TEXAS ASSOCIATION OF DEFENSE COUNSEL

TEX-ABOTA
The Texas Chapters of ABOTA

May 13, 2022

Via Electronic and First Class Mail
Charles L. Babcock
Jackson Walker LLP
1401 McKinney Street, Ste. 1900
Houston, TX 77010

Re: Joint letter to SCAC from TEX-ABOTA, TTLA, TADC, TCJL, ACTL, and the Litigation Council of the State Bar of Texas

Dear Chair Babcock and members of the Committee,

On behalf of the undersigned organizations, thank you for the opportunity to submit our thoughts about the proposed rule changes governing remote proceedings that have recently been under discussion by the Committee. We understand that a number of concerns have been raised about the original proposal, many of which we share. We appreciate the deliberative and conscientious way in which the Committee is going about this very significant change in traditional trial practice in Texas and hope that our comments prove constructive and helpful in your further deliberations.

The initial proposal would authorize the court to "allow or require a participant to appear at a court proceeding in person—by being physically present in the courtroom—or remotely by audio, video, or other technological means." As you are aware, this language is similar to legislation introduced during the 2021 legislative session (SB 690 and HB 3611). HB 3611 made it to the calendar but too late for consideration by the House. SB 690 did not get a vote in Senate committee. These bills raised significant concerns at the time, including those expressed by each of the undersigned organizations, and were heavily negotiated to carve out certain proceedings, including some jury trials (in criminal matters). Even with various modifications, the bills did not garner sufficient support to move forward. We believe that it is important to acknowledge the legislative history of this concept and the importance of keeping the legislative leadership and chairs and members of the relevant committees, particularly the Senate State Affairs and House Judiciary & Civil Jurisprudence Committees, closely informed about the progress of a proposed rule.

We likewise believe that it is crucial that a high degree of consensus among members of the committee, relevant legislative bodies, and the bar be achieved before the adoption and implementation of any proposed rule. Such consensus will ensure a smoother transition to the

changes, particularly with respect to ensuring that the appropriate technology and technical support exists around the state, and lessen the chances that serious substantive or procedural difficulties will arise that have not been foreseen and that may adversely affect public confidence in the transparency and quality of remote interactions under the pressure of litigation. As mentioned above, the undersigned have many of the concerns expressed both in the legislative process and at the two SCAC meetings on the subject last month. Remote proceedings can be used very effectively to increase access and dispose of some types of matters efficiently, particularly if they are uncontested, routine matters that do not involve a disputed adversarial proceeding, such as witness testimony, evidentiary hearings, dispositive motions, or bench trials. While we understand that courts have long had authority to order telephonic appearances in certain circumstances, this has never substituted for in-person proceedings and its shortcomings are well known. We have also heard that some proponents of the rule believe that litigants will jump at the chance to move to remote appearances because, among other things, the time and expense of appearing in person, particularly if it involves travel. If that it is the case, and it may well be in some instances, the rule should certainly permit it, but not mandate it. The undersigned represent all manner of businesses and practitioners on both sides of the bar, and while we do not always agree on policy matters, we are of one mind that in-person proceedings must be preserved if parties desire them.

We are pleased to hear that the Committee has moved beyond a one-size-fits-all rule that allows courts to compel parties into the system regardless of the nature of the matter and the parties' judgment about how best to represent their clients. There are good reasons that we have courthouses and courtrooms that are designed to impress all who enter of the seriousness and solemnity of the legal process. Our courts serve the people who seek them out for redress of grievances recognized by the law or who are haled into them to defend themselves), and we strongly believe that citizens have a fundamental right to demand face-to-face adjudication if they wish it. With the agreement of the parties, however, any contested proceeding, up to and including a jury trial, could be conducted remotely.

Although the initial rule has a procedure for objecting to a judge's order mandating a remote proceeding based on "good cause," we are uncertain on what grounds or in what type of proceeding a ruling on an objection would be reviewed. We presume that a mandamus proceeding on an abuse of discretion standard would be appropriate, but we would like to see specific language in the rule stating a standard for "good cause" and a review process. Since the Committee has already indicated, we believe, that civil jury trials will not be subject to a mandate, part of our concern has already been addressed. Depending on what the Committee decides whether and to what extent a mandatory remote proceeding is warranted, we believe that a clear process for review is necessary to protect both due process concerns and Seventh Amendment implications. We are also concerned that appropriate standards for "good cause" will have to be worked out on a case-by-case basis, which may add more expense and delay to a proceeding rather than save them, as the rule aims to do.

Finally, we urge caution in making a huge policy change based on an extraordinary and, we hope, one-time event that is even now in its waning stages. Thus far we have seen very little

data about the effectiveness of remote proceedings in different settings and circumstances, beyond anecdotal experiences and mass undifferentiated data that does not distinguish the types of the cases involved or even whether either or both parties were represented by counsel. One reason the Legislature drew back from committing to this change last spring was this very uncertainty and the lack of sufficient time and adequate information upon which to base a decision. We can agree that the backlog of cases supports that remote proceedings could play a beneficial role in catching up. But at the same time, the value of simply "catching up" should be weighed against the risk of launching a process that ends up with so many problems that the courts and the Legislature will be compelled to step in and do course corrections. We strongly recommend that the proposed rule be negotiated with the stakeholders and that all stakeholders agree by signing on the dotted line. This will assure that we have a process that holds up and improves—or at least does no harm—to the administration of justice.

Thank you again for the opportunity to express our concerns. We look forward to working with you as we move forward on this important policy issue.

Sincerely,

TEX-ABOTA
The Texas Chapters of ABOTA

Jennifer H. Doan, President of TEX-ABOTA
HALTOM & DOAN
6500 Summerhill Rd., Ste. 100
Texarkana, TX 75503
Telephone: 903-255-1002
Email: jdoan@haltomdoan.com

Quentin Brogdon, President of TTLA
CRAIN BROGDON ROGERS, LLP
3400 Carlisle, Suite 200
Dallas, TX 75204
Telephone: 214-522-9404
Email: qbrogdon@cbrlawfirm.com

TEXAS ASSOCIATION OF DEFENSE COUNSEL

Christy Amuny, President of TADC
GERMER PLLC
550 Fannin, Ste. 400
Beaumont, TX 77701
Telephone: 409-813-8021
Email: camuny@germer.com

TEXAS CIVIL JUSTICE LEAGUE

George Christian, President of TCJL
400 West 15th Street, Ste. 1400
Austin, TX 78701
Telephone: 512-791-1429
Email: georgechristia@gmail.com

THE LITIGATION SECTION OF THE STATE BAR OF TEXAS

Cade Browning, Chair of the Litigation
Council of the State Bar of Texas
Browning Law Firm
802 Mulberry Street
Abilene, TX 79601
Telephone: 325-437-3737
Email: cade@browningfirm.com

Robby Alden

Robby Alden, Chair of the Texas State Committee of the American College of Trial Lawyers
Byrd Davis Alden & Henrichson, LLP
707 West 34th Street, Ste. 1
Austin, TX 78705
Telephone: 512-593-7650
Email: ralden@byrddavis.com

Cc: via First Class Mail
Chief Justice Nathan L. Hecht
Justice Debra Lehrmann
Justice Jeff Boyd
Justice John Phillip Devine
Justice Jimmy Blacklock
Justice Brett Busby
Justice Jane Bland
Justice Rebeca Aizpuru Huddle
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DISTRICT COURTS 2019 (pre-pandemic)	TOTAL NON-CRIMINAL	CIVIL	FAMILY
Cases Disposed	488,674	145,721	342,953
By Trials	100,539	8,706	91,833
Bench Trials	99,362	7,654	91,708
Jury Verdicts	1,177	1,052	125

https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf