

PRESENTED AT

33rd Annual Conference on State and Federal Appeals

June 8-9, 2023

Austin, TX

**Procedure Update:
A Review of Recent Developments in Procedural Rules
That May Impact Your Appellate Practice**

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Kennon is a partner at Scott Douglass & McConnico LLP. She joined the firm in 2011, after serving as the Rules Attorney for the Supreme Court of Texas, working as an associate for Baker Botts LLP, and clerking for former Chief Justice Wallace B. Jefferson of the Supreme Court of Texas. As the Rules Attorney, Kennon handled inquiries and issues relating to rules and assisted the court with promulgating and amending rules. At Scott Douglass & McConnico, her practice focuses on general civil litigation. She also handles appellate matters and advises on rule-related matters. She has represented a broad range of clients, including governmental entities, businesses, firms, lawyers, judges, associations, and individuals. Her education includes the University of Texas at Austin and the University of Texas School of Law. She served as the Head Teaching Quizmaster in law school.

Kennon is a frequent speaker for Continuing Legal Education courses. In addition, she is a published co-author of law-review articles and three editions of a book on discovery practices in Texas.

Kennon is also dedicated to serving the community. She does pro bono work on a regular basis. She has served as a member of the Texas Commission to Expand Civil Legal Services, a member of the Supreme Court of Texas Task Force for Rules in Expedited Actions, the President of the Austin Bar Association, the President of the Austin Young Lawyers Association, the Chair of the State Bar's Court Rules Committee, the Chair of the Austin Bar Foundation, the Editor-in-Chief for Austin Lawyer, a board member for Texas Folklife and Austin Friends of Traditional Music, and a board member and secretary for the Texas Legal Services Center. She currently serves as Chair-Elect of the State Bar's Board of Directors and as a member of the American Law Institute, the Texas Supreme Court Advisory Committee, the Editorial Board for The Advocate, the Supreme Court of Texas Remote Proceedings Task Force, the State Bar's Board of Directors, the Texas Access to Justice Commission, and the Austin Bar Association's Diversity, Equity, and Inclusion Committee.

Kennon received the Joseph C. Parker Diversity Award from the Austin Bar Association in 2022, the TCWLA Litigation/Appellate Attorney Award in 2018, a "Standing Ovation" State Bar Volunteer Award in 2017, and a Special Commendation of the Supreme Court of Texas and State Bar in 2011, for her work on Texas rules. She was named as a Texas Rising Star selectee in 2008, 2009, and 2013 through 2017 and as a Texas Super Lawyers selectee in 2019 through 2022. In addition, in 2020 through 2022, she was named by Austin Monthly as one of Austin's Top Attorneys in Civil Litigation and identified as a Chambers USA Band 1 recognized practitioner in Litigation: General Commercial in "Austin & Surrounds" in Texas.

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PROCEDURE UPDATE: A REVIEW OF RECENT DEVELOPMENTS IN PROCEDURAL RULES THAT MAY IMPACT YOUR APPELLATE PRACTICE

I. PRIMER ON PERTINENT RULEMAKING

When considering recent developments in procedural rules (including amendments that have been proposed but not adopted), it is helpful to have a basic understanding of the process by which the Supreme Court of Texas (“Court”) promulgates Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Judicial Administration. Thus, this paper provides the following rulemaking primer before addressing recent developments.

The Court has broad authority to promulgate and amend rules governing practice and procedure in civil actions. *See* Tex. Const. art. V, § 31(b) (directing the Court to “promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts”); Tex. Gov’t Code Ann. § 22.004(a) (“The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.”).

Article V of the Texas Constitution provides that the Court is “responsible for the efficient administration of the judicial branch” and requires the Court to “promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.” Tex. Const. art. V, § 31(a). Section 74.024 of the Texas Government Code addresses the Court’s administrative role in greater detail and authorizes the Court to “adopt rules of administration setting policies and guidelines necessary or desirable for the operation and management of the court system and for the efficient administration of justice.” Tex. Gov’t Code § 74.024(a). This statute also requires the Court to request the advice of the Texas Court of Criminal Appeals (“Court of Criminal Appeals”) “before adopting rules affecting the administration of criminal justice.” *Id.* § 74.024(b).

In Texas, the rulemaking process generally extends beyond the nine justices and the rules attorney at the Court. For example, a rules project may be prompted by a mandate from the Texas Legislature, a recommendation from the Supreme Court Advisory Committee (SCAC),¹ a recommendation from a State Bar of Texas (“State Bar”) committee focused on rules (e.g., the Court Rules Committee or the Administration of Rules of Evidence Committee), or feedback from the community that reveals a need for new rules or amendments to existing rules. In some instances, the Court independently identifies a need to revise rules (e.g., to make them more consistent with case law or comparable federal rules, to simplify or modernize procedures, to eliminate identified procedural traps, or to reflect changes in practice).

The workflow for a rules project depends on the perceived needs relating to that project. Sometimes, the Court refers a rules project directly to the SCAC for analysis. Other times, the Court will invite initial analysis from a State Bar committee and then refer that committee’s recommendations to the SCAC for further analysis. Occasionally, the Court creates a task force to prepare initial rule proposals. This has been done, for example, when the subject matter of the contemplated proposals is novel and when it appears that the contemplated proposals may benefit from particular perspectives or subject-matter expertise during the drafting process. Task-force proposals generally go through SCAC analysis before the Court decides whether and how to act on them.

Regardless of how a rule project begins or proceeds, if it yields rule content from the Court itself, that content will be set forth in an administrative order. Generally, in the absence of a legislative mandate requiring an expedited process, the Court must publish proposed new rules and rule amendments for 60 days before they become effective. *Id.* § 22.004(b); § 74.024(d). Proposed rule content is published in the *Texas Bar Journal* and in administrative orders posted on the Court’s website (at <http://www.txcourts.gov/supreme/administrative-orders.aspx>). The Court invites public comments during the designated 60-day (or longer) comment period, reviews comments received (with assistance from the rules attorney), and sometimes modifies proposed rule content in response to comments.²

¹ The SCAC, “first created in 1940 and periodically reconstituted since then, assists the [Court] in the continuing study, review, and development of rules of administration and procedure for Texas courts The [SCAC] drafts rules as directed by the Court; solicits, summarizes, and reports to the Court the views of the bar and the public on court rules and procedures; and makes recommendations for change.” Tex. Jud. Branch, Sup. Ct. Advisory Comm., <https://www.txcourts.gov/scac/about-us/>.

² For more information on rulemaking, see Chief Justice Nathan L. Hecht, Martha G. Newton & Kennon L. Wooten, *How Texas Court Rules are Made* (May 13, 2016), <http://www.txcourts.gov/rules-forms/rules-standards.aspx>.

II. RECENT DEVELOPMENTS IN PROCEDURAL RULES IMPACTING APPELLATE PRACTICE

Understanding that one's appellate practice often includes proceedings at the trial-court level, this paper addresses all amendments to procedural rules set forth in the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Judicial Administration that took effect between January 1, 2022 and June 1, 2023.³ To enable readers to identify readily the content they want or need to review, the amendments are organized by topic below.

Due to the breadth of subject matter covered, this paper will not endeavor to detail all amendments that have taken effect during the last 1.5 years. Instead, high-level summaries are provided in the paper and all pertinent administrative orders are attached so that readers can review the pertinent rule content in full.⁴ Finally, practice pointers are included throughout the paper in an effort to help readers avoid potential pitfalls relating to recently amended rules.

A. Direct Appeals to the Supreme Court of Texas

In limited situations, a party may appeal a case directly from a trial court to the Court. For example, this is possible when a trial court grants or denies injunctive relief based on the constitutionality of a Texas statute. *See* Tex. Gov't Code § 22.001(c) ("Except as provided by this subsection or other law, an appeal may be taken to the supreme court only if the appeal was first brought to the court of appeals. An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state."). Distinct procedures apply to direct appeals.

Texas Rule of Appellate Procedure (TRAP) 57, which sets out the procedures for direct appeals, was amended significantly in an administrative order dated December 20, 2021. *See* Misc. Docket No. 21-9155 (**Attachment A**). It is fair to say that TRAP 57 was effectively rewritten. Amended TRAP 57 took effect on January 1, 2022. Thus, if you are considering a direct appeal, it is important to follow the new procedures laid out in amended TRAP 57. *See id.*

Practice Pointer: If you considering the possibility of appealing your case directly from a trial court to the Supreme Court of Texas, remember to (1) lay the proper foundation to authorize the direct appeal, *see, e.g.*, Tex. Gov't Code § 22.001(c), and (2) follow TRAP 57 when proceeding with the direct appeal.

B. Oral Arguments in Intermediate Appellate Courts

TRAP 39.7, which addresses requests for oral argument, was amended in administrative orders dated January 24, 2023. *See* Misc. Docket No. 23-9001 & Misc. Docket No. 23-001 (**Attachment B-1**).⁵ Consistent with standard procedure, the proposed rule amendments were issued for public comment before they were finalized. *See* Misc. Docket No. 22-9089 & Misc. Docket No. 22-007 (**Attachment B-2**). Because there were no changes to the proposed rule amendments in response to public comments, the final version of the rule amendments are set forth in the original order (**Attachment B-2**) rather than the final order (**Attachment B-1**). Amended TRAP 39.7 took effect on February 1, 2023.

The prior version of TRAP 39.7 provided as follows: "A party desiring oral argument must note that request on the front cover of the party's brief. *A party's failure to request oral argument waives the party's right to argue.* But even if a party has waived oral argument, the court may direct the party to appear and argue." TRAP 39.7 (emphasis added). In 2022, it came to the Court's attention that some courts of appeals were setting cases for oral argument and then prohibiting parties who did not request oral arguments in their briefs from participating unless they filed motions to participate. The Court also learned that some courts of appeals were not ruling on such motions until just days before subject oral arguments were scheduled to occur. To avoid these procedural pitfalls, the Court amended TRAP 39.7.

As amended, TRAP 39.7 no longer states that a party's failure to request oral argument waives the party's right to argue. The amendments clarify further that, "If the court sets the case for oral argument, then all parties that filed a

³ The Court's Rules Attorney, Jackie Daumerie, provided invaluable assistance with identifying and explaining amendments.

⁴ Administrative orders are useful for verifying rule content, determining the effective date of rule content, and obtaining background information regarding rules. Oftentimes, however, practitioners simply want to review the current, complete versions of rules. Current, complete, searchable versions of the rules are available at <https://www.txcourts.gov/rules-forms/rules-standards/>.

⁵ There are two orders because the Court and the Court of Criminal Appeals both issued orders for these rule amendments. The same is true for other instances in which two orders are referenced as a single attachment in the remainder of this paper.

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First appeared as part of the conference materials for the
33rd Annual Conference on State and Federal Appeals session
"Procedure Update"