on voir dire or during cross-examination to test the credibility of the parent's testimony. Parents often report relying on input from the children's treating physicians. However, as AI chatbots replace personal interactions with medical professionals, opinions based on doctors' recommendations may be deemed unreliable. This is exacerbated by the recent trend of AI systems being quietly trained by unsophisticated workers to anthropomorphize communications—emoting to show seemingly real empathy and thus soothe frightened patients. Mimicry of empathy and humanity by AI can manipulate human emotion and sway outcomes in imperceptible ways.
3. **Editing of Digital Media:** "Deep fakes" are fictitious digital images and videos. They are created with simple, free apps currently available on both Apple and Android smartphones. With a few clicks or taps, AI can manipulate digital media and create seemingly authentic photos and videos that easily fool unwary recipients. AI detectors flag suspicious files, but they are not foolproof. Attorneys should routinely run all digital photos through AI detectors.
4. **Caller ID Spoofing:** Spoofing is the falsification of information transmitted to a recipient phone's display that disguises the identity of the caller. The technique enables the user to impersonate others by changing the incoming phone number

- shown on the receiving phone. In this way, someone can fabricate abusive, repeated, or harassing calls and texts seemingly originating from one spouse, parent, paramour, child, law enforcement, or CPS. The perpetrator can create a mountain of false evidence while hiding behind AI anonymity. AI systems can be instructed to inundate a recipient with nonstop harassing messages or calls, without leaving any digital footprint on the perpetrator's phone or computer. By evaluating years of messages and emails, the AI system can mimic the victim's speech and emoji patterns—a key element of admissibility. Further, AI spoofers can be used to fraudulently obtain or circumvent liability for life-long protective orders under Tex. Code Crim. Pro. 7b for stalking by digital harassment. And because these systems do not work through the service provider, third-party discovery from the phone company will appear to confirm that the calls or messages originated from the spoofed number, lending an air of credibility to the ruse.
5. **Voice Cloning:** Voice cloning apps and websites allow someone to convincingly spoof the voice of any other person with only a single audio sample of the target. Someone with dozens of voicemails and recorded conversations from years of marriage, or even a recorded deposition, can use these systems to create audio files that require an AI detector or forensic expert to detect.
 6. **Data Analysis Manipulation:** AI systems can be used to subtly modify large data sets, corrupt legitimate data analysis, and generate false conclusions that appear legitimate and are only detectable by competing expert review. They can fabricate peer review and approval, circumventing the rigorous gatekeeping process that would otherwise be required for admissibility. This allows lay witnesses to present false opinions as verified scientific fact, or as the basis for a law-expert opinion.
 7. **Dissemination of Misinformation:** As described above, AI can monitor and find useful social media evidence. However, it can also wield the power of social media to maliciously generate false information and evidence. AI can be unleashed to wage a social media disinformation campaign. It can flood various platforms in a reputation manipulation campaign targeting the judge, opposing counsel, parties, or witnesses. It can untraceably tamper with or poison a jury pool, spreading lies or false legal positions and authority. It can significantly damage the reputation of court participants, enabling the other side to provide negative reputation testimony to undermine the credibility of opposing witnesses. And these efforts could create sufficient taint to legitimately support a motion to recuse or venue transfer motion under TRCP 257.
 8. **Facilitated Hacking:** Hackers use AI systems to breach secure cloud databases and obtain unauthorized access to sensitive personal information. Clients' financial, medical, or personal communications, including attorney-client privileged emails, could be surreptitiously obtained. Moreover, hackers can target law firms seeking to break into their secure servers, obtaining access to all privileged records and client files. Lawyers should question the source of such information to avoid running afoul of criminal prohibitions on the use of stolen digital data, such as the Texas Penal Code 16.04. Additionally, these systems can hack dating apps and target unwary spouses for romantic entrapment using AI chatbot baiting.

9. **Voluminous Records:** One of the great benefits of AI is the handling of voluminous records: thousands of documents, millions of emails, or decades of bank statements and canceled checks. Through AI analysis, there is the possibility that all could be categorized and summarized, potentially one day without human oversight. However, important questions remain about the validation of such tools and the ongoing role of human oversight. The committee will explore how to address risks presented by greater use of this technology.
10. **Local Rules and Court Practices:** AI systems can analyze a court participant's public life and social media presence, seeking leverage for inappropriate strong-arming and manipulation. In a similar way, the systems can be unleashed on a judge's personal and professional history, determining personal predilections, biases, and likely outcomes. The old saying, "A good lawyer knows the law. A great lawyer knows the judge," takes on new meaning when the knowledge includes a detailed and thorough psychological and historical evaluation of the judge.

A review of Texas Rule of Evidence 901 provides:

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison by an expert witness or the trier of fact with a specimen that the court has found is genuine.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a statute or other rule prescribed under statutory authority.

Let's start with the basics of evidence. We can look to the Federal Rules as most states have adopted them. The Federal Rules of Evidence stipulate that, for an item to be accepted as evidence, it must meet criteria of relevance and authenticity. Relevance necessitates that the evidence offered possesses ample probative value to warrant its inclusion. See Fed. R. Evid. 401. In terms of the admissibility of relevant evidence, Rule 402 specifies that "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible." See Fed. R. Evid. 402. To authenticate or identify evidence, the proponent is obligated to present sufficient evidence supporting a determination that the item is indeed what the proponent asserts it to be. See Fed. R. Evid. 901.

The advent of diverse communication technologies has transformed the dynamics of interpersonal communication. See Jeffrey Bellin, Facebook, Twitter, and the Uncertain Future of Present Sense Impression, 160 U. PA. L. Rev. 331, 332-34 (2012) (acknowledging the substantial influence of new technological developments on the modes and tools used in human communication).

The evolution of communication methods driven by technological advancements has significantly influenced the regulations concerning hearsay. See *id.* at 332-33 (indicating the need for potential adjustments to rules that traditionally exclude certain types of statements from hearsay).

The court in *Lorraine v. Markel American Insurance Company* outlined the five questions courts use to determine whether electronically stored information (ESI) may be admitted into evidence. The court stated that "[w]henver ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered":

1. Is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be)?
2. If relevant under Rule 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be)?
3. If the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804, and 807)?
4. Is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001–1008)?
5. Is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance?

Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 538 (D. Md., 2007).

Electronic Evidence Under Existing Rules

While electronic evidence and online communications may seem like new and unique areas in evidence, they are evaluated under the same familiar rules judges have always used. State and federal courts have rejected calls to abandon the existing rules of evidence when evaluating electronic evidence.

For example, a Pennsylvania court addressed the authentication required to introduce transcripts of instant message conversations:

"Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that, while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional

written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of [the rules of evidence and case law].... We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity."

In re F.P., 878 A.2d 91, 95-96 (Pa. Super. Ct. 2005).

The requirement of authentication or identification is a crucial condition for the admissibility of evidence, satisfied by sufficient evidence to support that the matter is what its proponent claims. According to Tex. R. Evid. 901(a), if the evidence is not what the proponent claims, it cannot be relevant. A party must make a prima facie showing for an exhibit's admission, and unless self-authenticating under Rule 902, extrinsic evidence is required. Tex. R. Evid. 901(b) provides illustrations for compliance.

Rule 901 sets a preliminary standard to test evidence reliability, subject to cross-examination. The foundation required varies with circumstances and judges' discretion. There's no uniform approach for authenticating electronic evidence due to rapid technological changes. The same rules of evidence apply to both electronic and traditional evidence, and both can be unreliable. As stated in In re F.P., 878 A.2d 91, 95 (Pa. 2005), the same concerns about reliability apply to all types of evidence.

Digital Converted Images

To authenticate digitally converted images, testimony is needed about the conversion process from film to digital format, requiring a witness with personal knowledge of its accuracy and reliability under Rules 901(b)(1) and 901(b)(9), which may involve expert testimony under Rule 702. Alternatively, a witness familiar with the scene depicted in the photo can testify to its accuracy, bypassing the need for conversion process testimony. For digitally enhanced images, which might alter the original scene (e.g., removing shadows or intensifying colors), proof under Rule 901(b)(9) is required to show the enhancement process is reliable and accurate, typically involving expert testimony under Rule 702.

COMMENTS:

While we acknowledge that there is an evidentiary concern from “deepfakes” and that the technology is improving rapidly, Rule 901 sets a preliminary standard to test evidence reliability, subject to cross-examination. The foundation required varies with circumstances and judges' discretion. There is no uniform approach for authenticating electronic evidence due to rapid technological changes. The same rules of evidence apply to both electronic and traditional evidence, and both can be unreliable. Moreover, judges

can still consider holding a pretrial hearing to evaluate the parties' arguments and any expert testimony.

ADDITIONAL COMMENTS:

While some of these comments may not directly pertain to a rule change, this Committee also reviewed and agrees that the following additional recommendations made by the TRAIL Task Force would improve the functioning of the courts in terms of AI:

1. Increase Texas lawyers' awareness of the benefits and risks of AI by expanding the number of CLEs and articles regarding the same.
2. Consider requiring 1 hour of MCLE per year to meet the technical competency and proficiency requirements of Texas Disciplinary Rules of Professional Conduct, Rule 1.01, Comment 8.
3. Examine and review TRCP 13, Effect of Signing Pleadings, Motions, and Other Papers: Sanctions, to ensure that trial and appellate courts have adequate remedies regarding AI-generated misinformation or hallucinations.
4. Review Ethics Opinion ABA Formal Opinion 512 issued on July 29, 2024.
5. Consider and revise these recommendations once the Texas Ethics Opinion is issued regarding the use of AI. This committee understands that we are awaiting the issuance of a Texas Ethics opinion on the use of AI in practice.
6. Increase and support AI integration and education for low-income and pro bono legal service providers.

Tab J

MEMORANDUM

TO: Supreme Court Advisory Committee
FROM: Appellate Subcommittee
DATE: August 7, 2024
RE: Proposed Response to the State Bar Rule Committee's 2015 Suggestion

The State Bar Court Rules Committee proposes amending the Texas Rules of Appellate Procedure 9.4, 38.1 and 38.2 to provide a requirement for a section for each argument in an appellant's brief that would detail preservation of error in the trial court with record citations (proposal is attached as an exhibit). This section would not include argument and would not count against the word limit of briefs.

The Subcommittee discussed the proposal and questions were raised about the necessity of the proposed rules changes. There is room for discussion and the Subcommittee seeks the full Committee's input on the necessity of the changes.

If additional preservation briefing requirements are to be included in the rules, the Subcommittee feels that such requirement should (1) be added to the existing list of briefing rules rather than placed in a standalone section, (2) allow argument on preservation because this is frequently a disputed topic and preservation sometimes falls in a gray area, and (3) preservation briefing should count against maximum word limits.

1. State Bar Court Rules Committee proposal.

To mandate a subsection detailing preservation of arguments in the appellant record, the Court Rules Committee proposed to amend three rules.

The first and most extensive is *Appellate Rule 38.1 - Appellant's Brief*. The proposal is to put in the following subsection (g):

(g) Statement of Error Preservation. For each issue presented for review, the brief must provide either

(1) citations, without argument, to the record showing that

(A) the complaint was made to the trial court by a timely request, objection, or motion; and

(B) the trial court

(i) ruled on the request, objection, or motion, either expressly or implicitly; or

(ii) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal; or

(2) citations, without argument, to appropriate authority that the complaint was not required to be raised in the trial court.

The Court Rules Committee also suggests an amendment to *Appellate Rule 38.2 - Appellee's Brief*, by including a new (C) which would read as follows:

(C) the appellee's brief is required to include a statement of error preservation only as to issues brought forward by the appellee; and

The Court Rules Committee also proposes that these new requirements would not count against the word limits in the brief. The Court Rules Committee suggests including the phrase, "statement of error preservation" in *Appellate Rule 9.4(i) – Length*, (which is the rule that exempts certain parts of briefs from the overall word count for the maximum length of briefs). The idea is to exclude the new sections from the maximum word count.

2. The reasons for the Appellate Subcommittee's reluctance to recommend the proposal.

a. Although the Court Rules Committee's proposal deserves discussion, the Subcommittee suggests there is probably no reason for an amendment.

The Appellate Subcommittee believes that preservation is already handled well. In most cases, appellants go to great lengths to detail preservation and if they don't, appellees point it out. Furthermore, courts often inquire into preservation on their own and are not shy in rejecting arguments because a lack of preservation.

In some incidences, preservation is obvious. For example, if the complaint is that a trial court improperly granted summary judgment—the act of filing a response to the summary judgment preserves the error. No more needs to be said.

Some preservation is governed by the Rules of Civil Procedure. The best example is the Court's Charge in the 270 rules series.

Furthermore, some trial court errors do not need to be preserved. For example, Rule 166a(c) provides that issues not presented to the trial court shall not be considered on appeal as grounds to reverse a summary judgment. Likewise, Rule 274 provides that complaints about the charge are waived unless specifically included in objections.

b. A separate preservation section is not the best way to accomplish the Court Rules Committee's goal.

Preservation is often hotly disputed. A section requiring preservation might make some sense, but prohibiting argument is not practical.

3. Alternative Proposal.

The Appellate Subcommittee recommends that, if the Court or Committee believes a change is needed, amending Rules 38.1 and 38.2 might be easier. Accordingly, the Appellate Subcommittee recommends that Texas Rule of Appellate Procedure Rule *38.1(j) Argument* be amended as follows:

(j) Argument. The brief must contain a clear and concise argument for the contentions made, with appropriate citations to the authority and to the record. ***And, if required, the brief must contain citations to the record where the complaint was raised and ruled upon by the trial court.***

Of course, a similar amendment must be made to Texas Rule of Appellate Procedure 38.2 - *Appellee's Brief*. We propose adding a paragraph (3) to 38.2(a) - *Form of Brief* as follows:

(3) If the appellee raises cross-points, the appellee's brief should contain, if required, citations to the record where the complaint was raised and ruled upon by the trial court.

The Appellate Subcommittee sees no reason to exempt preservation citations and arguments from the word count of Rule of Appellate Procedure 9.4. If preservation is contested, the briefing will include argument that should count against the maximum word length.

4. Conclusion.

The Appellate Subcommittee urges a discussion on the necessity for the State Bar Court Rules Committee's proposal requiring a separate preservation section for each appellate argument. If, however, the Court or the Committee is so inclined, the Subcommittee recommends a simpler procedure as is detailed above.

Tab K

Topic 1: Error Preservation Citations

STATE BAR COURT RULES COMMITTEE

PROPOSED AMENDMENT TO TEXAS RULE OF APPELLATE PROCEDURE 9.4

I. Exact Language of Existing Rule

9.4. Form

Except for the record, a document filed with an appellate court, including a paper copy of an electronically filed document, must--unless the court accepts another form in the interest of justice -- be in the following form:

(a) *Printing.* A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing must be on one side of the paper.

(b) *Paper Type and Size.* The paper on which a document is produced must be 8 1/2 by 11 inches, white or nearly white, and opaque.

(c) *Margins.* Documents must have at least one-inch margins on both sides and at the top and bottom.

(d) *Spacing.* Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced.

(e) *Typeface.* A document produced on a computer must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. A typewritten document must be printed in standard 10-character-per-inch (cpi) monospaced typeface.

(f) *Binding and Covering.* A paper document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A paper document should be stapled once in the top left-hand corner or be bound so that it will lie flat when open. A paper petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue.

(g) *Contents of Cover.* A document's front cover, if any, must contain the case style, the case number, the title of the document being filed, the name of the party filing the document, and the name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover of that party's first brief.

(h) *Appendix and Original Proceeding Record.* A paper appendix may be bound either with the document to which it is related or separately. If

separately bound, the appendix must comply with paragraph (f). A paper record in an original proceeding or a paper appendix must be tabbed and indexed. An electronically filed record in an original proceeding or an electronically filed appendix that includes more than one item must contain bookmarks to assist in locating each item.

(i) *Length.*

(1) Contents Included and Excluded. In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

(2) Maximum Length. The documents listed below must not exceed the following limits:

(A) A brief and response in a direct appeal to the Court of Criminal Appeals in a case in which the death penalty has been assessed: 37,500 words if computer-generated, and 125 pages if not.

(B) A brief and response in an appellate court (other than a brief under subparagraph (A)) and a petition and response in an original proceeding in the court of appeals: 15,000 words if computer-generated, and 50 pages if not. In a civil case in the court of appeals, the aggregate of all briefs filed by a party must not exceed 27,000 words if computer-generated, and 90 pages if not.

(C) A reply brief in an appellate court and a reply to a response to a petition in an original proceeding in the court of appeals: 7,500 words if computer-generated, and 25 pages if not.

(D) A petition and response in an original proceeding in the Supreme Court, a petition for review and response in the Supreme Court, a petition for discretionary review in the Court of Criminal Appeals, and a motion for rehearing in an appellate court: 4,500 words if computer-generated, and 15 pages if not.

(E) A reply to a response to a petition for review in the Supreme Court, a reply to a response to a petition in an original proceeding in the Supreme Court, and a reply to a petition for discretionary review in the Court of Criminal Appeals: 2,400 words if computer-generated, and 8 pages if not.

(3) Certificate of Compliance. A computer-generated document that is subject to a word limit under this rule must include a certificate by counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.

(4) Extensions. A court may, on motion, permit a document that exceeds the prescribed limit.

(j) *Electronically Filed Documents.* An electronically filed document must:

(1) be in text-searchable portable document format (PDF);

(2) be directly converted to PDF rather than scanned, if possible;

(3) not be locked;

(4) be combined with any appendix into one computer file, unless that file would exceed the size limit prescribed by the electronic filing manager; and

(5) otherwise comply with the Technology Standards set by the Judicial Committee on Information Technology and approved by the Supreme Court.

(k) *Nonconforming Documents.* If a document fails to conform with these rules, the court may strike the document or identify the error and permit the party to resubmit the document in a conforming format by a specified deadline.

II. Proposed Changes to Existing Rule

9.4. Form

Except for the record, a document filed with an appellate court, including a paper copy of an electronically filed document, must--unless the court accepts another form in the interest of justice -- be in the following form:

(a) *Printing.* A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing must be on one side of the paper.

(b) *Paper Type and Size.* The paper on which a document is produced must be 8 1/2 by 11 inches, white or nearly white, and opaque.

(c) *Margins.* Documents must have at least one-inch margins on both sides and at the top and bottom.

(d) *Spacing.* Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced.

(e) *Typeface.* A document produced on a computer must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. A typewritten document must be printed in standard 10-character-per-inch (cpi) monospaced typeface.

(f) *Binding and Covering.* A paper document must be bound so as to ensure that it will not lose its cover or fall apart in regular use. A paper document should be stapled once in the top left-hand corner or be bound so that it will lie flat when open. A paper petition or brief should have durable front and back covers which must not be plastic or be red, black, or dark blue.

(g) *Contents of Cover.* A document's front cover, if any, must contain the case style, the case number, the title of the document being filed, the name of the party filing the document, and the name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number of the lead counsel for the filing party. If a party requests oral argument in the court of appeals, the request must appear on the front cover of that party's first brief.

(h) *Appendix and Original Proceeding Record.* A paper appendix may be bound either with the document to which it is related or separately. If separately bound, the appendix must comply with paragraph (f). A paper record in an original proceeding or a paper appendix must be tabbed and indexed. An electronically filed record in an original proceeding or an electronically filed appendix that includes more than one item must contain bookmarks to assist in locating each item.

(i) *Length.*

(1) Contents Included and Excluded. In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of parties and counsel, statement



regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, **statement of error preservation**, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

(2) Maximum Length. The documents listed below must not exceed the following limits:

(A) A brief and response in a direct appeal to the Court of Criminal Appeals in a case in which the death penalty has been assessed: 37,500 words if computer-generated, and 125 pages if not.

(B) A brief and response in an appellate court (other than a brief under subparagraph (A)) and a petition and response in an original proceeding in the court of appeals: 15,000 words if computer-generated, and 50 pages if not. In a civil case in the court of appeals, the aggregate of all briefs filed by a party must not exceed 27,000 words if computer-generated, and 90 pages if not.

(C) A reply brief in an appellate court and a reply to a response to a petition in an original proceeding in the court of appeals: 7,500 words if computer-generated, and 25 pages if not.

(D) A petition and response in an original proceeding in the Supreme Court, a petition for review and response in the Supreme Court, a petition for discretionary review in the Court of Criminal Appeals, and a motion for rehearing in an appellate court: 4,500 words if computer-generated, and 15 pages if not.

(E) A reply to a response to a petition for review in the Supreme Court, a reply to a response to a petition in an original proceeding in the Supreme Court, and a reply to a petition for discretionary review in the Court of Criminal Appeals: 2,400 words if computer-generated, and 8 pages if not.

(3) Certificate of Compliance. A computer-generated document that is subject to a word limit under this rule must include a certificate by counsel or an unrepresented party stating the number of words in the

document. The person certifying may rely on the word count of the computer program used to prepare the document.

(4) Extensions. A court may, on motion, permit a document that exceeds the prescribed limit.

(j) *Electronically Filed Documents.* An electronically filed document must:

(1) be in text-searchable portable document format (PDF);

(2) be directly converted to PDF rather than scanned, if possible;

(3) not be locked;

(4) be combined with any appendix into one computer file, unless that file would exceed the size limit prescribed by the electronic filing manager; and

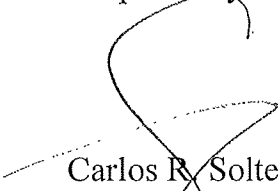
(5) otherwise comply with the Technology Standards set by the Judicial Committee on Information Technology and approved by the Supreme Court.

(k) *Nonconforming Documents.* If a document fails to conform with these rules, the court may strike the document or identify the error and permit the party to resubmit the document in a conforming format by a specified deadline.

III. Brief Statement of Reasons for Proposed Amendment

The proposed revision is a companion to the proposed revision of Texas Rule of Appellate Procedure 38.1 and provides that a statement of error preservation is not included when calculating a document's length.

Respectfully submitted,



Carlos R. Soltero
Chair, State Bar Court Rules Committee
May 1, 2015

STATE BAR COURT RULES COMMITTEE

PROPOSED AMENDMENT TO TEXAS RULE OF APPELLATE PROCEDURE 38.1

I. Exact Language of Existing Rules

38.1. Appellant's Brief

The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

(b) *Table of Contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the Case.* The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Any Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of the party's brief.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(g) *Statement of Facts.* The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(h) *Summary of the Argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

(i) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(j) *Prayer.* The brief must contain a short conclusion that clearly states the nature of the relief sought.

(k) *Appendix in Civil Cases.*

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the trial court's judgment or other appealable order from which relief is sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and

(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the brief.

II. Proposed Changes to Existing Rule

38.1. Appellant's Brief

The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

(b) *Table of Contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the Case.* The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Any Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of the party's brief.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(g) Statement of Error Preservation. For each issue presented for review, the brief must provide either

(1) citations, without argument, to the record showing that

(A) the complaint was made to the trial court by a timely request, objection, or motion; and

(B) the trial court

(i) ruled on the request, objection, or motion, either expressly or implicitly; or

(ii) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal; or

(2) citations, without argument, to appropriate authority that the complaint was not required to be raised in the trial court.

(h) Statement of Facts. The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(i) Summary of the Argument. The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

(j) Argument. The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(k) Prayer. The brief must contain a short conclusion that clearly states the nature of the relief sought.

(l) Appendix in Civil Cases.

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the trial court's judgment or other appealable order from which relief is sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and

(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the brief.

III. Brief Statement of Reasons for Proposed Amendment

Preservation of error in the trial court is a prerequisite to appellate review of most complaints, but the rules of appellate procedure currently do not require the complaining party to provide citations to the record showing that a complaint was preserved. As a result, the appellate courts bear the burden of sifting the record to determine whether the complaint was raised and whether the trial court ruled on it. In the absence of an express

ruling, the appellate court also must determine whether the trial court implicitly ruled. If the error was not preserved, then the time the attorney spent in briefing the issue, the money the client paid for the work, and the judicial resources expended in reading the argument, reviewing the record, and opining that the error was unpreserved all are wasted.

Because the party raising an appellate complaint is in the best position to know whether the error was preserved in the trial court, it would be both more efficient and more equitable to place the burden of showing that the prerequisites to appellate review have been satisfied on the party seeking the benefit of that review.

Respectfully submitted,



Carlos R. Soltero
Chair, State Bar Court Rules Committee
May 1, 2015

STATE BAR COURT RULES COMMITTEE

PROPOSED AMENDMENT TO TEXAS RULE OF APPELLATE PROCEDURE 38.2

I. Exact Language of Existing Rule

38.2. Appellee's Brief

(a) Form of Brief.

(1) An appellee's brief must conform to the requirements of Rule 38.1, except that:

(A) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list;

(B) the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief; and

(C) the appendix to the appellee's brief need not contain any item already contained in an appendix filed by the appellant.

(2) When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.

(b) Cross-Points.

(1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint. Included in this requirement is a point that:

(A) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or

(B) the verdict should be set aside because of improper argument of counsel.

(2) When Evidentiary Hearing Needed. The appellate court must remand a case to the trial court to take evidence if:

(A) the appellate court has sustained a point raised by the appellant; and

(B) the appellee raised a cross-point that requires the taking of additional evidence.

II. Proposed Changes to Existing Rule

38.2. Appellee's Brief

(a) Form of Brief.

(1) An appellee's brief must conform to the requirements of Rule 38.1, except that:

(A) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list;

(B) the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief; and

(C) the appellee's brief is required to include a statement of error preservation only as to issues brought forward by the appellee; and

(D) the appendix to the appellee's brief need not contain any item already contained in an appendix filed by the appellant.

(2) When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.

(b) Cross-Points.

(1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an

affirmance of the judgment waives that complaint. Included in this requirement is a point that:

(A) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or

(B) the verdict should be set aside because of improper argument of counsel.

(2) When Evidentiary Hearing Needed. The appellate court must remand a case to the trial court to take evidence if:

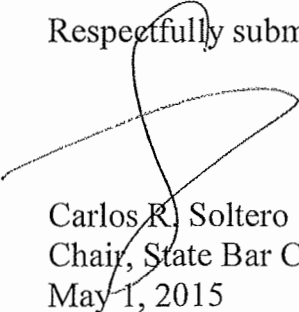
(A) the appellate court has sustained a point raised by the appellant; and

(B) the appellee raised a cross-point that requires the taking of additional evidence.

III. Brief Statement of Reasons for Proposed Amendment

The proposed revision is a companion to the proposed revision of Texas Rule of Appellate Procedure 38.1 and provides that a statement of error preservation must be included in an appellee's brief only if the appellee is complaining of error.

Respectfully submitted,



Carlos R. Soltero
Chair, State Bar Court Rules Committee
May 1, 2015

Tab L

From: [Victoria Katz](#)
To: [Rulescomments](#); [Blake Hawthorne](#)
Subject: TRCP 4 clarification
Date: Wednesday, June 5, 2024 1:58:37 PM
Attachments: [image538625.png](#)

You don't often get email from victoria.katz@aderant.com. [Learn why this is important](#)

**CAUTION: This email originated from outside of the Texas Judicial Branch email system.
DO NOT click links or open attachments unless you expect them from the sender and know the content is safe.**

Good afternoon,

Although TRCP 4 does not have amendments pending and is not out for comment, we are writing in the hopes of receiving clarification of the term “next day” as used therein. If there is a more appropriate person/e-mail to whom to direct our question, we would appreciate being provided that information.

TRCP 4 says, “The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.” [Emphasis added.] However, the term “next day” is not defined.

When counting forward from an event there is little ambiguity as to what is considered the “next day” under TRCP 4. However, when counting backwards, if the deadline falls on a weekend or holiday, it is uncertain what is the “next day.” Is the next day the preceding day (backward), counting in the same direction as the initial time period, or is it the succeeding day (forward)? For example, TRCO 166a(c) says that the deadline to file and serve opposing affidavits and other responses to a summary judgment motion is “not later than seven days prior to the day of hearing.” If the 7th day prior to the hearing falls on a weekend or holiday, would the deadline move forward to the 6th day prior to the hearing, or backwards to the 8th day prior to the hearing?

We are aware of the case *Hammonds v. Thomas*, 770 S.W.2d 1, 2-3 (Tex. App.—Texarkana 1989, no writ), which ruled that the summary judgment response deadline moves forward to the 6th day prior to the hearing, however it is our understanding that at least one later case disagreed with this ruling. We also are aware of the case *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994), which ruled that TRCP 4 applies to all deadlines, not just forward counting deadlines. The *Lewis* court, however, was limited to whether extra time should be added to the deadline to serve notice of a motion for summary judgment when the notice is served by mail. It did not address what direction a deadline moves under TRCP 4 when the last day falls on a weekend or holiday.

Further, to avoid confusion in the future regarding backward counting deadlines in Texas state courts, we respectfully propose that the Texas courts amend TRCP 4 to define the term “next day” for both forward and backward counting deadlines. A model for such amendment might be the amendment to the Federal Rules of Civil Procedure (“FRCP”), which was made to clarify a very similar ambiguity. FRCP 6(a)(5) now says, “The ‘next day’ is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.”

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing in the Texas state courts. Because this ambiguity in TRCP 4 is causing considerable confusion for our users, we would greatly appreciate any information you are able to provide us regarding this issue.

Sincerely,

Victoria Katz
Senior Rules Attorney

Email: victoria.katz@aderant.com

Support: +1 850 224 2004

MyAderant Client Portal: www.MyAderant.com

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Tab M

Texas Supreme Court Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)
From: Subcommittee on Rules 1-14c
Date: August 6, 2024
Re: Proposed Amendment to Rule 4 to define “next day”

Request to Amend Rule 4

The subcommittee on Rules 1-14c has reviewed the request by Aderant Computer Law, a software-based courts publisher providing deadline information to law firms, that we amend Rule 4 to define “next day.” TRCP 4 does not define next day. It states:

The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

Tex. R. Civ. P. 4. In contrast, FRCP 6(a)(5) defines next day:

“Next Day” Defined. The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

Background

Some Texas rules set deadlines before a hearing or event. *See, e.g.,* TRCP166a(c) (requiring summary-judgment motion to be “filed and served at least twenty-one days before the time specified for the hearing”). Others set deadlines after an event. *See., e.g.,* TRCP329b(a) (requiring new-trial motion to be “filed prior to or within thirty days after the judgment or other order complained of is signed”).

As noted by Aderant in its request for an amendment:

When counting forward from an event there is little ambiguity as to what is considered the “next day” under TRCP 4. However, when counting backwards, if the deadline falls on a weekend or holiday, it is uncertain what is the “next day.” Is the next day the preceding day (backward), counting in the same direction as the initial time period, or is it the succeeding day (forward)? For example, TRC[P 1]66a(c) says that the deadline to file and serve opposing affidavits and other responses to a summary judgment motion is

“not later than seven days prior to the day of hearing.” If the 7th day prior to the hearing falls on a weekend or holiday, would the deadline move forward to the 6th day prior to the hearing, or backwards to the 8th day prior to the hearing?

We are aware of the case *Hammonds v. Thomas*, 770 S.W.2d 1, 2-3 (Tex. App--Texarkana 1989, no writ), which ruled that the summary judgment response deadline moves forward to the 6th day prior to the hearing, however it is our understanding that at least one later case disagreed with this ruling. We also are aware of the case *Lewis v. Blake*, 876 S.W.2d 314,316 (Tex. 1994), which ruled that TRCP 4 applies to all deadlines, not just forward counting deadlines. The *Lewis* court, however, was limited to whether extra time should be added to the deadline to serve notice of a motion for summary judgment when the notice is served by mail. It did not address what direction a deadline moves under TRCP 4 when the last day falls on a weekend or holiday.

Texas courts have split on “the applicability of Rule 4 to time periods that are counted backwards in time, as opposed to those counted forward,” as observed by *Reichhold Chemicals, Inc. v. Puremco Mfg. Co.*, 854 S.W.2d 240, 246–47 (Tex. App.—Waco 1993, writ denied):

Compare Hammonds v. Thomas, 770 S.W.2d 1, 3 (Tex. App.—Texarkana 1989, no writ) (holding that Rule 4 applies to Rule 166a, so that controverting affidavits required to be filed seven days before a summary-judgment hearing could be filed on July 5 when the seventh day before the hearing was July 4) *with Old Republic Ins. Co. v. Wuensche*, 782 S.W.2d 346, 348–49 (Tex. App.—Fort Worth 1989, writ denied) (affirming the refusal of an amended pleading and holding that Rule 4 does not apply to the requirement of Rule 93 that a verified denial be filed “not less than seven days before ... trial”).

Id. at 247. *Reichhold* followed *Old Republic* and held that that “Rule 4 assumes that time calculations are not calculated backwards from a date ... [but] start with some act, event, or default” and that the rule was intended to *extend* time periods, not *shorten* them.” *Id.*

Reichhold was later criticized by the Fourteenth Court of Appeals as inconsistent with a subsequent Texas Supreme Court decision in *Lewis v. Blake. Melendez v. Exxon Corp.*, 998 S.W.2d 266, 275–76 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (reiterating that *Lewis* held Rule 4 applies to any period of time prescribed by the rules of procedure and holding that Rule 4 applies to the time period in Rule 63 regarding amendment of pleadings). The *Melendez* court counted forward, as the court did in *Sosa*, and thus held that the supplementation of discovery responses was timely.

Aderant suggested that Texas adopt a clarifying rule like Federal Rule of Civil Procedure 6(a)(5), which defines next day and removes any ambiguity. It states:

“Next Day” Defined. The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

Fed. R. Civ. P. 6(a)(5).

Recommendation

We unanimously agreed that this definition should be added to our Rule 4.

Tab N

To: Supreme Court Advisory Committee

From: Appellate Rule Subcommittee

Date: August 1, 2024

Re: Proposal Regarding Publication of Court of Appeals Opinion When Review is Granted

On July 17, 2024, the Texas Supreme Court referred the following matter for review and recommendation:

“Publishers like West do not publish memorandum opinions in civil cases by using a formal reporter citation reference or print them in bound volumes. Memorandum opinions are publicly available, however, and their citation is permitted under current rules by reference to an online reporter locator number. The Court’s practice is to order publication of a court of appeals’ memorandum opinion in cases in which the Court has granted review, thus giving those opinions a formal reporter citation reference. The Committee should advise whether the Court should require that court of appeals opinions be designated for formal publication when review is granted.”

This matter was assigned to the Appellate Rules Subcommittee, which makes the following recommendation.

Before citation of memorandum opinions was formalized and Texas Rule of Appellate Procedure 47.3 was adopted, the distinction between “published” opinions appearing in the S.W.3d reporter and “unpublished” opinions appearing only online was a significant consideration with respect to a given opinion’s precedential weight and authority. Since that time, widespread use of and access to online opinion reporting sources has diminished the importance of this distinction. Rule 47.3 describes criteria for appellate courts to use in deciding whether an opinion should be designated for inclusion in the S.W.3d reporter or, instead, designated as a memorandum opinion. As a practical matter, the formality and contents of “published” opinions appearing in the S.W.3d reporter and “memorandum” opinions often are similar. Courts and advocates frequently cite both types of opinions interchangeably, and treat them as having equivalent weight.

The referred matter does not encompass larger questions regarding whether (1) the distinction between “published” and “unpublished” opinions should be maintained, or (2) the criteria for designating an opinion as a “memorandum opinion” should be revisited.

The subcommittee recommends that, so long as the distinction between formal “published” opinions and “memorandum” opinions is maintained in the rules, the Texas Supreme Court should require that court of appeals opinions be designated for formal publication when review is granted. This procedure comports with the statutory important-to-the-jurisprudence criterion for granting review. Under the current Rule 47.3 standards for designation of a “memorandum opinion,” inclusion of an opinion in the S.W.3d reporter is an indication that an opinion addresses issues important to Texas jurisprudence. Inclusion in the official reporter also may marginally increase ease of access to the opinion. For these reasons, the Court’s practice should continue.