SCAC MEETING AGENDA (AMENDED)
Friday, September 13, 2019, 9:00 a.m. – 5:00 p.m.
Saturday, September 14, 2019, 9:00 a.m. – 12:00 p.m.

Location: **Sheraton Austin Hotel at the Capital**
Creekside Conference room
701 East 11th Street
Austin, TX 78701
(512) 478-1111

1. WELCOME (Babcock)

2. 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 21, 2019 meeting.

3. COMMENTS FROM JUSTICE BOYD

4. CITATION

E-Filing Sub-Committee Members:
Richard Orsinger – Chair
Lamont Jefferson – Vice Chair
Hon. Jane Bland
David Jackson

5. TEXAS RULE OF CIVIL PROCEDURE 116

15-165a Sub-Committee Members:
Richard Orsinger – Chair
Frank Gilstrap – Vice Chair
Prof. Alexandra Albright
Prof. Elaine Carlson
Nina Cortell
Prof. William Dorsaneo
Pete Schenkkan
Hon. Anahid Estevez

6. TEXAS RULE OF CIVIL PROCEDURE 244

216-299a Sub-Committee Members:
Prof. Elaine Carlson – Chair
Thomas C. Riney – Vice Chair
Hon. David Peeples
Alistair B. Dawson
Robert Meadows
Hon. Kent Sullivan
Kennon Wooten

(a) February 11, 2019 Report re: TRCP 244

7. EX-PARTE COMMUNICATIONS IN PROBLEM-SOLVING COURTS [Start Time @ 3:30 p.m.]

Judicial Administration Sub-Committee Members:

Nina Cortell - Chair
Kennon Wooten – Vice Chair
Hon. David Peeples
Michael A. Hatchell
Prof. Lonny Hoffman
Hon. Tom Gray
Hon. Bill Boyce
Hon. David Newell
Andrew P. Van Osselaer (Associate/Haynes and Boone, LLP)
Judge Byrne [Participate via Dial-In]
Judge Mike Chitty [Participate via Dial-In]
Judge Reyes [Participate via Dial-In]

(b) Sept. 9, 2019 Memo: Ex Parte Communications in Problem-Solving Courts
(c) May 3, 2019 Memo to TSCAC on Ex Parte Communications
(1) Judge Reyes' Comments on Proposed Comment on Ex Parte Communication In Specialty Courts

8. EVICTION KIT FORMS

Rule 500-510 Sub-Committee Members:

The Hon. Levi Benton – Chair
The Hon. Anahid Eliz. Estevez - Vice Chair
Prof. Elaine Carlson
The Hon. Stephen Yelenosky

9. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

Appellate Sub-Committee Members:

Pamela Baron – Chair
Professor William Dorsaneo – Vice Chair
Hon. Bill Boyce
Professor Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(d) September 5, 2019 Memo: Appeals in Parental Termination Cases

10. REGISTRATION OF IN-HOUSE COUNSEL

Supreme Court Advisory Committee:

(e) Rule 23-Registration of In-House Counsel

11. CIVIL RULES IN MUNICIPAL COURTS

500-510 Sub-Committee Members:

Hon. Levi Benton – Chair
Hon. Ana Estevez – Vice Chair
Prof. Elaine Carlson
Hon. Stephen Yelenosky

12. PROTECTIVE ORDER REGISTRY FORMS

E-Filing Sub-Committee Members:

Richard Orsinger – Chair
Lamont Jefferson – Vice Chair
Hon. Jane Bland
David Jackson

13. MOTIONS FOR REHEARING IN THE COURTS OF APPEALS

Appellate Sub-Committee Members:

Pamela Baron – Chair
Professor William Dorsaneo – Vice Chair
Hon. Bill Boyce
Professor Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley

(f) September 2, 2019 Memo to SCAC re: TRAP 49.3-Motion for Rehearing

14. PARENTAL LEAVE CONTINUANCE RULE

216-299a Sub-Committee Members:

Prof. Elaine Carlson – Chair
Thomas C. Riney – Vice Chair
Hon. David Peeples
Alistair B. Dawson
Robert Meadows
Hon. Kent Sullivan
Kennon Wooten

Tab A

From: Subcommittee Rules 216-299a
Professor Elaine Carlson, Chair
Tom Riney, Vice Chair
Judge David Peeples
Alistair Dawson
Kennon Wooten
Kent Sullivan
Bobby Meadows

Date: February 10, 2019

Re: The Role of an Attorney Ad Litem Appointed Pursuant to TRCP 244 When Defendant is Served by Publication

Issue:

What is the appropriate role of an attorney ad litem appointed pursuant to Texas Rule of Civil Procedure (TRCP) 244 when a defendant is served by publication?

Existing Rule & Proposal of The State Bar of Texas Committee on Court Rules

TRCP 109 allows, on a limited basis, service by publication on a defendant in Texas civil lawsuits:

> When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, and to such party when the affidavit is made by his agent or attorney, or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service.

TRCP 244 requires the court to appoint an attorney ad litem to represent the absent defendant served by publication:

> Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

The State Bar of Texas Committee on Court Rules, concerned at the amount of the ad litem attorney fees that may be taxed against a prevailing plaintiff and questioning the propriety of the ad litem attorney providing full-blown representation of a missing defendant, proposed amendments to TRCP 244 that would limit the role of the attorney ad litem. Specifically, Carlos Soltero, Chair of the Committee, proffered this explanation:

> Under the current Rule 244, which provides for the appointment of an attorney to defend a suit in which service is made by publication, appointed attorneys have often perceived a duty to exhaust all remedies available to the non-appearing defendant and, in many cases, to represent the defendant's interests on appeal. The fees for these services are taxed as costs, ultimately borne by the plaintiff. *See Cahill v. Lyda,* 826 S.W.2d 932 (Tex. 1992).
>
> The practice of appointing an attorney for an absent defendant has its roots in Mexican and Spanish law and was adopted in Texas after Texas attained statehood. *See* Millar, *Jurisdiction Over Absent Defendants: Two Chapters in American Civil Procedure*, 14 La. L. Rev. 321, 335-335 (1954). This practice reflects a minority view in American jurisprudence, having been adopted by only four states. Id. At 335-38 (adopting Spanish law were Texas, Louisiana, Kentucky and Arkansas). One of those states, Louisiana, has abandoned the Spanish rule in favor of a rule similar to the rule proposed here. *See* La. Code Civ. Proc. Ann. art. 5094 (West 2003).
>
> The proposed Rule 244 limits and clarifies the role of the appointed attorney, whose duties would end after the attorney submits a report documenting the efforts made to locate the defendant and provide notice of the proceedings. The Committee believes that the proposed rule, by preventing automatic entry of default judgments against defendants who can be located, accomplishes the primary aim of the current rule. The Committee also notes that when a default judgment is entered following service by publication, Rule 329 allows the defendant two years in which to file a motion for new trial seeking to set aside the judgment.
>
> The principal advantage of the proposed rule is that it reduces the cost of the litigation. The proposed rule, by providing that the appointed attorney is not responsible for defending the suit or pursing an appeal, and by requiring fees and expenses awarded to be reasonable, eliminates the often-substantial fees and expenses associated with those responsibilities. Moreover, by clarifying that the appointed attorney does not represent the defendant, the proposed rule addresses the concern that under the current rule, the appointed attorney might owe a duty to a non-appearing defendant who later comes forward and alleges the representation was inadequate. By eliminating the specter of liability to the absent defendant, the proposed rule eliminates the current incentive for attorneys to render services and incur expenses whose benefit to the absent defendant cannot be justified in light of their cost to the plaintiff.

The proposal of the State Bar of Texas Committee on Court Rules is as follows:

244.1 APPOINTMENT OF ATTORNEY. If service has been made by publication and no answer has been filed nor appearance entered within the prescribed time, the court must appoint an attorney who, without acting as an attorney for any party, must use due diligence to try to locate the defendant.

244.2 REPORT OF ATTORNEY. The appointed attorney must make a report in open court or file a report with the court not later than the thirtieth day after being appointed, or within such other reasonable time period as the court may allow. The report must describe the parties' attempts to locate the defendant or obtain service of nonresident notice, describe the appointed attorney's attempts to locate the defendant, and provide the defendant's location, if discovered. No judgment on service by publication may be granted before the report is made and the court finds that the defendant cannot be located or personal service cannot be obtained.

244.3 DISCHARGE OF ATTORNEY. The court must discharge the appointed attorney from any further duties upon receiving a report from the attorney that complies with this Rule. The appointed attorney will have no duty or authority to represent the defendant on the merits of the case or to appeal any judgment in the case.

244.4 FEES AND EXPENSES. The court must award the attorney a reasonable fee for services provided and all reasonable expenses incurred during the appointment, to be taxed as part of the costs in the judgment rendered by the court.

Analysis:

Citation by publication is constructive service accomplished by publishing a truncated citation in the newspaper for four weeks generally in the county where the lawsuit is pending. TEX. R. CIV. P. 114-11. As observed by the United States Supreme Court in the seminal case of *Mullane v. Central Hanover Bank*, it is a very weak form of notice and raises serious due process concerns. **The form of service [personal, substituted or constructive] must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."** *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (emphasis added). The Court observed:

> It would be idle to pretend that publication alone is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper,

> and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint. Id. at 315.

However, the Court recognized that, for missing or unknown persons service by publication would not offend due process. *Id.* at 317.

The United States Supreme Court revisited the adequacy of service by publication in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 1983). Notice of a public auction of real property for unpaid taxes was given to creditors by publication. Indiana law required that notice be posted at the county courthouse and published for three consecutive weeks. The Court held "unless the mortgagee is not reasonably identifiable, constructive notice [by publication] alone does not satisfy the mandate of *Mullane*." *Id*. at 798. The identity of the mortgagee was known and the Court assumed the mortgagee's address could be ascertained by reasonably diligent efforts. When an interested party's identity is known, service by publication is generally inadequate and violates due process guarantees. However, constructive service by publication is sufficient when the interested party's identity is not known.

In *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), the United States Supreme Court held notice of a probate proceeding by publication to known creditors of the decedent or creditors whose identity could be reasonably ascertainable violated due process and Oklahoma statutes to the contrary were constitutionally infirm. The creditor, unaware of the probate proceeding, did not file its claim in the probate proceeding until after the statutory deadline passed. However, because a judgment premised on service by publication as to known creditors is void, the collateral attack by the creditor could be made at any time.

The Texas Supreme Court addressed the constitutionality of service by publication in *In re E.R*., 385 S.W.3d 552 (Tex. 2012). A mother's parental rights were terminated with service by citation accomplished by publication. The court held that method of service is invalid absent a demonstrated diligent attempt to locate the parent. The trial court must "inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant before granting a judgment when the only service of citation is by publication." TEX. R. CIV. P. 109; ; *see also* TEX. FAM.CODE § 161.107(b) ("If a parent of the child has not been personally served in a suit in which the Department of Family and Protective Services seeks termination, the department must make a diligent effort to locate that parent."). A lack of diligence makes service by publication ineffective. The court clarified what constitutes sufficient diligence, opining;

> A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality. Even disregarding the factual dispute about what [Mother] L.R. told Chidozie about her address, the uncontroverted evidence here establishes a lack of diligence. Chidozie neglected "obvious inquiries" a prudent investigator would have made. *In the Interest of S.P.,* 672 N.W.2d at 848. She did not contact L.R.'s mother, nor she did attempt service by mail in an effort to obtain a forwarding

> address. She did not pursue other forms of substituted service that would have been more likely to reach L.R., such as leaving a copy with L.R.'s mother. *See* TEX.R. CIV. P. 106(b)(1); *see also McDonald v. Mabee,* 243 U.S. 90, 92, 37 S.Ct. 343, 61 L.Ed. 608 (1917) ("To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."). Even if L.R.'s address was not "reasonably ascertainable," an address was unnecessary for personal service on L.R. because she visited the Department's offices during the relevant time period. When a known parent has not left the jurisdiction, when she has attended at least two court hearings and has come to the Department offices for a prescheduled, hour-long meeting with her children during the very period service was being attempted, and when the Department can reach her by telephone and can communicate with her family members, service by publication cannot provide the kind of process she is due. Sending a few faxes, checking websites, and making three phone calls—none of which were to L.R. or her family members—is not the type of diligent inquiry required before the Department may dispense with actual service in a case like this. *Mullane* authorized service by publication when "it is not reasonably possible or practicable to give more adequate warning." *Mullane,* 339 U.S. at 317, 70 S.Ct. 652. Here, it was both possible and practicable to more adequately warn L.R. of the impending termination of her parental rights, and notice by publication was therefore constitutionally inadequate. *Jones v. Flowers,* 547 U.S. 220, 237, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).
>
> *In re E.R.* at 566-567.

The Family Code provision that "the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed" only applies to parents for whom service by publication is valid. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *Id.* at. 566. However, a parent must take prompt action to set aside the judgment upon learning of an adverse judgment, even when service by publication violated their due process rights. "If, after learning that a judgment has terminated her rights, a parent unreasonably stands mute, and granting relief from the judgment would impair another party's substantial reliance interest, the trial court has discretion to deny relief." The record at issue in the case was silent as to when Mother learned that her rights were terminated or what actions she took in response. Accordingly, the case was reversed and remanded to the trial court to determine if Mother unreasonably delayed in seeking relief after learning of the judgment. If she acted with reasonable diligence, she would be entitled to a new trial.

Sub-Committee Recommendation

The subcommittee shares the due process concerns about the efficacy of service by publication and questions the realistic ability of an attorney ad litem to adequately

represent an absent client served by publication. Constructive service of citation need not be limited to publication and may be effectuated by any method of service reasonably calculated under the circumstances to give the absent defendant notice (such as through a social media platform). Another subcommittee chaired by Richard Orsinger is currently exploring alternative methods of constructive service besides service by publication.

This subcommittee is tasked with addressing (1) the appropriate role of an attorney ad litem appointed when a defendant is served constructively and (2) the payment of the ad litem fees. The subcommittee noted the disparity in the rules that require prior court approval before obtaining an order approving substituted service on someone other than the defendant and the provisions of TRCP 109 that allow the clerk to issue citation by publication for a defendant without prior judicial approval. Also of concern is the potential imposition of substantial ad litem costs (including attorneys fees of the ad litem) that may be taxed against the plaintiff (*see, e.g.*, *Garza v. Slaughter*, 331 S.W.3d 43 (Tex. App.-Houston [1st Dist.] 2010, no pet.)), as well as the lack of limitation on the scope of the ad litem's role. *See, e.g.*, *Cahill v. Lyda,* 826 S.W.2d 932, 933 (Tex. 1992) ("The attorney ad litem must exhaust all remedies available to the client and, if necessary, represent his [absent] client's interest on appeal."); *In re Estate of Stanton*, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. denied) ("It the attorney ad litem's duty to defend the rights of his involuntary client with the same vigor and astuteness as he would employ in the defense of clients who had expressly employed him for such purpose."); *Isaac v. Westheimer Colony Assoc.*, 933 S.W.2d 588, 590 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("The purpose of the portion of Rule 244 requiring the appointment of an attorney ad litem is to provide a non-appearing defendant effective representation."). The efficacy of an appointed ad litem to represent an absent defendant on the merits of the proceeding is questionable. Accordingly, the subcommittee suggests limiting the scope of the attorney ad litem's role.

The subcommittee recommends combining and amending TRCP 109 and 244 as follows:

Rule 109 [Constructive Service of Process] Citation By Publication

A plaintiff should first attempt to obtain service of citation on a defendant, pursuant to Rule 106, by personal in hand service or via the mail (certified or registered, return receipt requested) by qualified process servers. As to a non-resident defendant, the same attempt should be made in conformity with Rule 108.[1]

[If personal service of process is unsuccessful, the plaintiff must use diligent efforts to obtain information of where the defendant resides or a location where the defendant can probably be found before moving for substituted service under Rule 106(b).

If substituted service is unsuccessful [or if substituted service is not possible as the whereabouts of a defendant are unknown after diligent efforts have been made], the plaintiff may move for constructive service under this rule. The motion must be supported by a detailed affidavit by an affiant with personal knowledge describing with particularity the actions the plaintiff took in attempting to locate the defendant and the results of all earlier service attempts. An oral hearing on the motion must be conducted by the court and a record made. It is the court's duty to inquire into the sufficiency of the diligence exercised by the plaintiff in attempting to ascertain the defendant's residence or whereabouts.

If the trial court is not satisfied that sufficient diligent efforts have been made, the court may either order the plaintiff to make additional efforts to locate the defendant or appoint an attorney ad litem to assist the court in attempting to locate the defendant's residence or a location where the defendant can probably be found. The ad litem will have no other role and cannot recover fees or costs associated with any other role. The ad litem must assist the court alone and must not act as an attorney for any party.

[The trial court should inform the plaintiff of the following:] Reasonable and necessary fees sought by the attorney ad litem will be taxed as costs. While costs generally are taxed against the unsuccessful party, TEX. R. CIV. P. 131, for good cause the trial court may tax costs against the successful party. TEX. R. CIV. P. 141. The plaintiff may be required to pay those costs before final judgment and failing to do so, the plaintiff's suit may be dismissed, TEX. R. CIV. P. 143, or the plaintiff's property may be levied on, seized, and sold to satisfy unpaid costs, including unpaid ad litem fees. TEX. R. CIV. P. 129–130.

[1] For example, if the plaintiff has a last known mailing address, diligence requires service first via the mail to determine if the defendant can be served at that location and if not, whether a forwarding address for the defendant can be obtained.

The ad litem must review the plaintiff's efforts, conduct its own diligent search for the defendant, and file an affidavit with the trial court not later than the thirtieth day after being appointed or within such other reasonable time period as the court allows. The affidavit must describe with particularity the actions taken by the plaintiff and the ad litem in attempting to locate the defendant and the results of those efforts. An oral hearing must be conducted by the court and a record made. It is the duty of the court to inquire into the sufficiency of the diligence exercised by the attorney ad litem in attempting to ascertain the defendant's residence or whereabouts.

If the trial court is not satisfied that sufficient diligent efforts have been made by the ad litem, the court may direct the ad litem to undertake additional efforts to locate the defendant [or appoint a different ad litem to undertake that task]. If the trial court is satisfied that a diligent effort has been made by the ad litem to locate the defendant but that those efforts were unsuccessful, the court must discharge the ad litem from any further duties and may order constructive service [by publication] or service by any means reasonably effective under the circumstances to give the defendant notice pursuant to Rule 109a. The clerk shall issue citation in accordance with the court's order.

If the defendant fails to timely file an answer or otherwise timely appear, the trial court may enter a default judgment.

A diligent search, for purposes of this rule, must include inquiries that someone who really wants to find the defendant would make. A diligent search is measured not by the quantity of the search but the quality of the search. In determining whether a search is diligent, the trial court should consider the attempts made to locate the missing person or entity to see if attempts are made through channels expected to render the missing identity. While a reasonable search does not require the use of all possible or conceivable means of discovery, it is an inquiry that a reasonable person would make, and it must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought. Whether all reasonable means have been exhausted has to be determined by the circumstances of each particular case.

If the attorney ad litem requests compensation, the attorney ad litem must be reimbursed for reasonable and necessary expenses incurred and paid a reasonable hourly fee for necessary services performed. At the conclusion of the appointment, an attorney ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. On request of any party, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary.

Duties of Attorney Ad Litem under the Family Code

Do we want to enumerate more specifically the duties of the attorney at litem?

V.T.C.A., Family Code § 107.014

§ 107.014. Powers and Duties of Attorney ad Litem for Certain Parents

Effective: September 1, 2013

(a) Except as provided by Subsections (b) and (e), an attorney ad litem appointed under Section 107.013 to represent the interests of a parent whose identity or location is unknown or who has been served by citation by publication is only required to:

(1) conduct an investigation regarding the petitioner's due diligence in locating the parent;

(2) interview any party or other person who has significant knowledge of the case who may have information relating to the identity or location of the parent; and

(3) conduct an independent investigation to identify or locate the parent, as applicable.

(b) If the attorney ad litem identifies and locates the parent, the attorney ad litem shall:

(1) provide to each party and the court the parent's name and address and any other available locating information unless the court finds that:

(A) disclosure of a parent's address is likely to cause that parent harassment, serious harm, or injury; or

(B) the parent has been a victim of family violence; and

(2) if appropriate, assist the parent in making a claim of indigence for the appointment of an attorney.

(c) If the court makes a finding described by Subsection (b)(1)(A) or (B), the court may:

(1) order that the information not be disclosed; or

(2) render any other order the court considers necessary.

(d) If the court determines the parent is indigent, the court may appoint the attorney ad litem to continue to represent the parent under Section 107.013(a)(1).

(e) If the attorney ad litem is unable to identify or locate the parent, the attorney ad litem shall submit to the court a written summary of the attorney ad litem's efforts to identify or locate the parent with a statement that the attorney ad litem was unable to identify or locate the parent. On receipt of the summary required by this subsection, the court shall discharge the attorney from the appointment.

Credits Added by Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), § 5, eff. Sept. 1, 2013.

Compensation for Attorney Ad Litem

We may want to borrow from TEX. R. CIV. P. 173?

TEX. R. CIV. P. 173 Guardian Ad Litem

173.1. Appointment Governed by Statute or Other Rules

This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules

173.2. Appointment of Guardian ad Litem

(a) *When Appointment Required or Prohibited*. The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if:

(1) the next friend or guardian appears to the court to have an interest adverse to the party, or

(2) the parties agree.

(b) *Appointment of the Same Person for Different Parties*. The court must appoint the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

173.3. Procedure

(a) *Motion Permitted But Not Required*. The court may appoint a guardian ad litem on the motion of any party or on its own initiative.
(b) *Written Order Required*. An appointment must be made by written order.
(c) *Objection*. Any party may object to the appointment of a guardian ad litem.

173.4. Role of Guardian ad Litem

(a) *Court Officer and Advisor*. A guardian ad litem acts as an officer and advisor to the court.

(b) *Determination of Adverse Interest*. A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.

(c) *When Settlement Proposed*. When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

(d) *Participation in Litigation Limited*. A guardian ad litem:

(1) may participate in mediation or a similar proceeding to attempt to reach a settlement;
(2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest;
(3) must not participate in discovery, trial, or any other part of the litigation unless:
(A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and
(B) the participation is directed by the court in a written order stating sufficient reasons.

173.5. Communications Privileged

Communications between the guardian ad litem and the party, the next friend or guardian, or their attorney are privileged as if the guardian ad litem were the attorney for the party.

173.6. Compensation

(a) *Amount*. If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.

(b) *Procedure*. At the conclusion of the appointment, a guardian ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.

(c) *Taxation as Costs*. The court may tax a guardian ad litem's compensation as costs of court.

(d) *Other Benefit Prohibited*. A guardian ad litem may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule.

173.7. Review

(*a) Right of Appeal.* Any party may seek mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation. Any party and a guardian ad litem may appeal an order awarding the guardian ad litem compensation.

*(b) Severance***.** On motion of the guardian ad litem or any party, the court must sever any order awarding a guardian ad litem compensation to create a final, appealable order.

*(c) No Effect on Finality of Settlement or Judgment***.** Appellate proceedings to review an order pertaining to a guardian ad litem do not affect the finality of a settlement or judgment.

COMMENT--2004

1. The rule is completely revised.

2. This rule does not apply when the procedures and purposes for appointment of guardians ad litem (as well as attorneys ad litem) are prescribed by statutes, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.

3. The rule contemplates that a guardian ad litem will be appointed when a party's next friend or guardian appears to have an interest adverse to the party because of the division of settlement proceeds. In those situations, the responsibility of the guardian ad litem as prescribed by the rule is very limited, and no reason exists for the guardian ad litem to participate in the conduct of the litigation in any other way or to review the discovery or the litigation file except to the limited extent that it may bear on the division of settlement proceeds. See *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004) (per curiam). A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.

4. Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Rule 44. In no event may a guardian ad litem supervise or supplant the next friend or undertake to represent the party while serving as guardian ad litem.

5. As an officer and advisor to the court, a guardian ad litem should have qualified judicial immunity.

6. Though an officer and adviser to the court, a guardian ad litem must not have *ex parte* communications with the court. See Tex. Code Jud. Conduct, Canon 3.

7. Because the role of guardian ad litem is limited in all but extraordinary situations, and any risk that might result from services performed is also limited, compensation, if any is sought, should ordinarily be limited.

8. A violation of this rule is subject to appropriate sanction.

Tab B

MEMORANDUM

Date: September 9, 2019

To: Texas Supreme Court Advisory Committee

From: Judicial Administration Subcommittee

Subject: Ex Parte Communications in Problem-Solving Courts

For assignment and relevant background, *see* May 3, 2019 memorandum and attachments.

Votes at the May meeting:

1. Whether to include a comment that authorizes ex parte communications in specialty courts—**22 in favor; 3 against.**

2. Votes on whether to provide a recusal provision—**13 for mandatory recusal; 6 for discretionary.**

Current proposed comment, for discussion at September 13 meeting: *see* next page.

It is not a violation of this Canon for a judge—when serving on a statutory specialty court—to initiate, permit, or consider ex parte or privileged[1] communications insofar as the judge reasonably believes such communications are necessary to fulfill the specialty court's functions and the specialty court's procedures contemplate such communications. If such communications occur, then, after the conclusion of the party's participation in the specialty court program, the specialty court judge

MANDATORY RECUSAL OPTIONS:

A. must recuse from further involvement in the proceedings, absent written consent of the party.

B. must not, absent that party's written consent, preside over any case brought against that party in which the content of those communications is relevant to the merits of the case.

DISCRETIONARY RECUSAL OPTION:

should consider whether recusal is proper under Rule 18b of the Texas Rules of Civil Procedure, absent written consent of the party.

[1] To be discussed: whether to include privileged communications.

Tab C

MEMORANDUM

To: Texas Supreme Court Advisory Committee

From: Judicial Administration Subcommittee

Re: Ex Parte Communications in Problem-Solving Courts

Date: May 3, 2019

OVERVIEW:

The Judicial Administration Subcommittee has been asked to consider whether Canon 3 of the Code of Judicial Conduct should be amended to permit ex parte communications in problem-solving courts. There are differing views on the Subcommittee as to whether any amendment or comment is proper and what the wording of any comment should be. Subject to that caveat, the Subcommittee presents, for discussion by the Texas Supreme Court Advisory Committee, the proposed comment at page 4 of this memorandum (which also reflects alternate proposals).

Background information is provided at pages 1-3 of this memorandum, including the referenced attachments.

BACKGROUND:

1. Excerpt from referral letter from Chief Justice Hecht:

Ex Parte Communications in Problem-Solving Courts. In the [email below], Hon. Robert Anchondo proposes adding a comment to or amending Canon 3 of the Code of Judicial Conduct to permit ex parte communications in problem-solving courts. The following article may inform the Committee's work: Brian D. Shannon, *Specialty Courts, Ex Parte Communications, and the Need to Revise the Texas Code of Judicial Conduct*, 66 Baylor L. Rev. 127 (2014).

- The referenced law review article is attached at Tab A.

2. Email from Hon. Robert Anchondo:

Greetings Jaclyn, pursuant to our conversation I am respectfully requesting that Canon 3 (B) (8) (e) be modified or a comment be included as follows to address ex parte communication issues facing problem solving courts: **"A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, DWI treatment courts, veterans courts, juvenile courts. In this capacity, the judge may assume a more interactive role with the parties, treatment providers, community supervision officers, law enforcement officers, social workers, and others"**. Regulation of ex parte contacts in the drug court context is evolving. Under the 1990 version of the ABA Model Code of Judicial Conduct, ex parte communications were prohibited, except in limited situations involving administrative purposes, scheduling, or emergencies. The 2007 ABA Model Code of Judicial Conduct dramatically changes the ethical landscape by permitting ex parte

communications in drug and other problem solving courts. Rule 2.9 (A) (5) of the 2007 Model Code provides that a judge may "initiate, permit, or consider any ex parte communication when expressly authorized by law to do so." The comment to this provision states: "A judge may initiate, permit, or consider ex parte communications when authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, DWI problem courts or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others." Please forward this information to whomever it may be necessary to address this issue and hopefully resolve performing our duties of Judicial Office Impartially and Diligently. Thank you for your attention.

3. Memorandum prepared by Andrew Van Osselaer reflecting feedback from specialty court judges, attached at Tab B.

4. Pending legislation, attached at Tab C.

5. Gov't Code Sections 121.001 and 121.002, attached at Tab D.

6. Excerpt from Canon 3 of Texas Code of Judicial Conduct:

Performing the duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age,

sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

PROPOSED COMMENT TO CANON 3:

It is not a violation of the prohibition on ex parte communications for a judge, when serving on a statutory specialty court, to initiate, permit or consider ex parte communications insofar as the communications are reasonably necessary to fulfill the court's functions and the specialty court's procedures contemplate those communications.[1] If such ex parte communications occur, then the judge, prior to presiding over a contested matter, should consider whether recusal is proper under Canon 3, Texas Rule of Civil Procedure 18b, or other Texas law.[2]

[1] Alternate proposal: Substitute the "reasonably necessary" language with: "the type of ex parte communication] specifically authorized and approved by the rules governing the specialty court as adopted by the Specialty Courts Advisory Council and approved by the Texas Judicial Council. (See Tex. Gov't Code 121.002)."

[2] Alternate proposal: This comment does not prevent a judge from voluntarily recusing from contested matters following ex parte communications. A permissible ex parte communication is not a ground to force recusal of a judge.

SPECIALTY COURTS, EX PARTE COMMUNICATIONS, AND THE NEED TO REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Brian D. Shannon*

*Charles "Tex" Thornton Professor of Law, Texas Tech University School of Law; B.S., summa cum laude, Angelo State University, 1979; J.D., with high honors, The University of Texas School of Law, 1982. Professor Shannon serves on the board of directors for StarCare Specialty Health System (formerly known as Lubbock Regional Mental Health & Mental Retardation Center), is a past chair of the State Bar of Texas Committee on People with Disabilities, and from 2003-11 was a gubernatorial appointee to the Texas Governor's Committee on People with Disabilities. This Article represents the opinions of the author, however, and does not necessarily reflect the views of these other organizations. Shannon also served on the Texas legislative task force that re-wrote the Texas statutes pertaining to competency to stand trial, and he is the co-author of multiple editions of a book on Texas criminal procedure as it relates to persons diagnosed with mental illness. Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness: An Analysis and Guide (NAMI-Texas 4th ed. 2008). For their comments and guidance, the author would like to thank Judge Ruben Reyes, who chairs the Texas Governor's Criminal Justice Advisory Council and is the presiding judge of the Lubbock County, Texas, Adult Drug Court, and Judge Oscar Kazen, who is the Associate Probate Court Judge for Bexar County, Texas, and presides over a specialty court that oversees San Antonio's Involuntary Outpatient Civil Commitment Program.

I. INTRODUCTION

As of January 2013, there were roughly "140 operational specialty courts in Texas."[1] These specialty courts include an array of focuses, "such as adult and juvenile drug courts, veteran courts, DWI courts, . . . family drug courts," and mental health courts.[2] A listing of Texas specialty courts that is maintained by the Texas Governor's office includes the foregoing types of specialty courts, as well as reentry courts, DWI hybrid courts, co-occurring disorder courts, and prostitution courts.[3] These courts differ from the usual adjudicatory model. For example, the first of the "Ten Key Components" of drug courts is the following: "Drug courts integrate alcohol and other drug treatment services with justice system case processing."[4] Going beyond adjudication and punishment, the "mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity."[5] Correspondingly, the following characteristics are typical of "the vast majority of mental health courts":[6]

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[1] The Governor of the State of Tex. Crim. Justice Div., *Criminal Justice Advisory Council Report: Recommendations for Texas Specialty Courts*, at 1, OFFICE OF THE GOVERNOR - RICK PERRY, http://governor.state.tx.us/files/cjd/CJAC_Report_January_2013.pdf (last visited Nov. 23, 2013) [hereinafter CJAC Report]. A listing maintained by the Texas Governor's office of all such specialty courts in Texas identified a total of 140 specialty courts as of August 1, 2013. *See* The Governor of the State of Tex. Crim. Justice Div., *Texas Specialty Courts*, OFFICE OF THE GOVERNOR–RICK PERRY (Aug. 1, 2013), *available at* http://governor.state.tx.us/files/cjd/Specialty_Courts_By_County_August_2013.pdf [hereinafter Specialty Courts List].

[2] CJAC Report, *supra* note 1, at 1; *see also* The Governor of the State of Tex., Executive Order RP 77—Relating to the reauthorization of the operation of the Governor's Criminal Justice Advisory Council, 37 Tex. Reg. 2806 (2012), *available at* http://governor.state.tx.us/news/executive-order/16995/.

[3] Specialty Courts List, *supra* note 1, at 1.

[4] BUREAU OF JUSTICE ASSISTANCE, NCJ 205621, *Defining Drug Courts: The Key Components*, at 1 (2004), *available at* https://www.ncjrs.gov/pdffiles1/bja/205621.pdf.

[5] *Id.*

[6] COUNCIL OF STATE GOV'TS JUSTICE CENTER, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*, at vii (2007), BUREAU OF JUSTICE ASSISTANCE - HOME, https://www.bja.gov/Publications/MHC_Essential_Elements.pdf (last visited Nov. 23, 2013).

> • A specialized court docket, which employs a problem-solving approach to court processing in lieu of more traditional court procedures for certain defendants with mental illnesses.
>
> • Judicially supervised, community-based treatment plans for each defendant participating in the court, which a team of court staff and mental health professionals design and implement.
>
> • Regular status hearings at which treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions are imposed on participants who do not adhere to conditions of participation.
>
> • Criteria defining a participant's completion of (sometimes called graduation from) the program.[7]

The judge's role in a specialty court differs from that of the traditional judicial role.[8] As a specialty court judge, "the judge's role is less that of a traditional 'umpire,' than a problem-solver, who coordinates court proceedings with one or more parties and a range of service providers, including social workers, psychologists, drug, alcohol, employment, or family counselors, and others."[9] As one mental health court judge described, "Being a judge in a problem-solving court looks very different from what has been the judge's traditional role. A judge in a problem-solving court becomes the leader of a team rather than a dispassionate arbitrator."[10] In that regard, "the collaborative nature of drug court decision

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[7] *Id.* For further discussion of specialty courts generally (often called "therapeutic" or "problem-solving" courts); *see, e.g.*, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS (2002), *available at* http://www.courtinnovation.org/sites/default/files/JudgesProblem SolvingCourts1.pdf.

[8] *See* CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 5.03(7), 5-23 (5th ed. 2013).

[9] *Id.*

[10] Louraine C. Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model Code*, 28 JUST. SYS. J. 317, 317 (2007). Judge Arkfeld presided over both a mental health court and a homeless court; *see* Court Leadership Institute of Arizona, *Faculty*, ARIZONA JUDICIAL BRANCH, *available at* http://www.azcourts.gov/clia/Faculty.aspx & http://www.azcourts.gov/clia/

making (seen most clearly in staffings) may undermine perceptions of judicial independence and impartiality."[11] In addition, because the judge—as team leader—will be coordinating information and discussion between multiple members of the specialty court team, "in such a capacity, *ex parte* communications with these various participants can be difficult to avoid."[12] Correspondingly, "a blanket prohibition on *ex parte* communication" could thwart the specialty court judge's efforts at addressing the "underlying causes of legal problems giving rise to the cases they adjudicate" such as substance abuse or mental illness.[13] In addition, exposure to ex parte communications and extensive involvement in staffings can lead to concerns regarding a specialty court judge's impartiality in any subsequent judicial proceedings—particularly in situations in which an individual has been terminated from the specialty court program.[14]

The Texas Code of Judicial Conduct does not include any provisions that recognize the new role of judges in specialty courts.[15] This Article will discuss the shortcomings in this regard in the Texas Code of Judicial Conduct, particularly with regard to ex parte communications; the approach set forth in the American Bar Association's 2007 Model Code of Judicial Conduct; and the law in several other states.[16] Finally, the Article will propose revisions to the Texas Code of Judicial Conduct pertaining to ex parte communications and specialty courts, and the related topic of disqualifications or recusals.[17]

Faculty/LorraineArkfeld.aspx.

[11] William G. Meyer, *Ethical Obligations of Judges in Drug Courts*, THE DRUG COURT JUDICIAL BENCHBOOK 197 (Douglas B. Marlowe & William G. Meyer eds., Nat'l Drug Court Inst. 2011).

[12] GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (italics in original). At specialty court team staffings, "the judge in the problem-solving court now hears all kinds of information that a judge would not normally hear, nor would the information necessarily be considered relevant to the determination of the facts or law of the case at hand." Arkfeld, *supra* note 10, at 317.

[13] GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (emphasis in original).

[14] *See* Meyer, *supra* note 11, at 205–06 (discussing possible disqualification issues, and observing that a "judge should disclose on the record information that he or she believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes that there is no real basis for disqualification").

[15] TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2005 & Supp. 2013).

[16] *See generally* ABA MODEL CODE OF JUD. CONDUCT (2011).

[17] There are other ethical issues that can arise with regard to specialty courts that are beyond the scope of this Article. For an excellent overview discussion of ethical issues in drug courts that

II. SPECIALTY COURTS AND CURRENT SHORTCOMINGS IN THE TEXAS CODE OF JUDICIAL CONDUCT

The Texas Code of Judicial Conduct does not mention specialty courts.[18] Indeed, although a January 2005 report of the Texas Supreme Court's Task Force on the Code of Judicial Conduct included recommendations for several amendments to the Texas Code, that report also did not address specialty courts.[19] Accordingly, the current Texas Code presumptively governs judges in both traditional courts, as well as specialty courts.[20] There are several sections relevant to ex parte communications and disqualifications or recusals. First, Canon 3(B)(8) places significant limits on the judge's consideration of ex parte communications.[21] Although the current Canon includes an exception for ex parte communications that are "expressly authorized by law," the Texas Code, however, does not further define the phrase "authorized by law."[22] Does it extend to local rules establishing specialty courts, or is it limited to statutes, formally adopted administrative regulations, and court opinions? As will be discussed below, in contrast to the Texas Code, the 2007 ABA Model Code provides further guidance in this regard with respect to specialty courts.[23] Similar changes are warranted for the Texas Code.

Another issue concerning specialty courts that should be considered and addressed pertains to disqualifications or recusals. Canon 3 of the Texas Code requires a judge to perform the duties of office "impartially and diligently."[24] Specifically, subsection (B)(1) of Canon 3 requires that a judge not decide a matter "in which disqualification is required or recusal is

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would be pertinent to any specialty court, *see* Meyer, *supra* note 11; *see also* GEYH ET AL., *supra* note 8, § 10.05(3), at 10-27 (highlighting situations in which specialty court judges had "associated with criminal defendants outside of court in ways that appear improper").

[18] *See generally* TEX. CODE JUD. CONDUCT.

[19] *See* Tex. Supreme Court Task Force on the Code of Jud. Conduct, *Final Report and Recommendations* (2005), *available at* http://www.scjc.state.tx.us/pdf/rpts/cjcfinalreport.pdf (recommending several amendments to the Code). The Texas Supreme Court has never adopted any of the Task Force's recommendations for Code amendments. *See* Kevin Dubose, *The Development of Judicial Ethics in Texas*, 1 State Bar of Tex. Prof. Dev. Program, The History of Texas Supreme Court Jurisprudence Course 13, 13.6 (2013).

[20] TEX. CODE JUD. CONDUCT, Preamble.

[21] *Id.* Canon 3(B)(8).

[22] *Id.* Canon 3(B)(8)(e).

[23] *See infra* Part III.

[24] TEX. CODE JUD. CONDUCT, Canon 3.

appropriate."[25] In addition, a "judge shall perform judicial duties without bias or prejudice," and a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . ."[26] A specialty court judge may learn a considerable amount of information about a program participant both on the record and through ex parte communications as the specialty court's team leader.[27] In addition, due to "the intense level of involvement a problem-solving judge has with the defendant and the case, there has always been a question about the judge's impartiality."[28] As discussed below, some states have adopted particular provisions relating to disqualifications or recusals in specialty court proceedings.[29] Should the Texas Code of Judicial Conduct be amended to include any specific rule in this regard for specialty courts?

III. THE ABA MODEL APPROACH

The American Bar Association (ABA) substantially revised its Model Code of Judicial Conduct in 2007.[30] For the first time, the Model Code included recognition of specialty courts.[31] In particular, the revised Code addressed specialty courts in Comment 3 to Section 1 of the Application provisions of the Code, which provides:

> In recent years many jurisdictions have created what are often called "problem solving" courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others

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[25] *Id.* Canon 3(B)(1).

[26] *Id.* Canon 3(B)(5)–(6); *see also* TEX. R. CIV. P. 18b(b)(1)–(3) (identifying certain grounds for recusal in civil cases including questionable impartiality, "personal bias or prejudice," and "personal knowledge of disputed evidentiary facts").

[27] *See* Arkfeld, *supra* note 10, at 318.

[28] *Id.* at 319.

[29] *See infra* notes 135–142 and accompanying text.

[30] GEYH ET AL., *supra* note 8, § 1.03, at 1-5. There were also further amendments in 2010. *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

[31] *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.9 cmt. 4 (2011); One specialty court judge observed that the 2007 "Code for the first time recognizes those of us who work in problem-solving courts." *See* Arkfeld, *supra* note 10, at 318.

> outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on "problem solving" courts shall comply with this Code except to the extent local rules provide and permit otherwise.[32]

In the lead-up to the adoption of the 2007 ABA Model Code, several witnesses at hearings conducted by the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct "urged the Commission to create special ethical rules" for specialty courts.[33] Because of the number and wide variety of specialty courts, however, the Commission opted not to adopt separate ethical guidelines solely for specialty courts.[34] Instead, the Commission set forth Comment 3 as quoted above, by which the ABA recognized that judges presiding over specialty courts are engaging in "nontraditional" activities as part of their duties.[35] The Comment also reflects the Commission's intent that local rules governing specialty courts should prevail over the Code's provisions when they "specifically authorize conduct not otherwise permitted under these Rules."[36] Accordingly, in those

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[32] ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

[33] Mark L. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 264 (2007); *see also* Arkfeld, *supra* note 10, at 318 (stating that "[f]or those who sit in problem-solving court, one of the hopes was that the new Code would address their issues and the concerns that arise out of this new way of conducting court proceedings").

[34] *See* Harrison, *supra* note 33, at 264 (observing that the "Commission was ultimately unwilling to" create separate ethical rules for specialty courts "because therapeutic courts are too numerous and varied to enable the Commission to devise enforceable rules of general applicability for such courts."); *see also* Michele B Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 119 (2011) (observing that "Unfortunately, the ABA fell short of adopting guidelines specifically for alternative courts.").

[35] ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

[36] *Id.*; *see also* Arkfeld, *supra* note 10, at 318 (asserting that Comment 3 reflects an acknowledgement "that the states, which may adopt or modify whatever portions of the Code they feel are appropriate, may allow judges to do things the Code restricts, for example, engage in ex parte communications in the course of monitoring a drug offender's sentence in which treatment is ordered."). *But see* Neitz, *supra* note 34, at 120 (criticizing the Commission's decision to leave these determinations up to local rules: "By leaving these issues to be resolved at the state and local level, the ABA's reluctance to create ethical guidelines for the unique circumstances of nontraditional courts creates a dilemma for judges in these courts.").

states that have adopted the 2007 Model Code, judges in specialty courts who face ethical questions will need to review their state's version of the Code, but may also consult local rules that govern the specialty court.[37]

The 2007 ABA Model Code also addressed and acknowledged that the judge's role in a specialty court is different from that of a court in a traditional proceeding in the coverage of issues pertaining to ex parte communications.[38] First, Model Rule 2.9(A)(5) provides that "[a] judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so."[39] In turn, the 2007 Model Code defines "law" to include "court rules as well as statutes, constitutional provisions, and decisional law."[40] The drafters of the 2007 ABA Model Code provided further guidance with regard to this subsection by including Comment 4 that specifically discussed ex parte communications in specialty courts:

> A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[41]

This provision and comment go further than previous ethical guidelines in attempting to address specialty courts. Nonetheless, "the Commission stopped short of recommending an express problem-solving justice exception to the bar on ex parte communications" due to the wide variety and types of specialty courts.[42] Accordingly, some commentators have

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[37] In addition, should specialty court judges and court administrators located in 2007 Model Code states believe that the Code does not address a particular issue, Comment 3 suggests that "the option exists that a local rule or administrative order could be implemented that would exempt the judge from the Code's requirements." Arkfeld, *supra* note 10, at 318.

[38] *See* ABA MODEL CODE OF JUDICIAL CONDUCT Application § I cmt. 3 (2011).

[39] *Id.* Canon 2, R. 2.9(A)(5).

[40] *See id.* at Terminology (defining "law" for purposes of the Model Code).

[41] *See id.* Canon 2, R. 2.9(A)(5) cmt. 4.

[42] *See* GEYH ET AL., *supra* note 8, at 5-23 (citing CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 38 (2009)).

suggested that states or local jurisdictions do more to tailor statutes or court rules to address the unique needs of specialty courts in their jurisdictions.[43]

IV. A REVIEW FROM OTHER STATES

Although there is not yet a considerable amount of case authority regarding ex parte communications and disqualification or recusal issues arising from specialty court proceedings, several other states have considered these issues in both judicial decisions and ethics opinions.[44] In addition, about half the states have adopted the 2007 ABA Model Code and its provisions recognizing specialty courts.[45] This Section will examine the existing case law and ethics opinions from other states, and then turn to a review of those states that have not only adopted that 2007 ABA Model Code, but also included additional, unique provisions relating to specialty courts.

A. Case Law and Ethics Opinions

A judge overseeing a specialty court will often be exposed to a significant amount of information about a program participant not only through traditional judicial processes, but also via program staffings or ex parte communications with court team members.[46] What, then, is the judge's proper action in a situation in which a hearing is necessary, for example, to consider whether an individual's specialty court participation

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[43] *See id.* (reviewing the history of the development of the special rule for ex parte communications for specialty courts and concluding, "The solution, then, lies in courts of the several jurisdictions developing rules of their own that relax restrictions on *ex parte* communications to meet the special needs of problem-solving justice in their respective court systems."); *see also* Arkfeld, *supra* note 10, at 321 (expressing a concern that the phrase in Rule 2.9(A)(5) and in Comment 4 regarding "expressly authorized by law" might be "open to interpretation" and not necessarily extend to specialty courts that "do not operate under a specific law or administrative order," but nonetheless arguing "that the judge may ethically proceed with the defense attorney present and with waivers in place").

[44] *See, e.g., In re* Disqualification of Giesler, 985 N.E.2d 486 (Ohio 2011).

[45] *See* GEYH ET AL., *supra* note 8, § 1.03, at 1-6–1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Judicial Conduct, although most with revisions to various sections").

[46] *See* Meyer, *supra* note 11, at 205 (observing that a judge overseeing a specialty court will "often have substantial information about . . . [specialty] court participants—some of which was gained through on-the-record colloquies and pleadings and other information from informal staffings . . . .") (focusing on drug courts).

should be terminated or in subsequent proceedings on issues such as parole revocation or sentencing? Case authority, as well as ethics opinions, from other jurisdictions with regard to these questions vis-à-vis specialty court judges provide mixed outcomes. This Section will explore relevant recent judicial decisions and ethics opinions from several other states.

1. New Hampshire

In the New Hampshire case of *State v. Belyea*, Defendant pleaded guilty to forgery and credit card offenses and, following certain probation violations, received a suspended sentence, but with the condition that he take part in a drug court program.[47] During his time with the program, he garnered three program sanctions, the last of which resulted from his leaving the state without permission for two months.[48] Thereafter, the State moved to impose the previously suspended sentence and to terminate Defendant's participation in the drug court program.[49] In response to the State's motion, Defendant moved to recuse the judge "from presiding over any termination proceedings, contending that the judge's participation as a member of the drug court team, which had recommended his termination, created an appearance of impropriety."[50] The trial judge denied the motion and presided over the termination hearing.[51] At the close of the hearing, the judge "ruled that the defendant's participation in the Program [sic] was 'no longer warranted,' and he imposed the . . . suspended sentence."[52] On appeal, Defendant urged that the judge should have recused himself and contended "that a disinterested observer would entertain significant doubt about whether . . . [the trial judge] prejudged the facts and was able to remain indifferent to the outcome of the termination hearing."[53] In particular, he asserted that because the judge had been a part of the treatment team, the judge had "already evaluated the evidence and likely

[47] 999 A.2d 1080, 1081 (N.H. 2010).

[48] *Id.* at 1082.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* Defendant admitted during the hearing that he indeed had been out of the state for nearly two months. *Id.*

[53] *Id.* at 1085.

given input about the recommendation to terminate" to other members of the team.[54]

The New Hampshire Supreme Court rejected Defendant's appeal and noted that his "argument rest[ed] upon the faulty premise that . . . when . . . [the judge] participated as a member of the drug court team and monitored the defendant's progress, he acted in some role other than as a neutral and detached magistrate."[55] Instead, the Court found that the trial judge "remained an impartial judicial officer," and that there was nothing in the record to reflect that the judge "acted as an investigator, advocate, or prosecutor when participating with the drug court team."[56] The Court observed further, "It is not uncommon for judges to acquire information about a case while sitting in their judicial capacity in one judicial setting and later to adjudicate the case without casting significant doubt on their ability to render a fair and impartial decision."[57] The trial judge in *Belyea* "listened to current information on the defendant's progress or problems in the Program" as part of the entire drug court team and considered "recommendations presented by individual members of the team, as a result of the defendant's purported misconduct."[58]

With regard to Defendant's contention of bias based on the trial judge's prior participation as part of the treatment team, the New Hampshire Supreme Court concluded that there was "no evidence that he had or considered facts not known by the drug treatment team or that he had personal, independent knowledge of any facts relied upon in ordering Defendant's termination from the Program [sic]."[59] Moreover, as the presiding judge of the drug court team, the trial judge had solely "learned information about the defendant's compliant and noncompliant behavior in the context of the [team's] weekly review meetings and in the presence of the entire team, and retained the authority to decide and impose any sanctions . . . for a participant's misconduct."[60] Accordingly, the New

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[54] *Id.*

[55] *Id.*

[56] *Id.* The New Hampshire Supreme Court also observed that the trial judge's participation was "in the presence of the entire drug court team, which included a lawyer from the New Hampshire Public Defender Program." *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1087.

[60] *Id.* at 1086. The record also revealed that there were "no disputed evidentiary facts that . . . [the trial judge] relied upon terminating . . . [Defendant] from the program. At the hearing, the

Hampshire Supreme Court determined that no "objective, disinterested observer would . . . entertain significant doubt about . . . [the trial judge's] impartiality."[61]

2. Idaho

Like New Hampshire, other courts have taken the view that a specialty court judge can preside over termination hearings. For example, in *State v. Rogers*, the Idaho Supreme Court considered an appeal by a drug court participant who had been terminated from the program and sentenced for possession of a controlled substance.[62] Defendant had initially pleaded guilty to possession, but the State agreed to a dismissal should Defendant successfully complete the drug court program.[63] After the drug court judge "confronted [Defendant] with information suggesting [Defendant] had been attempting to solicit fellow drug court participants to enter into a prostitution ring or 'adult entertainment business,'" the judge "terminated [Defendant] from the drug court program" and thereafter imposed a sentence on the original possession charge.[64]

On appeal, Defendant alleged that his termination violated due process protections.[65] The Idaho Supreme Court determined that because Defendant pleaded guilty to enter into the drug court program, he then had a protected "liberty interest at stake as he . . . [would] no longer be able to assert his innocence if expelled from the program."[66] Because he had a liberty interest in remaining in the program, he was therefore "entitled to procedural due process before he . . . [could] be terminated from that program."[67]

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defendant agreed that he had left the state for two months without permission." *Id.* This was a "clear violation" of the drug court policies, and the judge's decision to terminate Defendant from the program and impose the previously suspended sentence was based solely on Defendant's "admitted misconduct in fleeing the state, as well as his three prior Program [sic] sanctions." *Id.*

[61] *Id.* at 1086–87.

[62] 170 P.3d 881, 882 (Idaho 2007).

[63] *Id.*

[64] *Id.* at 883. Defendant had also previously violated drug court rules and was sanctioned, yet had "seemed to improve markedly [thereafter] and even earned praise for his performance from the drug court judge" on two occasions. *Id.*

[65] *Id.* at 882–83.

[66] *Id.* at 884.

[67] *Id.* The Court reasoned that a liberty interest was implicated because prior to his termination from the drug court program "he was living in society (subject to the restrictions of

Notwithstanding this holding, however, the Court also determined that the drug court judge could preside over the termination proceedings, as well as any ensuing sentencing hearing, and that such subsequent adjudicatory processes would satisfy procedural due process requirements.[68]

3. Minnesota

Similarly, consider the court's dicta in an unpublished Minnesota Court of Appeals case involving the termination of parental rights.[69] Evidence in that case revealed that the children's mother had "received nine sanctions for drug court violations" and also "had one missed [drug] test, one diluted [drug] test, and one positive test for cocaine."[70] After the trial court terminated her parental rights, and among her contentions on appeal, Appellant asserted that the trial judge "should have voluntarily removed himself as the judge . . . because he . . . had previous knowledge of facts outside of the record and preside[d] over the county's drug court program."[71] The appellate court declined to rule on the contention because the parent had not properly objected at trial.[72] Nonetheless, the court added, "In any event, we see no basis for removal."[73] The court found no evidence of bias or reason to question the judge's impartiality and declared that "any knowledge the judge had of the appellant's drug history was obtained in his judicial capacity" and not via his personal or private life.[74] The court concluded, "Any information the district court judge obtained about appellant through her participation in the county's drug court program was acquired in his judicial capacity" not his private life.[75] "Therefore, he was

complying with the drug court program), and after his termination from . . . [the drug court program] he was incarcerated." *Id.* at 885.

[68] *Id.* at 886. The Court also observed that "the neutral court may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed to [Defendant] prior to the hearing, is reliable, and would assist the court in making its determination." *Id.*

[69] *In re* Welfare of Children of C.C., No. 07-JV-11-2909, 2012 Minn. App. LEXIS 471, at *1, *3 (Minn. Ct. App. May 29, 2012).

[70] *Id.* at *4.

[71] *Id.* at *20.

[72] *Id.*

[73] *Id.* at *21–22.

[74] *Id.*

[75] *Id.*

not required to disqualify himself under the Minnesota Code of Judicial Conduct."[76]

4. Kentucky

Kentucky takes a similar view. In 2011 the Ethics Committee of the Kentucky Judiciary issued an ethics opinion "regarding recusal when the drug or mental health court judge will be the same judge presiding over a probation revocation hearing."[77] The ethics committee concluded that in general a specialty court judge may preside at a subsequent revocation hearing at which program termination serves as the basis for the revocation, and that "recusal would only be required in certain circumstances."[78] In particular, the committee opined that if the specialty court judge "receives the reason for the termination from the program in the course of his or her official duties, and no part of the evidence at a subsequent revocation hearing is dependent on the judge's personal knowledge of any pertinent circumstances, no recusal is required."[79]

In formulating this opinion, the Ethics Committee of the Kentucky Judiciary reasoned that a specialty court judge "by the very nature and purpose of the program, must remain familiar with the status of the participant, who has voluntarily elected to enter the program."[80] The committee observed further, however, that recusal could "be required in situations where information on which the revocation may be based comes from the judge's 'personal knowledge,' *i.e.*, information learned by the judge outside the regular drug or mental health court process."[81] The

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[76] *Id.*; *see also* Wilkinson v. State, 641 S.E.2d 189, 190 (Ga. Ct. App. 2006). The court rejected an appeal from a trial judge's decision to terminate an individual from a drug court program. *Id.* One of the issues on appeal was the drug court judge's purported refusal to consider the defendant's recusal motion relating to the termination hearing. *Id.* at 191. The court of appeals found the contention without merit and relied, in part, on the fact that the defendant had waived certain rights to seek recusal of the drug court judge as part of entering into the drug court contract. *Id.* The court also stated, "[W]e will not interfere with a trial court's termination of a drug contract absent manifest abuse of discretion on the part of the trial court." *Id.* at 190.

[77] The Ethics Comm. of the Ky. Judiciary, *Judicial Ethics Opinion JE-122*, KY BENCH & BAR, November 2011, at 34, 34, *available at* http://www.kybar.org/documents/benchbar_searchable/benchbar_1111.pdf.

[78] *Id.*

[79] *Id.* at 35.

[80] *Id.*

[81] *Id.*

committee then identified an example that would likely require recusal as a situation in which the specialty court judge "personally observed the . . . [program] participant committing some act that would form or support the basis for termination from the program."[82]

5. Tennessee

By way of contrast, however, the Tennessee Court of Criminal Appeals took a very different approach to the recusal question in *State v. Stewart* by focusing on due process concerns.[83] In *Stewart*, Defendant claimed "that his due process rights were violated because the judge presiding over his probation revocation had previously served as a member of his drug court team and had received *ex parte* information regarding Defendant's conduct at issue by virtue of his prior involvement."[84] The court agreed that due process required that a different judge, who had "not previously reviewed the same or related subject matter as part of the defendant's drug court team," must adjudicate the probation revocation proceedings.[85] Defendant in *Stewart* was not successful in his drug court participation, and accrued numerous program violations.[86] Consequently, "a trial judge who had participated in a significant amount of the defendant's drug court treatment, including his expulsion from the program," presided over Defendant's probation revocation hearing.[87] Defendant "urged the trial judge to recuse

[82] *Id.* In formulating its opinion, the committee observed that the "Kentucky Supreme Court has stated that drug court 'is a **court function**, clearly laid out as an alternative sentencing program . . . .'" *Id.* (citing Commonwealth v. Nicely, 326 S.W.3d 441, 444 (Ky. 2010)) (emphasis in original). The committee also noted, "Ordinarily, recusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse." *See id.* (quoting Marlowe v. Commonwealth, 709 S.W.2d 424, 428 (Ky. 1986)) (internal citations omitted) (internal quotation marks omitted).

[83] No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, *28 (Tenn. Crim. App. Aug. 18, 2010).

[84] *Id.* at *1.

[85] *Id.* at *1–2.

[86] *See id.* at *8–10. The appellate court observed that the case was "not a shining example of a successful drug court program intervention" and that as part of the program, "the defendant had ongoing issues with marijuana usage and repeatedly failed to comply with basic program requirements." *Id.* at *8. He was also "'sanctioned' five or six times and sentenced to significant jail terms wholly outside of those envisioned by his original sentence or probation." *See id.* at *8–10 (delineating a lengthy list of the defendant's drug court program violations and sanctions).

[87] *Id.* at *10–11.

himself because of his prior participation on the drug court team," but the judge declined, "citing the practical difficulties of bringing in a new judge every time someone violates their drug court contract."[88] The trial judge then found that Defendant had violated his probation terms, and the court sentenced him to jail time.[89]

On appeal, the Tennessee Court of Criminal Appeals determined that due process bars "any member of the defendant's drug court from adjudicating a subsequent parole revocation *when the violations or conduct at issue in both forums involves the same or related subject matter.*"[90] Given the liberty interest at stake, the court first observed, "[i]t is now firmly established that a probationer is entitled to due process when a State attempts to remove his probationary status and have him incarcerated."[91] The Court then identified the minimum required procedural protections and described the right to a "neutral hearing body" as "[o]ne of the most fundamental" of the due process rights.[92] In finding a violation of due process in *Stewart*, the Court reasoned that "the role of a judge in the drug courts program is, by its very nature, almost the polar opposite of 'neutral and detached.'"[93] In great detail, the Court highlighted the following array of due process concerns with regard to a drug court judge's neutrality in later presiding at a defendant's probation revocation hearing:

> • Drug court judges are expected "'*to step beyond* their traditionally independent and objective arbiter roles.'"[94]

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[88] *Id.* at *11. In seeking recusal, the defendant argued "that the judge would already be familiar with the materials that would comprise most of the State's proof at the probation revocation by virtue of his [prior] involvement." *Id.* Although the trial judge denied the motion to recuse, he "stated that he would not mind getting further guidance from the Court of Criminal Appeals on the issue as it was likely to arise again in other cases." *Id.*

[89] *Id.* at *12.

[90] *Id.* (emphasis in original).

[91] *Id.* at *13.

[92] *Id.* at *13–14. The court further opined that "a defendant's rights are plainly violated when his probation revocation case is reviewed by something other than a 'neutral and detached' arbiter" and that in Tennessee, trial judges serve as the probation revocation adjudicators. *Id.* at *14 & n.1.

[93] *Id.* at *14.

[94] *Id.* at *15 (emphasis in original) (quoting Key Components, *supra* note 4, at 15). The court further explained that under Tennessee law, drug court treatment programs are required to operate "according to the principles established by the Drug Courts Standards Committee of the National Association of Drug Court Professionals." *Id.* at *14. *See also* TENN. CODE ANN. § 16-22-104

• Drug court judges are expected to "issue praise for regular attendance or a period of clean drug tests, offer encouragement, and even award the participants tokens of accomplishment during open court ceremonies" for program successes.[95]

• Drug court judges should have "frequent status hearings and maintain regular communications with other program staff to uncover noncompliance," should instill a "fear that big brother is always watching," and address program infractions "with responses ranging from disparaging remarks to jail time."[96]

• Drug court judges are "an integral part of the defendant's 'therapeutic team'" and are "expected to 'play an active role in the [participant's] drug treatment process.'"[97] Accordingly, a drug court judge "will necessarily find it difficult, if not impossible, to reach the constitutionally-required level of detachment when dealing with a course of conduct . . . [that was] previously reviewed as a member of a drug court team."[98]

• Drug court judges will have participated in team decisions about treatment and services, and thus will "develop a stake in the success or failure" of the selected programs.[99]

• Drug court judges are participating in a collaborative process of decision-making that "poses an additional threat

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(West 2013) (setting forth ten general principles for the establishment and operation of drug court programs). Given the lack of further legislative elucidation of these ten principles, the court turned to the National Association of Drug Court Professionals' program guidelines for further clarification. *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *14–15.

[95] *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *14–15 (citing Key Components, *supra* note 4, at 13). The court reasoned that such repeated praiseworthy activities could lead the prosecution to "question a judge's impartiality." *Id.* at *16.

[96] *Id.* The court further observed that the judge's imposition of disciplinary actions "could cause the defendant to reasonably question the judge's impartiality when reviewing the same subject matter in a different forum later." *Id.* at *17.

[97] *Id.* at *18 (quoting Key Components, *supra* note 4, at 2, 7).

[98] *Id.*

[99] *See id.* at *19 (leading the court to question a drug court judge's detachment in later proceedings).

> to the impartiality of any judge who would later adjudicate a defendant's probation revocation involving the same or related conduct."[100]
>
> • Drug court judges will have received access to a "considerable amount of *ex parte* information . . . as a necessary component of the drug court process."[101]
>
> • Drug court judges, as part of participation in and leadership of the drug court process, are privy "to a considerable amount of information about the defendant's conduct that would not normally be relevant to adjudicating a probation revocation"[102] and will likely be aware of other challenges or problems such as a "participant's mental illnesses, sexually transmitted diseases, domestic violence, unemployment, and homelessness."[103]

Accordingly, the court in *Stewart* concluded that a drug court judge who participated as part of, and presided over, a defendant's drug court team could not "function as a 'neutral and detached' hearing body . . . for alleged probation violations that . . . [were] based on the same or related subject matter" that the drug court team had previously reviewed.[104] In reaching its decision, the court specifically rejected the reasoning of both the Idaho Supreme Court in *State v. Rogers*[105] and the New Hampshire Supreme

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[100] *Id.* at *20. The court suggested that a drug court judge might subordinate his or her views to those of the treatment team, could put certain decisions up to a vote of the treatment team members, and generally be personally invested in "prior collaborative team decisions" that could "cloud the exercise of his or her own individualized, detached, and impartial review" of later adjudicatory processes. *Id.* at *21.

[101] *Id.* at *22. The court identified as troubling potential ex parte contacts such as frequent treatment team communications about a defendant's program participation, and "frequent interactions between the participants and drug court judges, in which the participants will not be represented by counsel." *Id.* at *23–25. The court further opined that "it simply strains credulity to believe that judges could or would consistently set aside all of the considerable amount of information they receive in this *ex parte* manner at a later probation revocation." *Id.* at *23–24.

[102] *Id.* at *25.

[103] *Id.* at *25 (quoting Key Components, *supra* note 4, at 7).

[104] *Id.* at *30.

[105] *See id.* at *30–*31 (rejecting the approach of State v. Rogers, 170 P.3d 881, 886 (Idaho 2007), and reasoning that the Idaho court had not considered "all of the due process problems attendant to permitting judges to play . . . dual roles with respect to the same subject matter"). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

Court in *State v. Belyea*.[106] In addition, given that the court in *Stewart* reached its conclusion on due process grounds, the court found it "unnecessary to address whether the [Tennessee] Code of Judicial Conduct . . . would also generally require recusal" in similar cases.[107]

Of note, approximately six months following the Tennessee Court of Criminal Appeals' decision in *Stewart*, the state's Judicial Ethics Committee provided an advisory opinion on the very question left unaddressed in *Stewart*: whether the state's Code of Judicial Conduct will "permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court

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[106] *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *31–34 (declining to follow the decision in State v. Belyea, 999 A.2d 1080 (N.H. 2010), and observing that it was "similarly unpersuaded" by *Belyea*'s treatment of the court's "constitutional concerns"). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text. The *Stewart* court also noted that its decision was consistent with an earlier 2008 Tennessee decision. *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *28–29 (citing State v. Stewart, No. M2008-00474-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. Oct. 6, 2008)). In the 2008 *Stewart* case (which coincidentally involved a different defendant with the surname Stewart), the court found a due process violation when the drug court judge delegated decisions about probation revocation and appropriate sentencing to members of the drug court team who had been present at the revocation hearing. *Id.* at *5–6, *10. After presiding at the revocation hearing, the judge asked the team members to deliberate and provide a recommendation. *Id.* at *5–6. The team met without the judge and thereafter provided a recommendation for termination and that the defendant "'serve his original sentence.'" *Id.* at *6. The trial judge adopted "'the ruling of the team.'" *Id.* The appellate court held this to be reversible error and found "telling that the trial judge instructed the drug court team at the hearing, 'I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between.'" *Id.* at *11. Moreover, the appellate court ordered that the matter be heard by a different judge on remand because of concerns that the drug court judge had received ex parte communications in his role with the drug court team, which could have impacted his impartiality in later proceedings. *Id.* at *12. In particular, the court declared that "the trial judge received communication outside the presence of the parties concerning the matter and relied on that communication in disposing of the defendant's case." *Id.* Thereafter, in the 2010 *Stewart* case, the court relied on its earlier holding in the 2008 *Stewart* decision with regard to finding due process concerns pertaining to exposure to ex parte communications during drug court team activities. *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *28–30. *See also* Alexander v. State, 48 P.3d 110, 115 (Okla. 2002) (recognizing "the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant," and declaring that in future cases involving the termination of drug court participation, a "defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution").

[107] *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *12–13.

program."[108] In contrast to the court's sweeping language in *Stewart*, the state's ethics committee opined that the state's Code of Judicial Conduct "does not automatically require recusal," and that recusal is required "only if the judge determines that he/she cannot be impartial."[109] In contrast to *Stewart*, the ethics committee relied favorably on both the New Hampshire Supreme Court's decision in *State v. Belyea*[110] and the Idaho Supreme Court's opinion in *State v. Rogers*,[111] and quoted both cases with approval.[112] Moreover, the ethics committee added that "[i]t appears that judicial ethical considerations are moving in the direction taken in *Belyea* as to allowing 'special' courts to receive ex parte communications."[113] As for *Stewart*, the ethics committee merely referenced the case and its holding, and then observed that the Tennessee Court of Criminal Appeals had decided the case "upon constitutional rather than ethical grounds and . . . [took] no position as to the latter."[114]

Somewhat inexplicably, the Tennessee ethics committee made no attempt to reconcile its decision, which focused on judicial ethics, with the *Stewart* holding that was grounded on due process considerations.[115]

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[108] Tenn. Judicial Ethics Comm., Advisory Op. 11-01, at 1 (Mar. 23, 2011), *available at* http://www.tncourts.gov/sites/default/files/docs/11-01.pdf.

[109] *Id.*

[110] *See Belyea*, 999 A.2d at 1085–86 (finding no prejudgment of the facts or question as to a drug court judge's impartiality where the judge had acquired information and knowledge while serving in a judicial capacity on the drug court team). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text.

[111] *See* State v. Rogers, 170 P.3d 881, 886 (Idaho 2007) (determining that a drug court judge may serve in subsequent program termination proceedings and sentencing hearings). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

[112] Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2.

[113] *Id.*, at 4. In support of this proposition, the committee referenced the 2007 ABA Model Code of Judicial Conduct and quoted from the ABA's comments to "Rule 2.9 the special considerations granted in this regard to 'problem-solving' courts." *Id. See also supra* notes 31–43 and accompanying text (discussing the 2007 ABA Model Code and provisions included therein pertaining to specialty courts).

[114] Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4. The committee did recognize that *Stewart* had held that "the due process clause prevented a judge who had been a member of the defendant's drug court team from later conducting a probation revocation hearing as to the defendant" for alleged violations "'based on the same or related subject matter that has been reviewed' by the judge as a member of the drug court team." *See id.* (quoting State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Aug. 18, 2010)).

[115] *Id.*

Instead, the ethics committee declared that in Tennessee the courts follow "the same 'reasonableness' standard as was applied in *Belyea*."[116] "That is, the judge must take the more objective, rather than subjective, approach and 'ask what a reasonable, disinterested person knowing all the relevant facts would think about his or her impartiality.'"[117] In turn, a judge's decision on recusal should be made on a "case-by-case basis," and for a drug court judge "the outcome would necessarily depend upon the specific information the judge acquired as a member of the drug court team."[118] Accordingly, the ethics committee concluded "that serving as a functioning member of the drug court team does not in and of itself require recusal of the judge in a revocation hearing."[119] This opinion, of course, appears to run directly counter to the Tennessee Court of Criminal Appeals decision in *Stewart* in which the court sweepingly declared that due process precludes a judge who was a member of a drug court team from later presiding over a probation revocation hearing in which the probation violations are the same as those that were before the drug court team.[120]

Can the 2011 Tennessee ethics opinion and the court's due process decision in *Stewart* be reconciled? Although the court's language in *Stewart* was broad, the specific facts are instructive. Upon reviewing the record, the court observed, "[W]e are additionally troubled by the four or five occasions where the defendant in this case was 'sanctioned' to significant jail time by the drug court team during the two years he participated in the program."[121] This resulted in the defendant being "appreciably worse off from a punitive perspective than if he had chosen not to participate in the drug court program at all."[122] Finding this problematic, the court urged

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[116] *Id.*

[117] *See id.* (quoting Kinard v. Kinard, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998), and referencing the New Hampshire Supreme Court's approach in State v. Belyea, 999 A.2d 1080, 1085–86 (N.H. 2010)).

[118] *Id.* The committee added that under "the 'reasonableness' standard, recusal may be required in one case and not required in another." *Id.*

[119] *Id.* at 5. The committee added further that recusal would be necessary "only if the appearance of impartiality should surface in the face of a fair and honest 'objective standard' analysis by the judge predicated upon the specific facts developed in each particular case." *Id.*

[120] *See* State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, *30 (Tenn. Crim. App. Aug. 18, 2010).

[121] *Id.* at *37. The court added that "the net effect of these sanctions appears to be that approximately a half-year has been tacked onto the overall defendant's sentence." *Id.*

[122] *Id.* The court seemed troubled that a therapeutic form of process could result in the addition of "significant amounts of jail time" as sanctions. *Id.* at *39.

judges who oversee drug court programs to assure that the programs "focus[] on drug addiction therapy and treatment, and recogniz[e] that, for good reason, punishment with substantial periods of incarceration is [the] bailiwick of the traditional criminal justice system."[123] By way of contrast, the ethics committee referenced no comparable egregious facts pertaining to the matter under its review.[124] Instead, the ethics committee noted that individuals who participated in the drug court program pertaining to the matter then under review each executed a detailed "waiver, consenting to the drug court judge's receiving a broad range of ex parte communications regarding the matter."[125] After quoting the waiver in full, the ethics committee concluded that the waiver authorized the drug court judge "to have what would appear to be access to all relevant documents and records but limits its use to 'status hearings, progress reports, and sentencing hearings.'"[126] Accordingly, the ethics committee declined to require an automatic recusal and determined that a case-by-case review was appropriate.[127]

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[123] *Id.* at *41. The court added, "When necessary, truly recalcitrant participants may be swiftly returned to the traditional system via the drug court expulsion process." *Id.*

[124] Indeed, the committee identified virtually no facts with regard to the specific matter for which the drug court judge had requested an ethics opinion. *See* Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2 (setting forth the only references in the opinion to the underlying case).

[125] *Id.* at 2. The waiver authorized disclosure to drug court team members of communications such as "progress notes, medical diagnosis, testing, drug results, attendance records, results of medical testing and drug screens, HIV medical records, counselor and social worker notes and summaries, . . . and all other records associated with rehabilitation and treatment." *Id.* at 3 (quoting waiver).

[126] *Id.* at 3–4. Moreover, the waiver provided that recipients of information obtained throughout the process could "redisclose it only in connection with their official duties as members of the . . . Drug Court Team." *Id.* at 3 (quoting waiver). By way of contrast, although there had been references to a signed waiver in the record before the court in *Stewart*, the record did "not contain a copy, and consequently" the court did "not know the extent of the rights . . . [the defendant] purportedly waived prior to his participation" in the drug court program." *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at *39–*40 n.4. The court expressed doubt, however, as to whether—as a matter of due process—the defendant had the power to waive constitutional rights pertaining to "deprivations of his absolute right to liberty, such as those that may have occurred" in the case. *See id.* (discussing same in the context of the court's concern about the drug court having imposed additional jail time for program violations).

[127] Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

B. State Codes of Judicial Conduct

Roughly half the states have adopted the 2007 ABA Model Code of Judicial Conduct.[128] As discussed above, the 2007 Model Code recognizes the unique nature of specialty courts and includes some coverage of ex parte communications rules for such courts.[129] As described in this Section, however, a number of states have promulgated variations of the 2007 Model Code to address specialty courts more specifically.

1. Tennessee

Subsequent to both *Stewart* and the 2011 Tennessee Ethics Committee opinion discussed above,[130] the Tennessee Supreme Court adopted a new Code of Judicial Conduct that became effective on July 1, 2012.[131] Tennessee's new judicial conduct code is modeled in large part on the 2007 ABA Model Code of Judicial Conduct, but with some differences.[132] With regard to specialty courts such as drug courts and mental health courts, like the 2007 ABA Model Code, the revised Tennessee Code includes a general recognition of these courts in the Code's "application" section.[133] In

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[128] *See* GEYH ET AL., *supra* note 8, § 1.03, at 1-6–1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Jud. Conduct, although most with revisions to various sections"). For links to documents that describe the differences between the various state enactments and the text of the 2007 Model Code, see American Bar Ass'n, Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct, *available at* http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html.

[129] *See supra* notes 30–43 and accompanying text.

[130] *Stewart*, 2010 Tenn. Crim. App. LEXIS 691; Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 1. *See supra* notes 83–127 and accompanying text.

[131] *See In re: Petition to Amend New Rule 10, RJC 4.1, Rules of the Tenn. Supreme Court*, Order No. M2012-01031-SC-RL2-RL, at 1 (Tenn. June 26, 2012), *available at* http://www.tba.org/sites/default/files/rule_10_rjc4.1.pdf (adopting a "comprehensive revision of the Tennessee Code of Judicial Conduct").

[132] For a detailed chart comparing the 2012 Tennessee Code with the 2007 ABA Model Code, see *Comparison between final revised Tennessee Code of Judicial Conduct and ABA Model Code of Judicial Conduct (2007)* (Aug. 8, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tennessee_mcjc_final.authcheckdam.pdf.

[133] *See* TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, Application § I cmt. 3 (2012), *available at* http://www.tsc.state.tn.us/rules/supreme-court/10, which states:

> Some states, including Tennessee, have created courts in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be

addition, and specifically with regard to ex parte communications, the new Tennessee Code provides the following:

> When serving on a mental health court or a drug court, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. However, if this ex parte communication becomes an issue at a subsequent adjudicatory proceeding in which the judge is presiding, the judge shall either (1) disqualify himself or herself if the judge gained personal knowledge of disputed facts . . . or the judge's impartiality might reasonably be questioned . . . or (2) make disclosure of such communications subject to the [Code's] waiver provisions . . . .[134]

Accordingly, Tennessee's Supreme Court has adopted an approach that is closer to the 2011 Ethics Committee opinion's advisory opinion that judges in specialty courts are to consider recusal motions on a case-by-case basis,[135] rather than the Tennessee Court of Criminal Appeals' categorical approach based on due process considerations set forth in *Stewart*.[136]

2. Idaho

By way of contrast, consider the Idaho Supreme Court's approach to the same issue. In 2008, the court amended the ex parte contacts provisions of the Idaho Code of Judicial Conduct by adding the following subsection that focuses specifically on specialty courts:

> (f) A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings, or by written documents provided to

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authorized and even encouraged to communicate directly with social workers, probation officers and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. Judges serving on such courts shall comply with this Code except to the extent laws or court rules provide and permit otherwise.

Id.

[134] *Id.* Canon 2, R. 2.9 cmt. 4 (internal citations to other sections of the Code omitted).

[135] Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

[136] State v. Stewart, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, *30 (Tenn. Crim. App. Aug. 18, 2010).

> all members of the problem solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.[137]

The Idaho Supreme Court added the foregoing provision following a very restrictive March 2008 Idaho Judicial Council ethics opinion which "stated that 'e-mails, telephone calls or written communications from counselors, drug court coordinators, [or] prosecutors done in an ex parte manner are all prohibited except for those limited situations permitted by the [former] Canons.'"[138] The opinion also directed that the parties must have representation in attendance when the specialty court judge is present at a staffing.[139] The ethics opinion accordingly created a challenge for Idaho specialty courts described as follows: "If counsel does not attend all court sessions and staffings, how can judges [ethically] participate as part of the problem-solving court team . . . ?"[140] Another concern was the "possible infringement of a defendant's rights when a judge who had been exposed to ex parte communications presides over subsequent proceedings involving the termination of the defendant from a problem-solving court, a probation revocation hearing, or sentencing."[141]

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[137] IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf. The term "staffing," as used in the subsection, was added in 2012 and is defined to mean "a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant's progress in the problem solving court, treatment recommendations, or responses to participant compliance issues." *See id.* at Terminology (including the term in a list of "Terminology" definitions, and noting an adoption date of Nov. 30, 2012, with an effective date of Jan. 1, 2013).

[138] *See* Michael Henderson, *Ex Parte Communications – Adapting an Adversarial Rule to the Problem-Solving Setting*, THE ADVOCATE (Idaho), Vol. 51, Sept. 2008, at 48, 48 (quoting ethics opinion).

[139] *Id.*

[140] *Id.*

[141] *Id.* Recall that in State v. Rogers, 170 P.3d 881, 885–86 (Idaho 2007), the Idaho Supreme Court recognized that an individual participating in a drug court program has a protected liberty interest at stake in determinations whether to terminate that person's participation; however, the court also concluded that although the defendant was entitled to a due process hearing, the drug

In response to the 2008 ethics opinion that called into question these practices in the specialty courts, the Idaho Supreme Court "sought a wide range of views" and ultimately adopted amendments to its Code of Judicial Conduct specifically regarding special courts.[142] The new subsection—Canon 3(b)(7)(f)—both recognizes the role of specialty courts, and also authorizes the court to consider ex parte communications at staffings and via written documents that are provided to all members of the specialty court team.[143] The court also added a provision allowing a judge to "initiate, permit, or consider communications dealing with substantive matters or issues on the merits in the absence of a party who had notice . . . and did not appear" at scheduled court proceedings "including a conference, hearing, or trial."[144] Finally, however, the Idaho Supreme Court elected to adopt a blanket rule that any specialty court judge "who has received any . . . ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent" proceeding for program termination, a probation violation, or sentencing . . . .[145]

3. Additional States

Like Idaho, a number of other states have gone beyond the 2007 Model Code's provisions relating to ex parte communications in specialty courts to provide expanded or more specific coverage. Ten of these states, in addition to Idaho, have adopted specific subsections or unique comments that focus

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court judge could "preside over the termination hearings." For a detailed discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

[142] *See* Henderson, *supra* note 138, at 48 (also indicating that the court consulted with judges, court administrators, prosecutors, defense lawyers, and the state's Drug Court and Mental Health Court Coordinating Committee).

[143] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013).

[144] *See id.* Canon 3(B)(7)(e). *See also* Henderson, *supra* note 138, at 48 (observing that this "provision clarifies ex parte prohibition" with regard to scheduled court proceedings).

[145] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f). This decision, of course, represented a reversal, of sorts, from the same court's 2007 decision in *Rogers* that due process did not require that a subsequent termination proceeding must always be considered by a judge different from the previously presiding drug court judge. *See* Rogers, 170 P.3d, at 885–86. *See also* Neitz, *supra* note 34, at 124 (suggesting that this aspect of the "Idaho approach recognizes that ex parte communications can sometimes be useful, but should not be a determining factor in the resolution of a case").

on activities in specialty courts.[146] For example, Arizona's 2009 Code of Judicial Conduct added an additional subsection to Rule 2.9 covering ex parte communications, which provides:

> (6) A judge may engage in ex parte communications when serving on problem-solving courts, if such communications are authorized by protocols known and consented to by the parties or by local rules.[147]

Similarly, in adopting the 2007 Model Code, Hawaii crafted the following additional subsection regarding ex parte communications:

> (6) A judge may initiate, permit, or consider an ex parte communication when serving on a therapeutic or specialty court, such as a mental health court or drug court, provided that the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication and any factual information received that is not part of the record is timely disclosed to the parties.[148]

Ohio has promulgated a comparable provision, which states:

> (6) A judge may initiate, receive, permit, or consider an ex parte communication when administering a *specialized docket*, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the ex parte communication.[149]

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[146] These additional states with unique provisions include Arizona, Hawaii, Ohio, Nebraska, North Dakota, Oklahoma, Kansas, Maryland, Iowa, and New Mexico. *See infra* notes 147–167 and accompanying text.

[147] ARIZ. REV. STAT. ANN., Sup. Ct. Rule 81, Canon 2, R. 2.9(6) (2009), *available at* http://www.azcourts.gov/Portals/37/NewCode/Master%20Word%20Version%20of%20Code.pdf.

[148] HAW. RULES OF CT. ANN., Ex. B, REV. CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2009), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm.

[149] OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2010) (emphasis in original), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf. The Ohio code defines "specialized docket" to include "drug courts, mental health courts, domestic violence courts, child support enforcement court, sex offender courts, OMVI/DUI courts reentry courts, housing courts, and environmental courts." *See id.* at 9, Terminology (defining "specialized docket" for purposes of the Ohio Code of Judicial Conduct).

Nebraska has similarly created a variation on the 2007 ABA Model Code by adopting the following additional subsection pertaining to specialty courts:

> (6) A judge may initiate, permit, or consider ex parte communications when serving on therapeutic or problem-solving courts, mental health courts, or drug courts, if such communications are authorized by protocols known and consented to by the parties. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[150]

In contrast to the more detailed subsections described above, North Dakota and Oklahoma have promulgated narrower provisions that focus on party consent. Indeed, both North Dakota's and Oklahoma's versions of the ex parte rules include the following identical language:

> (4) With the consent of all parties, the judge and court personnel may have ex parte communication with those involved in a specialized court team. Any party may expressly waive the right to receive that information.[151]

Rather than adding a separate subsection to its version of Rule 2.9, when Kansas adopted the 2007 ABA Model Code, the state promulgated a unique comment that cross-references a different court rule pertaining to specialty courts. In particular, the comment provides:

> (4) A judge may initiate, permit, or consider ex parte communications as authorized by Supreme Court Rule 109A when serving on therapeutic or problem-solving

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[150] NEB. REV. CODE OF JUD. CONDUCT § 5-302.9(6) (2011), *available at* http://www.supremecourt.ne.gov/supreme-court-rules/2152/%C2%A7-5-3029-ex-parte-communications.

[151] N.D. CT. RULES, RULES OF JUD. CONDUCT Canon 2, R. 2.9(4) (2012), *available at* http://www.ndcourts.gov/rules/judicial/frameset.htm; OKLA. CODE OF JUDICIAL CONDUCT Chap. 1, App. 4, Rule 2.9(4) (2011), *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=461667. Comment 4 to the North Dakota rule adds, "A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts." N.D. COURT RULES, RULES OF JUD. CONDUCT Canon 2, Rule 2.9(4), Comment (4). Similarly, Oklahoma's version includes virtually the same comment, except it refers to "specialized courts" rather than therapeutic or problem-solving courts. OKLA. CODE OF JUD. CONDUCT Chap. 1, App. 4, R. 2.9(4) & cmt. 4 (2011).

> courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[152]

In turn, Kansas Supreme Court Rule 109A sets forth additional provisions authorizing and regulating specialty courts for persons with mental illness or substance addictions.[153] The rule authorizes ex parte communications between the specialty court judge and members of the "problem-solving court team, either at a team meeting or in a document provided to all members of the team."[154] Moreover, the rule specifically allows the specialty court judge who has received ex parte communications as part of presiding over the specialty court team to preside over subsequent proceedings involving a defendant provided that the judge discloses "the existence and, if known, the nature of" the ex parte information, and both the defendant and the prosecution consent.[155] Accordingly, under this latter provision, if a defendant objects to having the specialty court judge preside over a later program termination, probation revocation, or sentencing proceeding, the rule would require the judge's recusal.[156] Unlike Idaho's unique adaptation of the 2007 ABA Model Code, however, the Kansas approach does not create a blanket requirement for recusal, and both parties may consent to allowing the specialty court judge to preside.[157]

Like Kansas, Maryland's version of the 2007 ABA Model Code pertaining to ex parte communications includes a cross-reference to another procedural rule; the Maryland provision states:

> (6) When serving in a problem-solving court program of a Circuit Court or the District Court pursuant to Rule 16-206,

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[152] KAN. CODE OF JUD. CONDUCT, R. 601B, Canon 2, R. 2.9 cmt. 4 (2009), *available at* http://www.kscourts.org/rules/Judicial_Conduct/Canon%202.pdf.

[153] KAN. SUP. CT. R. 109A, § (a) (2012), *available at* http://www.kscourts.org/rules/District_Rules/Rule%20109A.pdf.

[154] *Id.* § (b).

[155] *Id.* § (c)(1)–(2).

[156] *Id.* § (c)(2).

[157] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf. (describing Idaho's across-the-board requirement that a specialty court judge who has received ex parte communications while leading the specialty court *not* preside over subsequent legal proceedings involving the same defendant who was a part of the specialty court program).

> a judge may initiate, permit, and consider ex parte communications in conformance with the established protocols for the operation of the program if the parties have expressly consented to those protocols.[158]

In turn, Maryland Rule 16-206 sets forth general guidelines for specialty courts in the state, and delineates a process for the planning and approval of specialty courts.[159] The rule also includes official commentary suggesting that a specialty court judge should be sensitive to any prior receipt of ex parte communications in any ensuing post-termination proceedings.[160]

Although they did not adopt unique rules pertaining to specialty court judges, two additional states—Iowa and New Mexico—departed from the proffered language in the 2007 ABA Model Code of Judicial Conduct via the adoption of state-specific comments pertaining to specialty courts. First, Iowa modified the official comments to the "Application" section of the Model Code by including a unique comment pertaining almost exclusively to drug courts (and not to other specialty courts).[161] In contrast to the comparable section of the 2007 ABA Model Code, which provides that "local rules" may take priority in authorizing conduct by specialty court judges not otherwise permitted under the rules, the Iowa provision instead references other "law" regarding specialty courts that can take precedence

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[158] MD. RULE 16-813, Rule 2.9(a)(6) (2010).

[159] MD. RULE 16-206(a)–(c) (2013).

[160] *Id.* at 16-206(e), Committee Note (providing that in the consideration of "whether a judge should be disqualified . . . from post-termination proceedings involving a participant who has been terminated from a problem-solving court program, the judge should be sensitive to any exposure to ex parte communications or inadmissible information the judge may have received while the participant was in the program").

[161] IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Application § I cmt. 3, at 4 (2010). Comment 3, which focuses primarily on drug courts, provides the following:

> In Iowa, many districts have formed drug courts. Judges presiding in drug courts may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When the law specifically authorizes conduct not otherwise permitted under these rules, they take precedence over the provisions set forth in the Iowa Code of Judicial Conduct. Nevertheless, judges serving on drug courts and other "problem solving" courts shall comply with this Code except to the extent the law provides and permits otherwise.

Id.

over conduct permitted by the Iowa rules.[162] In turn, the Iowa Code defines "law" broadly to include not only "court rules," but also "statutes, constitutional provisions, and decisional law."[163] Similarly, New Mexico expanded both the rule pertaining to ex parte communications and one of the comments to its version of the ex parte rule to provide a broader scope of applicable, permissive source law for specialty courts than under the 2007 ABA Model Code.[164] Like Iowa and the 2007 ABA Model Code, the New Mexico Code defines "law" to "encompass[] court rules as well as statutes, constitutional provisions, and decisional law."[165] With regard to its version of the ex parte communications rule, however, New Mexico goes somewhat further in the text of the rule than the 2007 ABA Model Code by specifically providing in its rule that a "judge may initiate, permit, or consider any ex parte communication when expressly authorized by *law, rule, or Supreme Court order* to do so."[166] In addition, New Mexico's comment to its ex parte rule with regard to judges in specialty courts also specifically references authorization by "law, rule, or Supreme Court order."[167]

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[162] *Compare id.* (authorizing other "law" to take priority over the Iowa Code provisions), *with* ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing "local rules" to take priority over conflicting Model Code provisions).

[163] *See* IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Terminology, at 630 (defining "law"). In this regard, the Iowa Code has the same broad definition of "law" as does the 2007 ABA Model Code. *See* ABA MODEL CODE OF JUD. CONDUCT, Terminology (2007) (defining "law"). The ABA Code, however, only references "local rules" with regard to specialty courts in the comments to its "application" section. ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011).

[164] *See* N.M. ST. CT. RULES, RULES OF JUD. CONDUCT R. 21-209(A)(5) & cmt. 4 (2012) (providing an expanded scope of applicable law).

[165] *See id.*, R. Set 21, Terminology (defining "law" for purposes of the code).

[166] *Compare id.* Rule 21-209(A)(5) (quoted in text above with emphasis added), *with* ABA MODEL CODE OF JUD. CONDUCT, Canon 2, Rule 2.9(5) (2011) (using identical language except for including the phrase "authorized by law"–with "law" being otherwise broadly defined in the Terminology section of the 2007 ABA Model Code).

[167] NMRA, Rule 21-209, cmt. 4. In full, Comment 4 provides:

> (4) A judge may initiate, permit, or consider ex parte communications expressly authorized by law, rule, or Supreme Court order, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

V. RECOMMENDATIONS TO REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Texas has not adopted the 2007 ABA Model Code of Judicial Conduct. Nonetheless, jurisdictions around Texas have been actively developing a wide array of specialty courts.[168] In addition, the Texas Legislature has given significant recognition to specialty courts.[169] During the 2013 regular legislative session, the Texas Legislature enacted Senate Bill 462 relating to specialty court programs in the state.[170] In part, the legislation consolidated into a single chapter of the Texas Government Code existing provisions pertaining to drug court programs, family drug court programs, mental health court programs, and veterans court programs that had previously been scattered across the Family Code, the Health and Safety Code, and the Government Code.[171] As noted by the bill's sponsor following the conclusion of the 2013 regular legislative session, however, Senate Bill 462 was also intended to "improve oversight of specialty court programs by requiring them to register with the criminal justice division of the Office of the Governor and follow programmatic best practices in order to receive state and federal grant funds."[172] Moreover, Senate Bill 462 added new language to the Texas Government Code mandating that specialty court

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In contrast, the 2007 ABA Model Code has almost identical language for this comment, but only includes the phrase, "expressly authorized by law" – although "law" has the broad definition set forth in the Code. *See* ABA MODEL CODE OF JUD.CONDUCT, Canon 2, R. 2.9, R. 2.9 cmt. 4, & Terminology.

[168] *See* Specialty Courts List, *supra* note 1, at 1.

[169] *See* Act effective Sept. 1, 2013, 83d Leg., R.S., ch. 747, 2013 Tex. Sess. Law Serv. 1883 (West) (to be codified at Tex. Gov't Code tit. 2, subtit. K (West 2013)), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB00462F.pdf#navpanes=0 [hereinafter S.B. 462].

[170] *Id.*

[171] *See* House Judiciary & Civil Juris. Comm., Bill Analysis, at 1, Tex. C.S.S.B. 462, 83d Leg., R.S. (2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462H.pdf#navpanes=0 (describing the former law).

[172] Tex. Sen. Research Center, Bill Analysis, at 1, Tex. S.B. 462, 83d Leg., R.S. (2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462F.pdf#navpanes=0. The statement of intent also indicates that the new law requires the Governor's Specialty Courts Advisory Council "to recommend programmatic best practices to the criminal justice division." *Id.* This is consistent with a gubernatorial executive order also calling for advice on best practices for specialty courts. *See* The Governor of the State of Tex. Crim. Justice Div., *Ex. Order RP 77 – Relating to the reauthorization of the operation of the Governor's Criminal Justice Advisory Council*, 37 Tex. Reg. 2806 (2012), *available at* http://governor.state.tx.us/news/executive-order/16995/.

programs "shall . . . comply with all programmatic best practices recommended by the Specialty Courts Advisory Council . . . and approved by the Texas Judicial Council."[173]

The recommended programmatic best practices for Texas specialty courts have included the expectation for "adherence to the Ten Key Components and research-based best practices for specialty courts."[174] As described by the Texas Criminal Justice Advisory Council, the National Association of Drug Court Professionals developed "the Ten Key Components . . . as essential characteristics specialty programs must embody."[175] In turn, the Texas Legislature has codified these key components for Texas specialty courts.[176] Of significance to the discussion of a judge's role in a specialty court, these codified program characteristics contemplate an "ongoing judicial interaction with program participants."[177] Accordingly, the state legislature has not only recognized that a judge is engaged in a different, non-traditional role when presiding over a specialty court program, but has also codified the expectation that judges in such programs will have ongoing interactions with the participants. Unfortunately, however, the Texas Code of Judicial Conduct, unlike the 2007 Model ABA Code or its implementation in many states, does not address the unique role performed by judges in specialty courts, and it is

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[173] S.B. 462, *supra* note 170, at § 1.01 (enacting TEX. GOV'T CODE ANN. § 121.002(d)(1) (West Supp. 2013)). A failure to comply can result in the program's ineligibility for state or federal funds. *Id.* § 121.002(e).

[174] *See* CJAC Report, *supra* note 1, at 2.

[175] *See id.* (referencing Key Components, *supra* note 4) (setting forth ten components identified as keys to successful drug court programs)).

[176] *See* CJAC Report, *supra* note 1, at 2. *See also* TEX. GOV'T CODE ANN. § 123.001(a)(1)–(10) (West Supp. 2013) (defining ten "essential characteristics" for Texas drug courts); *id.* § 122.001(1)–(10) (family drug courts); *id.* § 124.001(a)(1)–(10) (veterans courts); *id.* § 125.001(1)–(9) (mental health courts). S.B. 462 re-codified these statutes from their former locations in other parts of the Texas Government Code. S.B. 462, *supra* note 169, at §§ 1.02, 1.04–.06.

[177] TEX. GOV'T CODE ANN. §§ 122.001(7), 123.001(a)(7), 124.001(a)(7), 125.001(5) (West Supp. 2013). *See also* Key Components, *supra* note 4, at 15 (noting that the "judge is the leader of the drug court team" and is the link for participants from "treatment and to the criminal justice system" and indicating that such "courts require judges to step beyond their traditionally independent and objective arbiter roles"). Another key component, now codified in Texas, creates an expectation for "the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants." *See, e.g.*, TEX. GOV'T CODE ANN. § 123.001(a)(2) (West Supp. 2013).

therefore time for the Texas Supreme Court to amend the Texas Code of Judicial Conduct to recognize such courts.

What is the best approach for amending the Texas Code of Judicial Conduct to recognize the unique role of judges in specialty courts – particularly with regard to ex parte communications and disqualifications or recusals? By not having acted as of yet, the Texas Supreme Court has the opportunity to study the actions by other states and adopt provisions that best serve the expanding use of specialty courts in Texas. Amending the ex parte communications section of the Texas Code of Judicial Conduct in a manner comparable to several other states' adoption of provisions comparable to the 2007 ABA Model Code would provide a significant improvement over current law with regard to specialty courts.[178] One approach to doing so would be to amend Canon 3(B)(8) of the Texas Code of Judicial Conduct pertaining to the prohibition on ex parte communications by amending the exception set forth in subsection (e) and adding a new subsection (f), as follows:

> (e) considering an ex parte communication expressly authorized by law, which for purposes of this exception includes statutes, constitutional provisions, decisional law, and state or local court rules or orders; and
>
> (f) A judge presiding over a specialty court program such as a drug court, family drug court, mental health court, or veterans court may initiate, permit, or consider ex parte communications with members of the specialty court team at staffing conferences or meetings, or by written documents provided to all members of the specialty court team, consistent with waiver and consent protocols developed and implemented by the specialty court program. In presiding over a specialty court, a judge may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.[179]

[178] The Texas Supreme Court might wish to consider adopting additional portions or all of the 2007 ABA Model Code, but the scope of such a review is beyond the scope of this Article.

[179] The suggested language would amend TEX. CODE JUD. CONDUCT, Canon 3(B)(8). The proposed new language is underlined.

The proposed amendments to subsection (e) represent an amalgam of the Iowa and New Mexico approaches described above.[180] In addition, adopting this language would recognize that specialty court programs are still evolving and different jurisdictions will likely approach problem-solving courts in differing ways.[181] The language suggested for subsection (f) creates an exception specifically addressed to specialty courts, and the text is drawn from the approaches of several states.[182] In addition, the four specific types of specialty courts identified in the proposed language are not intended to be exclusive, but track those four types of programs identified during the 2013 Texas legislative session in S.B. 462.[183] Finally, the proffered language relating to waiver and consent provisions is consistent with one of the Texas Criminal Justice Policy Council's focus areas.[184]

In addition to language pertaining to ex parte communications, the Texas Supreme Court should also consider adding language pertaining to disqualifications or recusals. Canon 3(B)(1) requires that a judge not decide a matter "in which disqualification is required or recusal is appropriate."[185] Moreover, a "judge shall perform judicial duties without bias or prejudice," and a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . ."[186] As discussed above, Idaho has adopted a firm rule that if the specialty court judge receives ex parte communications while presiding over the specialty court team, the judge

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[180] *See supra* notes 161–167 and accompanying text.

[181] *See* CJAC Report, *supra* note 1, at 7 (observing that "the size and diversity of Texas prevents a one-size-fits-all approach"). The Texas Supreme Court could also adopt a comment to the proposed, revised subsection (e) that incorporates the 2007 ABA Model Code's focus on local rules for specialty courts. *See* ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing "local rules" to take priority over conflicting Model Code provisions); *see also, supra* note 32 and accompanying text (quoting the ABA comment). For example, the Texas Supreme Court could consider the following approach for such a new comment: "When local rules establishing a specialty court specifically authorize conduct not otherwise permitted under this Code, they take precedence over the provisions set forth in the Code. Nevertheless, judges presiding over specialty courts shall comply with this Code except to the extent local rules provide and permit otherwise." This proffered language closely tracks the 2007 ABA Model Code's comparable comment.

[182] *See supra* notes 137–167 and accompanying text (notably, Idaho, Nebraska, and Kansas).

[183] *See* S.B. 462, *supra* note 170.

[184] *See* CJAC Report, *supra* note 1, at 7 (recommending the continued "development of standard consent and waiver forms for use by programs to ensure due process rights of participants are protected").

[185] TEX. CODE JUD. CONDUCT, Canon 3(B)(1).

[186] *Id.* Canon 3(B)(5)–(6).

"shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case."[187] That also appears to be the approach of the Tennessee Court of Criminal Appeals, although not that of the Tennessee Supreme Court.[188] This Article does not advocate a blanket requirement for recusal from subsequent proceedings simply because the specialty court judge received ex parte communications in the course of presiding over the specialty court program. Typically, courts consider recusal motions on a case-by-case basis. Why should this type of situation be any different, particularly if the specialty court participant signed a thorough consent and waiver form? Accordingly, one possible approach would be for the Texas Supreme Court to consider adding a new subsection (12) to Canon 3(B) pertaining to a judge's adjudicative responsibilities, as follows:

> (12) If ex parte communications permitted by this Canon become an issue at a subsequent adjudicatory proceeding at which a specialty court judge is presiding, the specialty court judge shall either (1) recuse himself or herself if the judge gained personal knowledge of disputed facts outside the context of the specialty court program, or (2) make disclosure of any such ex parte communications.[189]

The foregoing language is intended to address the possible need for a recusal depending on the nature and extent of the ex parte communications that might arise as part of an individual's participation in a specialty court program. It calls for a case-by-case assessment, rather than employing a blanket rule. Indeed, depending on the nature of the ex parte communications, as well as the extent of any signed waivers or consent documentation, there might be no need for recusal in a particular case.[190] Moreover, if the revised rules permit certain ex parte communications from,

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[187] *See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f), at 11.

[188] *See supra* notes 83–127 and accompanying text.

[189] This proposal closely tracks language from one of the official comments set forth in the 2012 Tennessee Code of Judicial Conduct. *See* TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, RJC 2.9 cmt. 4; *supra* notes 130–136 and accompanying text. As an alternative, this proposed language could be included at the end of proposed subsection (B)(8)(f), described above. *See supra* text accompanying note 179.

[190] *See, e.g.*, *supra* notes 108–127, and accompanying text (discussing Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108).

for example, treatment team members at a staffing meeting, the presiding specialty court judge will have received that information while performing a now permissible judicial role–and not gained it via "personal knowledge."[191]

VI. CONCLUSION

Specialty courts now comprise a significant and growing part of the Texas judicial landscape. Moreover, given both legislative and gubernatorial support for specialty courts in Texas, this growth will likely continue. To assure that there is appropriate recognition and coverage of this new role for a growing number of Texas judges who preside over specialty courts, it is time for the Texas Supreme Court to follow the lead of a number of states from around the country and amend the Texas Code of Judicial Conduct.

[191] *See* Meyer, *supra* note 11, at 205–06 (asserting that "[w]hen a drug court judge receives information from a treatment provider or other source, this would be subject to the rules on ex parte contacts" and "does not qualify as 'personal knowledge'" requiring disqualification because "the judge has not personally observed the events in question;" but, suggesting that judges should "recuse themselves from any adjudication arising out of events that they did witness, such as a participant appearing in court intoxicated or a participant attempting to escape"). In addition, separate and apart from issues pertaining to ex parte communications, there might exist other reasons by which the specialty court judge should consider whether to recuse himself or herself from an ensuing adversarial proceeding based on possible bias. *See, e.g.*, Arkfeld, *supra* note 10, at 320 (providing the following example of possible bias when the specialty court judge is called to preside at a later sentencing hearing: "The judge who had worked with the defendant throughout the failed treatment process might no longer be in the position to be considered objective and open-minded.").

haynesboone

MEMORANDUM

Date: April 16, 2019

To: Judicial Administration Subcommittee

From: Andrew P. Van Osselaer

Subject: Ex Parte Communication in Specialty Courts

EX PARTE COMMUNICATION IN TEXAS'S SPECIALTY COURTS

Specialty courts play an important role in Texas. They exist to give certain classes of cases that evoke important public policy concerns, such as the welfare of children or our veterans, the special attention they deserve. Because specialty courts play a unique role, not all rules befitting a court of general jurisdiction are necessarily appropriate for a specialty court.

To address the needs of specialty courts, the Judicial Administration Subcommittee is considering changes to Judicial Code of Conduct Canon 3, which prohibits ex parte communication with judges. In preparation for its discussion, at Nina Cortell's request, I reached out to five experienced specialty-court judges in Texas to seek their advice. That advice is reflected below.

I. Introduction to Specialty Courts in Texas

Specialty courts differ from traditional courts not only in that they are courts with limited jurisdiction, they also differ in that they are tasked with achieving specific policy goals—for example, the protection of children or the rehabilitation of drug addicts. Specialty-court judges, thus, are often more than mere arbiters. They may serve as a source of motivation, as a holder of accountability, as a service coordinator, or as a de facto team lead for various social service agencies. Texas's specialty courts include:

- Drug Court
- Veterans Treatment Court
- Juvenile Court
- Mental Health Court
- Family Drug Court
- Commercially Sexually Exploited Persons Court

Central to almost all specialty-court programs are frequent (often weekly) meetings, known as "staffings," between the court, law enforcement, the treatment team, the prosecutor, and the defense attorney. The purpose of a staffing is to update the court on the defendant's progress and to discuss the defendant's next steps before the defendant's next hearing, which often occurs later the same day. In some specialty-court programs, the defense attorney represents the defendant. In others, however, the defense attorney serves simply as a defendant-nonspecific advocate for participants in the program. Between staffings, court coordinators receive a flurry of communication from treatment personnel, law enforcement, defense counsel, and other sources, which the coordinator then compiles for the next staffing.

For those with little specialty-court experience, Judge Ruben Reyes forwarded two videos, which provide a look inside specialty courts:

- Judge Reyes Interview: LINK
- Tom Brokaw news story featuring footage of hearings: LINK

II. Canon 3's Current Prohibition

Under the current canon, ex parte communication is disallowed unless "authorized by law." Canon 3, Subsection 8 reads:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an

> alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:
>
> . . .
>
> (e) considering an ex parte communication expressly authorized by law.

It is unclear from the face of the rule whether "authorization" may be by local court rule.

III. Possible Changes to Canon 3

A. Adding a consent exception to Canon 3.B(e)

For example, Canon 3 may be changed to read: "considering an ex parte communication expressly authorized by law or by party consent."

B. Adding a comment in the style of the ABA Model Code

A comment may be added to Canon 3, explaining that the ex parte prohibition is not designed to impede the operations of specialty courts. The ABA Model Code has such a comment. It reads:

> A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

MODEL CODE OF JUDICIAL CONDUCT Canon 2, cmt. 4 (Am. Bar Ass'n 1980).

C. Defining "authorized by law" to include local court rules

Another option is to suggest in a comment that "authorized by law" includes by local rule.

IV. Feedback from Judges

I spoke with five specialty-court judges to ask their thoughts on these proposed changes and to ask what role ex parte communication plays in their courts. The five judges are:

- Ruben Reyes—Lubbock County drug court
- Ray Wheless—Collin County drug court; chair of the Specialty Courts Advisory Counsel
- Darlene Byrne— Travis County family drug court and juvenile mental health court
- Nancy Hohengarten— Travis County mental health court
- Wayne Christian— Bexar County veterans' court

A. Is ex parte communication a problem?

Of the five judges interviewed, four believe that Canon 3's ex parte prohibition impedes, or at least complicates, their programs. Judge Reyes mentioned that in his court, the defense attorney present at staffings does not represent specific participants. Thus, the staffings themselves may constitute ex parte communication. Judge Byrne, Judge Wheless, and Judge Hohengarten stated that although participants have counsel present during staffings, communications outside of staffings—for example, with the court coordinator—are frequently ex parte and are essential to the court's operations.

Judge Hohengarten mentioned that the issue with Canon 3 is more than academic. A new-to-town attorney, who was unfamiliar with the processes of Travis County's mental health court, once attempted unsuccessfully to seek disciplinary action against her based on a perceived violation of Canon 3's ex parte prohibition.

Judge Christian was the only judge that had no issue Canon 3's ex parte prohibition. He expressed that in his court, he goes out of the way to ensure that participants have a representative present during any communication with the court. Therefore, at least in his court, he did not have any issues.

B. Should a consent exception be added to Canon 3?

The four judges who believe ex parte communication is an issue approved adding a consent exception. Judge Wheless and Judge Byrne mentioned this would be easy to achieve and document through the program admissions process.

C. Should an ABA-like comment be added to Canon 3?

The four judges who believe ex parte communication is an issue approved adding an ABA-like comment. Judge Byrne and Judge Hohengarten mentioned that if the ABA's language is adopted, family treatment courts should be added to the list of examples of specialty courts.

D. Should Canon 3 (or a comment) explain that "authorized by law" includes by local rules?

Judge Reyes and Judge Christian approved of allowing local ex parte rules. Both said that would allow rules to be tailored to the specific needs of the program. Judge Byrne and Judge Hohengarten disapproved of a local-rule exception. They said that promulgating local rules is too slow and takes too much effort. Judge Byrne said this is in part because the Supreme Court of Texas must approve local rules.

E. Additional comments

I asked the judges if they had additional thoughts they would like to share with the Subcommittee.

Judge Reyes wanted to express that Canon 3's overarching mandate of judicial impartiality is itself out of step with the role of specialty-court judges, who often act more like coaches than arbiters.

Judge Wheless said he cannot properly monitor participants' progress and tailor treatment plans without ex parte communication. The flow of communication must be continuous and quick to make the program work. Judge Wheless also mentioned that providing an exception for specialty

courts should not be problematic because the communication is solely for the benefit of participants.

Judge Byrne mentioned that there is an issue of propriety when a specialty-court judge has presided over a participant's treatment (and has received a stream of inadmissible information about the participant) *and then also* presides over the participant's termination hearing. She said that she recuses herself in those situations despite feeling she could disregard all inadmissible evidence out of respect for the participant. She mentioned, however, that in counties with fewer judges, recusal may not be an option.

SECTION 9.05. Section 121.002, Government Code, is amended by amending Subsections (c) and (d) and adding Subsections (f) and (g) to read as follows:

(c) Notwithstanding any other law, a specialty court program may not operate until the judge, magistrate, or coordinator:

(1) provides to the Office of Court Administration of the Texas Judicial System [~~criminal justice division of the governor's office~~]:

(A) written notice of the program;

(B) any resolution or other official declaration under which the program was established; and

(C) a copy of the applicable strategic plan that

incorporates duties related to supervision that will be required under the program; and

(2) receives from the office [~~division~~] written verification of the program's compliance with Subdivision (1).

(d) A specialty court program shall:

(1) comply with all programmatic best practices recommended by the Specialty Courts Advisory Council under Section 772.0061(b)(2) and approved by the Texas Judicial Council; and

(2) report to the criminal justice division of the governor's office and the Texas Judicial Council any information required by the division or council regarding the performance of the program.

(f) The Office of Court Administration of the Texas Judicial System shall:

(1) on request provide technical assistance to the specialty court programs;

(2) coordinate with an entity funded by the criminal justice division of the governor's office that provides services to specialty courts;

(3) monitor the specialty court programs for compliance with programmatic best practices as required by Subsection (d); and

(4) notify the criminal justice division of the governor's office if a specialty court program fails to comply with programmatic best practices as required by Subsection (d).

(g) The Office of Court Administration of the Texas Judicial System shall coordinate with and provide information to the

criminal justice division of the governor's office on request of the division.

SECTION 9.06. (a) The Office of Court Administration of the Texas Judicial System shall contract with the National Center for State Courts to conduct a study of the caseloads of the district and statutory county courts in this state. The study must concentrate on the weighted caseload of each court, considering the nature and complexity of the cases heard.

(b) Not later than December 1, 2020, the National Center for State Courts shall report the results of the study required by Subsection (a) of this section to the Office of Court Administration of the Texas Judicial System. Not later than January 1, 2021, the office shall file a report on those results with the governor, the lieutenant governor, the speaker of the house of representatives, and the chairs of the standing committees of the senate and house of representatives with jurisdiction over the judicial system.

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle K. Specialty Courts (Refs & Annos)
Chapter 121. General Provisions

V.T.C.A., Government Code § 121.001

§ 121.001. Definition

Effective: September 1, 2013
Currentness

In this subtitle, "specialty court" means a court established under this subtitle or former law.

Credits
Added by Acts 2013, 83rd Leg., ch. 747 (S.B. 462), § 1.01, eff. Sept. 1, 2013.

V. T. C. A., Government Code § 121.001, TX GOVT § 121.001
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle K. Specialty Courts (Refs & Annos)
Chapter 121. General Provisions

V.T.C.A., Government Code § 121.002

§ 121.002. Oversight

Effective: September 1, 2015
Currentness

(a) The lieutenant governor and the speaker of the house of representatives may assign to appropriate legislative committees duties relating to the oversight of specialty court programs.

(b) For the purpose of determining the eligibility of a specialty court program to receive state or federal grant funds administered by a state agency, the governor or a legislative committee to which duties are assigned under Subsection (a) may request the state auditor to perform a management, operations, or financial or accounting audit of the program.

(c) Notwithstanding any other law, a specialty court program may not operate until the judge, magistrate, or coordinator:

(1) provides to the criminal justice division of the governor's office:

(A) written notice of the program;

(B) any resolution or other official declaration under which the program was established; and

(C) a copy of the applicable strategic plan that incorporates duties related to supervision that will be required under the program; and

(2) receives from the division written verification of the program's compliance with Subdivision (1).

(d) A specialty court program shall:

(1) comply with all programmatic best practices recommended by the Specialty Courts Advisory Council under Section 772.0061(b)(2) and approved by the Texas Judicial Council; and

(2) report to the criminal justice division any information required by the division regarding the performance of the program.

(e) A specialty court program that fails to comply with Subsections (c) and (d) is not eligible to receive any state or federal grant funds administered by any state agency.

Credits

Added by Acts 2013, 83rd Leg., ch. 747 (S.B. 462), § 1.01, eff. Sept. 1, 2013. Amended by Acts 2015, 84th Leg., ch. 1051 (H.B. 1930), § 5, eff. Sept. 1, 2015.

V. T. C. A., Government Code § 121.002, TX GOVT § 121.002
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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Tab 1

JUDGE REYES' COMMENTS ON PROPOSED COMMENT ON EX PARTE COMMUNICATION IN SPECIALTY COURTS

General Recommendations

A. Consider changing "serving on a statutory specialty court" to "presiding over a statutory specialty court".

B. Consider striking "judge reasonably believes such" as can foresee potential problems addressing what a judge believed and whether it was reasonable or not.

C. "If such communications occur" should be omitted as ex parte and/or privileged communications are an inherent part of the specialty courts.

D. Consider not to have automatic recusal / disqualification of specialty court judge for the following reasons:

    a. What if there is not another judge in the county with jurisdiction, e.g. district judge for a felony case? Visiting Judge would need to be appointed.
    b. If it is a misdemeanor case, then need another CCL Judge but could have Regional Administrative Judge appoint the District Judge to handle.
    c. Jurors instructed to consider evidence for 1 purpose but not another so same expectation from a Judge should be allowed, e.g. hearsay statement admitted to show control of premises.

E. Meaning of "after the conclusion of the party's participation in the specialty court program"?

    a. Does this apply to successful completion of the program as well as termination of the program for non-compliance?

Mandatory Recusal Option Recommendations:

F. Consider not making recusal mandatory for reasons stated in comment "D" under Current Proposal.

G. Meaning of "proceedings"?

    a. Include intermediate sanction hearings within the program? Include Motion to Revoke/ Application to Revoke Probation (MTR/ ARP) or Motion to Proceed With Adjudication of Guilt (MoPAG) or Termination from the Specialty Court Program?
    b. Additionally, does use of "proceedings" as well as the second mandatory recusal statement I"B" in the Mandatory Recusal section]

now disqualify the judge from presiding over a family law case or future ARP/MTR or MoPA or criminal case?

Discretionary Recusal Option Recommendations:

H. Suggest not referencing TRCP 18b specifically as basis for recusal/disqualification could arise in context of not only a civil case but also a criminal case. Not referencing TRCP 18b specifically allows appropriate applicable law to govern.

I. Additionally, subsection (b)3 of TRCP 18b (judge having personal knowledge of disputed evidentiary facts) would likely always serve as basis for the specialty court judge's recusal. Specialty Court model promotes and standards mandate integral judicial involvement with the specialty court participants, their participation and treatment.

Suggested Revision:

It is not a violation of this Canon for a judge, when presiding over a statutory specialty court, to initiate, permit or consider ex parte or privileged communications insofar as such communications are **[omit "reasonably"]** necessary to fulfill the court's functions and the specialty court's procedures contemplate those communications. A party may object to the specialty court judge presiding over a final hearing or final trial on the merits of the party's case.

Tab D

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **September 5, 2019**

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3 letter refer the following matter to the Appellate Rules Subcommittee:

> **Out-of-Time Appeals in Parental Rights Termination Cases.** A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:
>
> - a narrow late-appeal procedure;
> - an abate-and-remand procedure like the one proposed in the Phase II Report;
> - a habeas- or bill-of-review-style procedure; and
> - prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.
>
> **Suits Affecting the Parent-Child Relationship.** In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

The HB 7 Phase II Report recommends four changes that affect the appellate rules and also have some bearing on the out-of-time appeal assignment: (1) right to counsel, showing authority to appeal, and frivolous appeals; (2) a procedure in the court of appeals to consider ineffective-

assistance-of-counsel claims discovered by appellate counsel; (3) a rule standardizing the currently unwritten understanding on *Anders* briefs; and (4) opinion templates for use in parental termination cases.

II. Background

The subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

The subcommittee has not considered or discussed a similar procedure in the courts of appeals, nor has the subcommittee addressed a procedure for bringing late claims of ineffective assistance of counsel, *Anders* briefs, or frivolous appeals.

The Texas Supreme Court has indicated that it will consider the July 2017 proposals regarding late-filed petitions for review in conjunction with any additional recommendations on parental-termination topics identified in the May 31, 2019 referral letter.

III. Issues for Discussion

The subcommittee has broken down the referral topics into two stages to be addressed in the following order.

1. Stage One: Out-of-time appeals and related issues
    a. HB7 Phase II recommendations: indigent parent's right to counsel on appeal; notice of right to appeal; showing authority to appeal
    b. Assessing proposals for addressing untimely appeals and ineffective claims
        i. HB7 Phase II recommendation: abate and remand for evidentiary hearing in support of IAC claim
        ii. "narrow late-appeal procedure"
        iii. "habeas- or bill-of-review-style procedure" for a collateral attack
        iv. other possible procedures such as a requirement that counsel continue the representation until a notice of appeal has been filed.
2. Stage Two: Briefing and Opinions
    a. Frivolous appeals; *Anders* procedures in the courts of appeals as discussed by the HB7 task force; "Parental Termination Brief Checklist"
    b. Opinion templates as created by the HB7 task force

This memo focuses on Stage One, topic 1(a) with respect to the right to counsel on appeal, notice of right to appeal, and showing authority to appeal. The subcommittee will address Stage One, topic 1(b) and Stage Two in later meetings.

IV. Discussion

A. Notice of Right to Appeal and Right to Representation by Counsel

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an indigent parent is entitled to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code § 107.016(3).

The HB7 Task Force made the following recommendations regarding an indigent parent's notice of the right to appeal and the right to counsel on appeal.

> The HB7 Task Force proposes that a defendant in a parental-termination suit be notified in the citation about the right to counsel, including the right to counsel on appeal. This will provide an additional measure of notice in the event appointed counsel later declines to pursue an appeal due to abandonment of the case by the parent. The admonition could be added to the required notice and take the following form:
>
> > "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you."
> >
> > "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."
>
> To the extent the Supreme Court is currently considering a revision of Rule 99 to include standard form citations, the Task Force proposes the creation of a customized form citation, in English and Spanish (and with an internet citation to translations in other languages), to be used in parental termination cases. Such a citation could have language customized to address the availability of default judgments in parental-termination cases.

The subcommittee reviewed and discussed these HB7 Task Force recommendations.

The subcommittee recommends the following revision to the HB7 Task Force's proposed citation language.

> "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you." **at no cost to you."**
>
> "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."

The proposed revision clarifies the practical consequence of being "eligible for appointment of an attorney" and conforms the first paragraph to the second paragraph so they both provide the same information in parallel fashion.

The subcommittee also discussed use of the word "indigent" in the HB7 Task Force proposal. A question arose during the subcommittee's discussions concerning whether "indigent" would be understood by persons receiving this notice, and whether the term should be (1) defined, or (2) replaced with simpler wording such as "poor." The word "indigent" has a settled meaning for courts and lawyers, but this meaning may not be clear to non-lawyers who receive this notification. There was no consensus among the subcommittee members on whether to change or further define the word "indigent." The subcommittee notes that a discussion regarding potential use of the word "poor" occurred during the full advisory committee's June 2019 meeting in conjunction with deliberations regarding the contents of name change forms. Differing views were expressed during the full advisory committee's June 2019 meeting about whether the word "poor" carries pejorative connotations and whether "poor" is easier to understand than other terms describing lack of financial resources.

The HB7 Task Force proposal comports with an October 2017 report by the Rules 15-165a Subcommittee entitled, "Modernizing TRCP 99, Issuance and Form of Citation." The full advisory committee discussed this report at its October 2017 meeting, and the proposed revisions to TRCP 99 are pending before the Texas Supreme Court. Among other things, the October 2017 report recommends eliminating from TRCP 99 the description of a citation's mandatory contents and instead promulgating a form citation in plain language that clerks must follow. The Appellate Rules Subcommittee endorses the application of this approach to parental termination cases. The Appellate Rules Subcommittee solicits input from the full advisory committee about whether additional language addressing default judgments or other topics specific to parental termination cases should be considered for inclusion in a form citation for parental termination cases.

B. Showing Authority to Appeal

The HB7 Task Force made the following recommendations (footnotes omitted) with respect to requiring an attorney to show authority to pursue an appeal from a termination order.

> The filing of a notice of appeal starts the process of immediately preparing a record for which a court reporter might not be compensated. To avoid initiating the preparation of an appellate record in circumstances when a terminated parent may not actually be seeking to challenge a final order, the HB7 Task Force recommends an amendment to Rule 28.4(c) to require that a notice of appeal include an attorney certification that "the attorney consulted with the appellant and the appellant has directed the attorney to pursue to the appeal." *See Appendix C, Rule 28.4(c).* The Task Force further proposes a similar certification in a petition for review filed in the Supreme Court. *See Appendix D, Rule 53.2(l).* As an enforcement mechanism, the Task Force proposes borrowing from the procedure in Texas Rule of Civil Procedure 12 to challenge an attorney's authority but eliminating the requirement of a sworn motion.

The HB7 Task Force's proposed rule revisions read in part as follows.

> HB7 Task Force Proposed Texas Rule of Appellate Procedure 28.4(c):
>
> (c) *Certification by Appointed Counsel and Motion to Show Authority.* A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court's ruling. The court must rule on the motion to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.
>
> HB7 Task Force Proposed Texas Rule of Appellate Procedure 53.2(l):
>
> (l) *Certification by Appointed Counsel.* In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

The subcommittee reviewed and discussed these HB7 Task Force proposals.

The subcommittee endorses the recommendation to require a statement of authority to appeal or file a petition for review as reflected in proposed TRAP 53.2(l) and the first sentence of proposed TRAP 28.4(c) for the reasons spelled out in the HB7 Task Force's recommendation.

The subcommittee recommends a different approach regarding an enforcement mechanism in proposed TRAP 28.4(c). Questions arose among the subcommittee members regarding the necessity of creating a motion-to-show-authority procedure. If the full advisory committee concludes such a procedure is necessary, then the subcommittee recommends creating a simpler procedure. Grafting the procedure from TRCP 12 onto TRAP 28.4(c) makes for a lengthy and potentially cumbersome or redundant appellate rule. Instead of adding language to proposed TRAP 28.4(c) delineating the procedure for challenging authority to appeal, the subcommittee recommends (1) adding a second sentence to proposed TRAP 28.4(c) stating that a motion challenging an attorney's authority to pursue a parental-termination appeal will be handled in the trial court under TRCP 12, and (2) supplementing TRCP 12 as necessary to accommodate the accelerated timeframes applicable to parental-termination appeals.

C. Motions for Extension of Time and Conformity With Revisions to TRAP 4.7

Later subcommittee reports will address issues concerning extensions of time by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed counsel fails to timely pursue an appeal. At this juncture, the subcommittee recommends that any standards or procedures adopted for earlier appellate proceedings be compatible with those ultimately adopted with respect to petitions for review in the Texas Supreme Court.

As noted earlier, the subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

Memorandum

To: Texas Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: July 20, 2017

Re: Extension of Time to File Petition for Review in Parental Termination Cases

The referral on this topic is as follows:

> Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel.
>
> The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

During the June 2017 meeting of the full advisory committee, potential revisions to TRAP 4 were discussed to address this issue. Two versions of the rule revisions were proposed.

Version 1 allows a motion for extension of time to file a petition for review by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed

counsel fails to file the petition timely. This "no fault" version does not require allegations regarding any failure by appointed counsel to act on the parent's instructions or to inform the parent regarding the right to file a petition for review. The only required allegation is that appointed counsel failed to file the petition timely.

Version 2 also allows a motion for extension of time; in contrast to Version 1, however, this version requires a statement that appointed counsel failed to file the petition for review timely, and that either (1) the indigent parent instructed counsel to file it; or (2) counsel failed to inform the parent of the right to file a petition for review. Version 2 allows appointed counsel to file a response.

The full advisory committee voted 13 to 6 at the June 2017 meeting in favor of Version 1's approach, which omits a requirement to show fault on the part of appointed counsel.

With respect to Version 2, the full advisory committee voted 10-to-5 in favor of requiring verification if a showing of fault is required.

Justice Christopher suggested an alternative approach under which appointed counsel would be notified that counsel must file a petition for review unless an indigent parent consents in writing not to file the petition. This mandatory approach, it was suggested, could eliminate disputes over fault and the need to amend TRAP 4 to create a specific mechanism for extensions of time to file a petition for review in these circumstances. The full advisory committee voted 10-to-3 in favor of this alternative approach.

In light of the June 2017 discussion and votes, the appellate subcommittee has made minor changes to Versions 1 and 2 and has drafted new Version 3, all of which are attached to this memo. The three versions thus are: (1) a no-fault motion for extension mechanism (Version 1); (2) a motion for extension mechanism requiring verified allegations of fault on the part of appointed counsel, with an opportunity for counsel to respond (Version 2); and (3) a notice requirement under which the court of appeals' opinion and judgment must be accompanied by written notice to appointed counsel that a petition for review must be filed unless counsel obtains written consent from the indigent parent not to file the petition (Version 3).

The appellate subcommittee recommends adoption of Version 1 (no-fault motion) together with Version 3 (notice of appointed counsel's mandatory duty to file a petition for review unless indigent parent consents in writing not to file).

The subcommittee's view is that confusion and missed deadlines likely will be diminished under Version 3 if the rules require notice of appointed counsel's mandatory duty to file the petition for review. The subcommittee nonetheless concludes that some number of missed deadlines still are likely to occur even with explicit notice to appointed counsel of a

mandatory duty to file a petition for review on behalf of an indigent parent whose rights have been terminated. For this reason, an extension mechanism in the form of Version 1 should be included as a supplemental measure to allow an avenue for further review. No allegations regarding fault should be necessary to obtain an extension if the rules provide notice of appointed counsel's mandatory duty to file. There is no "fault" to be disputed if the duty to file is mandatory. The only showing necessary to obtain the extension in light of this mandatory duty should be a showing that the required petition for review was not filed timely.

July 18, 2017 CLEAN DRAFT OF VERSIONS 1, 2 AND 3

PROPOSED TRAP REVISIONS FOR MOTIONS FOR EXTENSION OF TIME TO FILE PFR IN PARENTAL TERMINATION CASES
(ADDING VERSION 3 WITH NOTICE REQUIREMENT BASED ON TRAP 25.2(D))

VERSION 1 (ELIMINATE ATTY FAULT REQUIREMENT)

4.7. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) *Additional Time to File Petition for Review.* An indigent parent with a statutory[1] right to appointed counsel in a parental-termination suit[2] may move for additional time to file a petition for review by filing a motion stating that the indigent parent's appointed counsel failed to file the petition timely.

(b) *Where and When to File.* A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days[3] after the following:

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[1] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[2] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

[3] This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

(1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.[4]

(c) *Order of the Court*. The court must grant the motion if the motion for additional time was timely filed, and appointed counsel for the indigent parent did not timely file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

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[4] The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

VERSION 2 (KEEP ATTY FAULT REQUIREMENT; ALLOW ATTY RESPONSE)

4.7. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) *Additional Time to File Petition for Review.* An indigent parent with a statutory[5] right to appointed counsel in a parental-termination suit[6] may move for additional time to file a petition for review if the parent's appointed counsel failed to file the petition timely.

(b) *Contents of Motion.* The motion for additional time must **[be verified and]** state that appointed counsel failed to timely file a petition for review, and that either:

(1) the indigent parent instructed the appointed counsel to file a petition for review; or

(2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review.

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[5] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[6] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

(c) *Where and When to File*. A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days[7] after the following:

> (1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or
>
> (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.[8]

(d) *Response*. Appointed counsel may, voluntarily or at the court's request, file a response stating that the indigent parent was notified in writing of the right to file a petition for review and instructed counsel in writing not to file.

(e) *Order of the Court*. The court must grant the motion if the motion for additional time was timely filed, appointed counsel for the indigent parent did not timely file a petition for review, and either

> (1) the indigent parent instructed the appointed counsel to file a petition for review; or
>
> (2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

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[7] This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

[8] The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

VERSION 3 (NOTICE OF RIGHT TO FILE PFR)

48.___ *Notice of Right to File Petition for Review in the Supreme Court of Texas in Parental-Termination Cases Involving Indigent Parent with Statutory Right to Appointed Counsel.* If the parental rights of an indigent parent with a statutory[9] right to appointed counsel[10] have been terminated, the appellate clerk will send to appointed counsel a notice of the parent's right to file a petition for review in the Supreme Court of Texas with the opinion and judgment. The notice will include a statement that appointed counsel must file a petition for review in the Supreme Court of Texas unless the parent consents in writing not to have appointed counsel file a petition for review.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective

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[9] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[10] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

Tab E

Texas Board of Law Examiners
Rules Governing Admission to the Bar of Texas

Rule 23
Registration of In-House Counsel

Pursuant to Texas Government Code Section 81.102(b)(1), this Rule requires attorneys licensed to practice in States other than Texas, who reside in Texas and provide legal services for compensation to Business Organizations in Texas, to register as In-House Counsel. Registered In-House Counsel are permitted to lawfully provide legal services to Business Organizations in Texas without becoming a member of the State Bar of Texas.

§1. Definitions

(a) "Registered In-House Counsel." A "Registered In-House Counsel" is a lawyer who:

(1) is authorized to practice law in a State other than Texas;

(2) is exclusively employed by a Business Organization, as herein defined, and receives or will receive compensation for legal services or representation on behalf of that Business Organization;

(3) is residing in Texas or is relocating to Texas for purposes of employment within six months of application for registration;

(4) has completed registration as In-House Counsel as required by this Rule and has paid all fees; and

(5) has been approved as Registered In-House Counsel by the Supreme Court of Texas.

(b) "Business Organization." A "Business Organization" is a corporation, company, partnership, association, or other legal entity, including its respective parents, subsidiaries, and affiliates, that is doing business in Texas, that is not engaged in the practice of law or the provision of legal services outside of the organization, and does not charge or collect a fee for legal representation or advice other than to entities comprising that organization for services of the Registered In-House Counsel.

§2. Activities

(a) Authorized Activities. Registered In-House Counsel may provide legal services in Texas to a single Business Organization. Registered In-House Counsel are authorized to engage in the following activities:

(1) giving legal advice to the directors, officers, employees, and agents of the employing Business Organization regarding its business affairs;

(2) negotiating and documenting all matters for the employing Business Organization;

(3) representing the employing Business Organization in its dealings with any governmental or administrative agency or commission if authorized by the rules of the agency or commission; and

(4) participating in the provision of *pro bono* services offered under the auspices of organized legal aid societies or state/local bar association projects or provided under the supervision of an attorney licensed to practice law in Texas who is also working on the *pro bono* representation.

(b) Unauthorized Activities. Except as provided by subsection (a), Registered In-House Counsel are not authorized to engage in the following activities:

(1) appearing for the Business Organization in Texas courts, either in person or by signing pleadings;

(2) interpreting Texas law or giving any advice concerning Texas law for anyone other than the Business Organization;

(3) participating in the Texas representation of any client other than the Business Organization, in any manner;

(4) preparing any legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, or transfer or release of lien, as proscribed by Texas Government Code Section 83.001; or

(5) rendering to anyone except the Business Organization any service requiring the use of legal skill or knowledge or performing any other act constituting the practice of law under Texas Government Code Section 81.101.

§3. Disclosure

Registered In-House counsel shall not represent themselves as members of the State Bar of Texas or that they are licensed to practice law in Texas. In any communication with individuals or organizations other than the employing Business Organization, Registered In-House Counsel must disclose that they are not licensed to practice law in the state of Texas. If the communication is in writing, Registered In-House Counsel must disclose the name of the employing Business Organization, their title or function within the organization, and that they are not licensed to practice law in Texas.

§4. Registration

(a) Lawyers seeking registration as In-House Counsel in Texas shall file the following with the Board:

(1) a certificate or other documentation from each State or foreign jurisdiction in which the lawyer is authorized to practice law proving that the lawyer is authorized to practice law and is active and in good standing; and, for any jurisdiction in which the lawyer has an inactive status as an attorney, documentation or certification certifying that the lawyer is voluntarily inactive and was not involuntarily placed on inactive status;

(2) a statement executed by the lawyer under penalty of perjury that he or she:

(A) has read and is familiar with the *Texas Disciplinary Rules of Professional Conduct* and will follow its provisions;

(B) submits to the jurisdiction of the Supreme Court of Texas for all purposes as defined in *Texas Disciplinary Rules of Professional Conduct*, the *Rules Governing Admission to the Bar of Texas*;

(C) is not subject to a disciplinary proceeding or outstanding order of reprimand, censure, or disbarment, permanent or temporary, for professional misconduct by the bar or courts or duly constituted organization overseeing the profession or granting authority to practice law of any jurisdiction and has not been permanently denied admission to practice law in any jurisdiction based on the lawyer's character or fitness; and

(D) authorizes notification to the State Bar of Texas of any disciplinary or other adverse action taken against the lawyer before the disciplinary authority overseeing the legal profession in all States and foreign jurisdictions in which the lawyer is licensed or otherwise authorized to practice law.

(3) a certificate or other documentation from the employing Business Organization certifying that it meets the definition of a Business Organization as defined in this Rule, that it is aware that the lawyer is not licensed to practice in Texas;

(4) an application to register as In-House Counsel as promulgated by the executive director of the Board; and

(5) payment of all required fees.

(b) Review by the Board. The Board will review applications for compliance with this Rule. Application for registration as In-House Counsel constitutes authorization for the Board to conduct an investigation and make a determination of good moral character and fitness pursuant to Rule 10 of the *Rules Governing Admission to the Bar of Texas*.

(c) Registration with Supreme Court. The Board will submit the name and address of all lawyers meeting the requirements of this Rule to the clerk of the Supreme Court of Texas with a request that the lawyer be registered as In-House Counsel. Authorization to perform services under this Rule is effective on the date the clerk of the Supreme Court of Texas approves the request for registration. If the registrant is relocating to Texas, the authorization becomes effective on the date of employment in Texas, but in no case later than six months after the date of the application.

(d) Annual Renewal. The Registered In-House Counsel shall pay a non-refundable annual fee to the State Bar of Texas equal to the current fee paid by active members of the State Bar of Texas and shall provide any updated or amended information the bar requires.

(e) Duty to Report Change in Status. Registered In-House Counsel shall report any change in status or authority to practice in another State or foreign jurisdiction within 30 days of the effective date of the change in status. If a lawyer registered as In-House Counsel elects inactive status in any State or foreign jurisdiction after registration, the Registered In-House Counsel must provide documentation

as required by subsection (a)(1) of this Section. Failure to provide such notice or documentation by the Registered In-House Counsel constitutes a basis for discipline pursuant to the *Texas Disciplinary Rules of Professional Conduct.*

§5. Duration and Termination of Registration

(a) Authorization to perform legal services as In-House Counsel under this Rule terminates on the earliest of the following events:

(1) admission of the Registered In-House Counsel to the general practice of law in Texas;

(2) the In-House Counsel ceases to be employed by the Business Organization listed on his or her then-current registration under this Rule; if such Registered In-House Counsel, within 60 days of ceasing to be so employed, becomes employed by another Business Organization and such employment meets all requirements of this Rule, his or her registration shall remain in effect, if within said 60-day period, the In-House Counsel files with the Board:

(A) written notification by the lawyer stating the date on which the prior employment terminated, identification of the new employer and the date on which the new employment commenced;

(B) certification by the former Business Organization that the termination of the employment was not based on misconduct or lack of fitness or failure to comply with this Rule; and

(C) the certification specified in subsection (a)(3) of Section 4, duly executed by the new employer. If the employment of the In-House Counsel ceases with no subsequent employment within 60 days thereafter, the lawyer shall promptly notify the Board in writing of the date of termination of the employment and shall not represent any Business Organization, company, partnership, association, or other non-governmental business entity authorized to transact business in Texas;

(3) a request by the Business Organization or the Registered In-House Counsel that the registration be withdrawn;

(4) relocation of a Registered In-House Counsel outside of Texas for more than 180 days;

(5) suspension, other than administrative suspension, or disbarment from the practice of law in any jurisdiction or any court or agency before which the lawyer is admitted; or

(6) failure of Registered In-House Counsel to fully comply with any provision of this Rule.

(b) Notice to the State Bar of Texas by the Registered In-house Counsel. Registered In-House Counsel must file notice of certification as In-House Counsel or issuance of new certification as provided in this Rule with the State Bar of Texas within 60 days of certification.

(c) Termination of Authorization. The Board will request that the clerk of the Supreme Court of Texas terminate the authorization to perform legal services under this Rule after the Board has received the notice required by subsection (a)(2) of this Section. The Board will mail notice of the termination to the Registered In-House Counsel and to the Business Organization of record employing the Registered In-House Counsel.

(d) Reapplication. A lawyer previously registered as In-House Counsel may reapply for registration as long as the requirements of this Rule are met.

(e) Re-registration. Lawyers whose Registered In-House Counsel status was terminated for failure to pay annual fees or to complete continuing legal education requirements may be recertified in the same manner that administratively suspended members of the State Bar of Texas are reinstated.

§6. Discipline

(a) Termination of Registration by Court. The Supreme Court of Texas may temporarily or permanently terminate a Registered In-House Counsel's registration for cause at any time, in addition to any other proceeding or discipline that may be imposed by the Supreme Court of Texas.

(b) Notification to Other States and National Lawyer Regulatory Data Bank. The Board is authorized to notify each state or foreign jurisdiction in which the Registered In-House Counsel is licensed to practice law of any disciplinary action

against the Registered In-House Counsel, and is further authorized to notify the National Lawyer Regulatory Data Bank.

§7. Continuing Legal Education Requirement

In-House Counsel shall comply with all continuing legal education requirements applicable to members of the Bar unless otherwise exempt.

§8. Admission Without Examination

The requirements of active and substantial engagement in the lawful practice of law as required for exemption from taking the Texas Bar Examination, as provided in Rule 13 of the *Rules Governing Admission to the Bar of Texas*, may be met by continuous registration as In-House Counsel in Texas for a period of three of the last five years immediately preceding the filing of an application for admission without examination.

§9. Effective Date

(a) This Rule requiring registration or licensure of In-House Counsel becomes effective on January 1, 2021.

(b) Any application for registration as In-House Counsel shall authorize the lawyer to be employed by a Texas Business Organization and shall be effective as of the date of filing with the Board.

(c) The Board will accept applications for registration as In-House Counsel beginning December 1, 2019.

Tab F

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: September 2, 2019

Re: TRAP 49.3, Motion for Rehearing

I. Matter referred to subcommittee

The Court's May 31, 2019 referral letter and Chairman Babcock's June 3 letter referred the following matter to the Appellate Rules Subcommittee:

> **Motions for Rehearing in the Courts of Appeals.** Justice Christopher and the State Bar Court Rules Committee have each proposed amendments to Rule of Appellate Procedure 49.3, which are attached. The Committee should consider both and make recommendations.

The two proposals are attached to this memo (App. A, B).

II. Background

TRAP 49.3 currently provides that a panel rehearing "may be granted by a majority of justices who participated in the decision. Otherwise, it must be denied."

In the November 2018 election, there was significant turnover in some of the appellate courts. As a result, for many opinions issued in late 2018, there was no longer "a majority of the justices who participated in the decision of the case" at the panel rehearing stage. Under TRAP 49.3, the appellate courts were required to automatically deny panel rehearing; and at least one court of appeals refused to grant an extension to file a panel rehearing because panel rehearing could not be granted under any circumstance (App. C).

The only relief available to the litigants in these cases was to seek en banc consideration. Under TRAP 41.2, en banc consideration is "not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." This is a much higher standard to meet than for panel rehearing. As Justice Christopher's memo notes, because of this higher standard, most of the en banc motions were denied.

As Justice Christopher explains, there were instances when the one remaining justice who participated in the panel decision found a rehearing motion meritorious but was unable to make any

correction because a majority of the original panel was no longer sitting. Short of convincing a majority of the en banc court that the correction met the high standard for en banc consideration, there was no avenue available to the remaining justice for altering the opinion and judgment.

As Justice Christopher notes in her memo, the events of November 2018 are capable of repetition: "Because of the uneven way that some justices on the courts of appeals are elected (i.e. 5 of 9 justices on both the First and Fourteenth court are elected at one time, and 8 of 13 were recently elected on the Fifth court) this problem can re-occur." As she also notes, panel rehearing is a valuable tool: "According to a Westlaw search, in the past three years, the Fourteenth Court has withdrawn an opinion and issued a new opinion on panel rehearing approximately 28 times. The First Court has done this approximately 47 times and the Fifth Court has done this 12 times."

Both Justice Christopher and the Court Rules Committee of the State Bar have proposed changes to TRAP 49.3. The proposals differ in significant ways and each is set out below.

III. Justice Christopher Proposal

Justice Christopher proposes the following change to TRAP 49.3:

> 49.3 Decision on Motion
>
> A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise it must be denied. <u>In the event that a majority of the justices who participated in the decision of the case are no longer on the court and a remaining justice, who authored or joined the majority opinion, believes that the opinion should be revised in light of the motion, then that justice can ask for two new justices to review the motion. The new panel can then decide the motion and revise the opinion if needed.</u> If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The key elements of Justice Christopher's proposal are:

> (1) there must be only one remaining justice who joined the majority opinion of the original panel;
> (2) that justice must request that additional justices be assigned to the panel to consider a motion for panel rehearing;
> (3) the procedure for selecting the justices to be added is left to the appellate court's internal procedures (although use of the word "new" suggests the additional justices must be new to the court by election or appointment);
> (4) if two members of the original panel remain, those two justices will determine the panel rehearing; and
> (4) if no member of the original panel remains, the motion for panel rehearing must be denied and the complaining party must seek en banc consideration.

IV. State Bar Court Rules Committee Proposal

The State Bar Court Rules Committee has endorsed the following amendment to TRAP 49.3:

49.3. Decision on Motion for Rehearing

> A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. However, if one or more of the justices on the original panel cannot participate in the motion for rehearing, the chief justice will ensure that sufficient additional justices are assigned to the case so that three justices participate in the decision on the motion for rehearing. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

The key elements of the Court Rules Committee's proposal are:

> (1) there must be two or fewer justices remaining from the original panel (i.e., the rule applies anytime there are fewer than three justices remaining on the panel);
> (2) the court must ensure that three justices participate in all panel rehearings; and
> (3) the chief justice will determine the assignment of additional justices to the panel.

V. Issues for discussion

The subcommittee has identified and discussed the following issues raised by the proposals:

1. Should TRAP 49.3 be revised to address situations when one or more members of the original panel are no longer sitting at the panel rehearing stage?
2. Under what circumstances should extra justices be assigned to a panel rehearing: (a) in all cases where one or more of the original panel are not sitting; (b) in all cases where two or more of the original panel are not sitting; or (c) in only those cases where the sole remaining justice requests participation of additional justices on panel rehearing and, if so, must that justice have joined the original majority opinion?
3. If additional panel members are provided, should the rule direct how that is to be accomplished, such as providing for the departing justice's successor to be appointed to the panel or random draw, or should it be left to the court's internal operating procedures or to the chief justice?

These issues all appear to be simple, but they become quite complicated on longer reflection. As one subcommittee member observed, whatever change is made is "politically fraught." That label applies to two important questions: the dignity to be afforded the original panel opinion and the method of selecting additional justices:

> *Weight of original opinion*. The current panel rehearing rule favors the original panel opinion by providing for no panel rehearing if the panel is short two or more members at

the time rehearing is considered; it permits only en banc consideration by the full court. Justice Christopher's proposal maintains that approach, allowing panel rehearing only when a justice who joined the original majority remains on the court and thinks the panel rehearing motion has merit. The Court Rules proposal takes the opposite approach and leaves open the possibility of alteration or even a flipped judgment on all panel rehearings.

Method of selecting additional panel members. The current panel rehearing rule does not provide for additional members so there is no method of selection provided. The current rules do not provide a method for selecting the original panel either – that is left to the court's internal operating procedures. Some courts of appeals assign panels randomly; some do not. TRAP 41.1(b) provides three methods when the original panel is deadlocked: the court picks another member to sit, the court asks the Chief Justice of the Texas Supreme Court to temporarily assign an eligible justice, or the court may take the matter en banc. Justice Christopher's proposal leaves the selection to the court's internal procedures (although use of the word "new" suggests the additional justices must be new to the court by election or appointment). The Court Rules proposal provides that the chief justice of the court of appeals will select additional panel members. The subcommittee unanimously agreed that any method of selecting additional members for a panel rehearing must be politically neutral, and generally favored a random system.

The subcommittee seeks input from the full committee on these issues before drafting any proposed change to the panel rehearing rule.

App. A. Justice Christopher Proposal

Memorandum

To: Chief Justice Nathan Hecht

From: Justice Tracy Christopher

Date: March 29, 2019

Re: Proposed revision to TRAP 49.3

I am asking that the Supreme Court consider an amendment to TRAP 49.3. This request is made on my own behalf and not on behalf of the Fourteenth Court of Appeals.

History: In November 2018, a number of appellate courts across the state lost many of its incumbent justices. As a result, for many of the opinions issued in December of 2018, there was no longer "a majority of the justices who participated in the decision of the case," at the time a motion for rehearing was filed. Appellate courts then automatically denied the motion pursuant to rule 49.3. Litigants were then forced to try to get relief via an en banc motion. Because the standards for en banc relief are high, most of these motions were rightfully denied.

However, on some occasions, a remaining member of the panel who decided the case might think that the opinion should be revised because of the arguments in the rehearing motion. The only current way to revise the opinion is to ask for en banc review. This puts a burden on the en banc court that could be avoided by a rule change. My proposed rule change would allow a remaining justice—who was in the majority—to rehear the case with two new justices.

Because of the uneven way that some justices on the courts of appeals are elected (i.e. 5 of 9 justices on both the First and Fourteenth court are elected at one time, and 8 of 13 were recently elected on the Fifth court) this problem can re-occur.

According to a Westlaw search, in the past three years, the Fourteenth Court has withdrawn an opinion and issued a new opinion on panel rehearing approximately 28 times. The First Court has done this approximately 47 times and the Fifth Court

has done this 12 times. While this rule change may not affect many cases, I still believe that it is a useful one that the parties and lawyers would support.

Proposed additions to the rule are underlined.

Proposed rule change:

49.3 Decision on Motion

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise it must be denied.

In the event that a majority of the justices who participated in the decision of the case are no longer on the court and a remaining justice, who authored or joined the majority opinion, believes that the opinion should be revised in light of the motion, then that justice can ask for two new justices to review the motion. The new panel can then decide the motion and revise the opinion if needed.

If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

App. B. Court Rules Committee of the State Bar Proposal

49.3. Decision on Motion **for Rehearing**

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. **However, if one or more of the justices on the original panel cannot participate in the motion for rehearing, the chief justice will ensure that sufficient additional justices are assigned to the case so that three justices participate in the decision on the motion for rehearing.** If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

App. C

Order entered January 11, 2019

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00855-CV

APEX FINANCIAL CORPORATION, Appellant

V.

LOAN CARE, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-05921

ORDER

Before the Court is appellant's Unopposed Motion to Extend Time to File Motion for Rehearing. Texas Rule of Appellate Procedure 49.3 provides, "A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied." Following the departures of two of the three justices who participated in this case, there remains no majority of justices who participated in the decision. As a result, the Court must deny a motion for rehearing filed in this proceeding. In the interest of justice, we **DENY** the unopposed motion to extend time to file a motion for rehearing.

/s/ BILL WHITEHILL
JUSTICE