

MEMORANDUM

TO: Texas Supreme Court Advisory Committee (SCAC)
FROM: Judicial Administration Subcommittee
RE: Local Rules Agenda Item—for the SCAC Meeting on September 28-29, 2018
DATE: September 24, 2018

In a referral letter dated July 5, 2017, Chief Justice Hecht asked the SCAC to consider issues relating to local rules. Specifically, he noted that Rule of Civil Procedure 3a and Rule of Judicial Administration 10 require the Supreme Court of Texas to approve any new or amended local rule of a trial court and asked the SCAC to propose a new process and corresponding rule amendments that remove the primary responsibility for approving the local rules of trial courts from the Supreme Court of Texas. He encouraged consideration of the following things:

- whether statewide rules should define what must be in a local rule, rather than a standing order;
- whether the regional presiding judge, the regional court of appeals, or both should be required to approve local rules of trial courts and whether the process should be different for rules that only apply to criminal cases;
- whether trial courts should be able to adopt certain kinds of rules without prior approval of a supervising court; and
- a process for Supreme Court review of a proposed or enacted local rule at the request of any person.

The local-rules project was assigned to the Judicial Administration Subcommittee, and the Court's former Rules Attorney Martha Newton prepared a memorandum to facilitate the subcommittee's work. The subcommittee met telephonically twice and discussed, among other things, Martha's memorandum, the considerations set forth above, the standards governing local rules, and potential rule amendments to address issues with current procedures and practices. The Court of Criminal Appeals' Rules Attorney, Holly Taylor, participated in the second call. The subcommittee then prepared a memorandum for the SCAC's consideration on July 13, 2018.

The SCAC discussed issues pertaining to local rules during its meeting on July 13, 2018. No votes occurred in regard to local rules during that meeting, but several ideas were discussed, including the following: (1) whether an entity should be formed to assist the Supreme Court with reviewing proposed local rules and, if so, whether that entity should be appointed by the Supreme Court or the State Bar of Texas; (2) whether, when, and how local rules and standing orders should be reviewed; (3) whether local-rules templates should be prepared and, if so, what they should address; (4) whether and how to address formally the Court of Criminal Appeals' role in relation to local rules; and (5) how to publicize local rules and standing orders.

The proposed rule amendments below are a product of the SCAC's discussion and of the subcommittee's further consideration of issues and options during telephonic meetings on September 6, 2018 and September 20, 2018. Of note, there are some areas of disagreement among members of the subcommittee. The subcommittee members will address those areas of

disagreement during the upcoming SCAC meeting. To facilitate the SCAC's discussion of the proposals below, the following documents are attached to this memorandum: (1) Martha Newton's memorandum (Exhibit A); (2) Tex. R. Civ. P. 3a (Exhibit B); (3) Tex. R. Jud. Admin. 10 (Exhibit C); (4) Tex. Gov't Code § 74.093 (Exhibit D); (4) Tex. R. App. P. 1.2 (Exhibit E); and (5) 28 U.S.C. §§ 2071–72 (Exhibit F).

PROPOSED RULE AMENDMENTS

Texas Rule of Civil Procedure 3a

Rule 3a. Local Rules and Standing Orders

Each administrative judicial region, district court, county court, county court at law, and probate court may ~~make~~adopt and amend local rules and standing orders governing practice before such courts, provided that the local rules and standing orders comply fully with the requirements of Rule 10 of the Texas Rules of Judicial Administration.~~;~~

~~(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;~~

~~(2) no time period provided by these rules may be altered by local rules;~~

~~(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;~~

~~(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;~~

~~(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;~~

~~(6) n~~No local rule or, standing order, or practice of any court, —other than those local rules and amendmentslocal rules and standing orders that~~which~~ fully comply with all requirements of this Rule 3a, Rule of Judicial Administration 10—shall ever be applied to determine the merits of any matter.

Texas Rule of Judicial Administration 10

Rule 10. Local Rules and Standing Orders

(a) *Relationship with Other Authorities.* The local rules and standing orders adopted or amended by the administrative judicial regions and the courts of each county in this state must not duplicate or be inconsistent with ~~shall conform to all~~any provisions of the federal or Texas constitution, Texas statutes, —or statewide and administrative region rules in Texas. This

requirement extends to, but is not limited to, any time periods provided by a constitutional provision, statute, or statewide rule.

~~If approved by the Supreme Court pursuant to Rule 3a, T.R.C.P., the local rules shall be published and available to the Bar and public, and shall include the following:~~

~~(b) *Multi-Court Counties.* a. In multi-court counties having two or more court divisions, each division must adopt a single set of local rules which shall govern all courts in the division.~~

~~(c) *Local Rule Content.* Each set of local rules in this state must:~~

~~(1) be consistent with any applicable template issued by the Supreme Court of Texas;~~

~~(2) for each rule, identify any provision in the Texas Rules of Civil Procedure or Code of Criminal Procedure that addresses the same subject matter as the rule, either through a numbering system that corresponds with the numbering system in the Texas Rules of Civil Procedure or Code of Criminal Procedure or through another, equally apparent method;~~

~~(3) include the following:~~

~~(i) b. provisions for the fair and equitable distribution of the caseload among the judges in the county;~~

~~(ii) e. Provisions to ensure uniformity of forms to be used by the courts under Rules 165a and 166, T.R.C.P.;~~

~~(iii) d. Designation of the responsibility for emergency and special matters;~~

~~(iv) e. Plans for judicial vacation, sick leave, attendance at educational programs, and similar matters; and~~

~~(v) any other content required by Section 74.093 of the Government Code.¹~~

~~(d) *Local Rule Approval Process.* No local rule will become effective until it is submitted to and approved by the Supreme Court of Texas or its appointed entity, unless the rule addresses only:~~

~~(1) standards of decorum;~~

~~(2) procedures for handling uncontested matters in civil cases; or~~

~~(3) content required by Section 74.093(b) of the Government Code.~~

The Supreme Court of Texas may request the advice of the Texas Court of Criminal Appeals before approving local rules affecting the administration of criminal justice consistent with Section 74.024 of the Government Code.

¹ Discussion Point: Should there be a provision requiring proposed amendments to identify any new content that is being proposed in a format that will make the proposed content readily distinguishable from existing rule content, or is it preferable to let the appointed committee decide the format in which proposed amendments must be submitted?

(e) *Publication Requirement.* A proposed local rule shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys and other individuals practicing before the court or courts for which it is made. All local rules must be submitted to the Administrative Director of the Texas Office of Court Administration within ten days of their effective date and made available online and upon request to the members of the bar and public.²

(f) *Standing Orders.* A standing order must not contain any content that is mandated under (c)(3) to be included in a local rule, and cannot be enforced in any case unless it has been filed in that case and provided to each party in that case. Before enforcing a standing order in any case, a court or judge may submit that standing order to the Supreme Court of Texas for approval.

(g) *Review Process.* Any person may submit a written request to the Supreme Court of Texas for review of any local rule or standing order [that has not been approved by the Supreme Court of Texas].³ If such local rule or standing order is in effect when the request for review is submitted, it will remain in effect unless and until it is modified or abrogated by the Supreme Court of Texas. Any request for review submitted under this rule must specify the local rule or standing order at issue and detail each concern relating to each specified rule or order. A request for review may be submitted through a State Bar of Texas representative.

² Discussion Point: Should the Office of Court Administration (OCA) be the receiving entity, or does it make more sense for the Supreme Court of Texas to receive local rules and then deliver them to OCA for publication online?

³ Discussion Point: Should the review process be available for all local rules and standing orders, or only those local rules and standing orders that have not been approved previously by the Supreme Court of Texas?

EXHIBIT A

To: The Judicial Administration Subcommittee of SCAC Oct. 23, 2017
From: Martha Newton
Re: Problems With the Existing Local Rules Approval Process

Here are my observations on the local rules approval process. Of course, they do not necessarily reflect the views of the Supreme Court or any of its Members.

Introduction

Professor Charles Alan Wright in his first treatises on federal practice and procedure recognized that the proliferation of local rules and practices threatened the integrity of the federal rules—and that was in 1965! But his warnings, though not unheeded, could not stop the process then and cannot roll it back now because two fundamental principles of rulemaking are in tension. On the one hand, uniformity is always and everywhere to be prized—up and down the halls of the federal courthouse, and from district to district. Knowing that the rules will be the same in the District of New Mexico and the Southern District of New York assures efficiency, builds trust and confidence, and, well, promotes justice. On the other hand, the evolution of society and of its expectations of the justice system demands innovation. E-filing and other technologies don't just assist the system; they change it fundamentally. Innovation often comes through individual experimentation, but to prevent this from disadvantaging those who do not usually practice in a particular court, new or different practices or procedures can't be the secret trove of the local bar. They should be available to all—in local rules. In time, Professor Wright was correct: uniformity must not stifle innovation, but it must assimilate it. The two competitors must work together.

The Texas Rules of Civil Procedure, first adopted in 1941, have always authorized trial courts to make local rules of practice. Since 1983, when former TRCP 817 became TRCP 3a, the rules have required that any proposed rule or amendment be submitted to SCOTX for approval before it becomes effective. *See* TEX. R. CIV. P. 3a(3) (current version); *id.* R. 3a (version adopted by order dated Dec. 5, 1983). The Rules of Judicial Administration, adopted in 1987, have required that local rules for district and statutory county courts address administrative issues such as the amount of vacation time and sick leave a judge is entitled to, and that

these provisions also be submitted to SCOTX under TRCP 3a. *See* TEX. R. JUD. ADMIN. 10(c).¹ The requirements in TRCP 3a and RJA 10 that every new or amended local rule of practice and administration be submitted to SCOTX for approval have resulted in a system that is unworkable.

Reasons Why the Current System is Unworkable

1. Too Many Trial Courts; Not Enough Manpower

Hundreds of Texas trial courts or groupings of trial courts (*e.g.*, the district courts of X County) have or want local rules. SCOTX has one staff member, the Rules Attorney, to review and present all submissions to the Court, in addition to the many other responsibilities of the position.

The Court must necessarily prioritize its statewide rulemaking projects. Since 2006, the highest number of sets of local rules approved by the Court in a single year was 17 sets in 2012. Most years, 10 or fewer sets are approved. There are typically about 25 sets of local rules pending before the Court at any given time.

The Court cannot approve submitted local rules at a fast-enough pace. This, I emphasize, is not for want of interest or because local rules are not important. The Court simply does not have the resources to move more swiftly. Most local rules are pending in the Court at least a year before they are approved. Some remain pending for several years. The Court will sometimes take up the rules of a larger county out of order because larger counties serve more Texans, so the delay tends to affect smaller, rural counties the most.

2. Delay Begets Delay

Once a set of local rules finally makes it to the top of the pile, the approval process is rarely smooth and efficient. The Court wants the Rules Attorney to

¹ Chapter 74 of the Government Code also requires that each county adopt local rules of administration that address matters enumerated in the statute, but the statute does not expressly require that the rules be approved by SCOTX. *See* TEX. GOV'T CODE § 74.093.

contact the sponsoring judge(s) to resolve any concerns before presenting the rules to the Court. Often, a sponsoring judge is no longer on the bench, amendments to the TRCP made in the interim render a proposed local rule or amendment outdated or invalid, or the submitting court wants to make changes to what was previously submitted. In addition, trial court judges can be hard to reach. For good reasons, direct contact information for a trial court judge is often hard to find, and of course, many are on the bench all day. Some courts never respond to our questions at all.

3. No Guidance on the Content of Local Rules

Trial court judges routinely issue “standing orders” that are never submitted to SCOTX for approval. There is no guidance in TRCP 3a or elsewhere on what kind of court-issued directive must be approved by SCOTX and what kind of directive a court can make on its own in a standing order. As a result, we often open local rules that have been pending in the Court for a long time only to find that the proposed changes relate to minor issues of courtroom or courthouse management—for example, they move the uncontested docket from Monday at 9 a.m. to Tuesday at 9 a.m. or add some basic, noncontroversial rules of courtroom decorum.

On the other end of the spectrum, some trial courts have attempted to impose rules through standing orders that are directly contrary to a rule in the TRCP. For example, we recently received local rules issued years ago as administrative orders, one exempting certain civil cases from the e-filing mandate in TRCP 21(f)(1), and another automatically sealing all documents filed in guardianship cases, despite the requirements of TRCP 76a.

Sometimes we have the opposite problem—a lower court has incorporated provisions of the TRCP or other statewide rules into its local rules. But when the TRCP or statewide rules change, the local rules become outdated.

4. No Recourse When Trial Courts Enforce Local Rules Without SCOTX Approval

We are frequently informed that other courts are enforcing local rules and procedures without SCOTX approval. Another Texas county has displayed on the district clerk’s website: (1) local rules for the district courts of the county that were

submitted to the Court but have not been approved because the local administrative judge has not responded to our questions about a specific rule; and (2) local rules for a particular district court in the county, never submitted to the Court, that require counsel to provide the judge with courtesy paper copies of pleadings and other documents.²

When a lower court enforces a local rule without SCOTX approval, court patrons do not have much recourse. The Court occasionally asks the Rules Attorney to call the lower court to express the Court’s disapproval, but there is no mechanism in the TRCP for the Court to abrogate a local rule. When the Court declines to approve a local rule, it does not issue an order; we just communicate the Court’s disapproval by phone or in writing.

5. Lack of Expertise on Criminal Rules

Proposed local rules often contain rules specific to criminal cases. The Court of Criminal Appeals does not have statutory authority to approve local rules, so SCOTX is often in the position of having to approve local rules on which the Court has no expertise. The Court has taken varied approaches to dealing with criminal rules over the years.

At some time in the past, the Court refused to approve any local rules for criminal cases at all. The Court’s policy later shifted to approving criminal rules that were “procedural only,” but that approach proved unworkable—procedural rules can have profound due process implications in criminal cases. More recently, I have begun conferring with the CCA’s rules attorney, Holly Taylor, on proposed local rules for criminal cases. This approach is better than any existing alternative, but it is inefficient for SCOTX to serve as an intermediary between a lower court and the

² TRCP 21(f)(9) states: “Unless required by local rule, a party need not file a paper copy of an electronically filed document.” When Rule 21 was amended to mandate e-filing in 2014, the Court was undecided whether to authorize lower courts to require the filing of courtesy paper copies. Paragraph (f)(9) enabled the Court to defer making a decision because any local rule requiring paper copies would have to be approved by the Court under Rule 3a. Since then, the Court has firmly settled on the side of no paper and rejected every local rule requiring paper that has been submitted for Court approval.

CCA. Additionally, the CCA has the busiest docket of any court in the country, and thus probably has even less time to devote to policing local rules than SCOTX has.

Some Ideas for an Improved System

The Court desires SCAC's independent advice on how to improve local rules. But here are some possible features of a new system:

- authorizing trial courts to adopt certain kinds of rules (whether called rules or standing orders) without getting approval from any higher court;
- requiring trial courts to choose from different versions of particular rules (this is sometimes done in the federal circuits)
- requiring that other proposed rules be approved by the court of appeals;
- prohibiting a local rule's either duplicating or making an exception to a rule in the TRCP;
- assuring that local rules for criminal cases will be approved by a judge or court with sufficient expertise;
- providing recourse for a court patron who believes that a local rule is being enforced without the requisite approval or that a local rule is improper under a rule or policy of statewide applicability; and
- requiring uniform publication and availability of all local rules in a central database on the Texas Judiciary's website.

EXHIBIT B

Texas Rule of Civil Procedure 3a

Rule 3a. Local Rules

Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts, provided:

- (1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;
- (2) no time period provided by these rules may be altered by local rules;
- (3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;
- (4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;
- (5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;
- (6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

EXHIBIT C

Texas Rule of Judicial Administration 10

Rule 10. Local Rules

The local rules adopted by the courts of each county shall conform to all provisions of state and administrative region rules. If approved by the Supreme Court pursuant to Rule 3a, T.R.C.P., the local rules shall be published and available to the Bar and public, and shall include the following:

- a. In multi-court counties having two or more court divisions, each division must adopt a single set of local rules which shall govern all courts in the division.
- b. Provisions for fair distribution of the caseload among the judges in the county.
- c. Provisions to ensure uniformity of forms to be used by the courts under Rules 165a and 166, T.R.C.P.
- d. Designation of the responsibility for emergency and special matters.
- e. Plans for judicial vacation, sick leave, attendance at educational programs, and similar matters.

EXHIBIT D

Texas Government Code § 74.093

§ 74.093. Rules of Administration

(a) The district and statutory county court judges in each county shall, by majority vote, adopt local rules of administration.

(b) The rules must provide for:

(1) assignment, docketing, transfer, and hearing of all cases, subject to jurisdictional limitations of the district courts and statutory county courts;

(2) designation of court divisions or branches responsible for certain matters;

(3) holding court at least once a week in the county unless in the opinion of the local administrative judge sessions at other intervals will result in more efficient court administration;

(4) fair and equitable division of caseloads; and

(5) plans for judicial vacation, sick leave, attendance at educational programs, and similar matters.

(c) The rules may provide for:

(1) the selection and authority of a presiding judge of the courts giving preference to a specified class of cases, such as civil, criminal, juvenile, or family law cases;

(2) other strategies for managing cases that require special judicial attention;

(3) a coordinated response for the transaction of essential judicial functions in the event of a disaster; and

(4) any other matter necessary to carry out this chapter or to improve the administration and management of the court system and its auxiliary services.

(c-1) The rules may provide for the establishment and maintenance of the lists required by Section 37.003, including the establishment and maintenance of more than one of a list required by that section that is categorized by the type of case, such as family law or probate law, and the person's qualifications.

(d) Rules relating to the transfer of cases or proceedings shall not allow the transfer of cases from one court to another unless the cases are within the jurisdiction of the court to which it is transferred. When a case is transferred from one court to another as provided under this section, all processes, writs, bonds, recognizances, or other obligations issued from the transferring court are returnable to the court to which the case is transferred as if originally issued by that court.

EXHIBIT E

Texas Rule of Appellate Procedure 1.2

Rule 1.2. Local Rules

(a) *Promulgation.* A court of appeals may promulgate rules governing its practice that are not inconsistent with these rules. Local rules governing civil cases must first be approved by the Supreme Court. Local rules governing criminal cases must first be approved by the Court of Criminal Appeals.

(b) *Copies.* The clerk must provide a copy of the court's local rules to anyone who requests it.

(c) *Party's Noncompliance.* A court must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and a reasonable opportunity to cure the noncompliance.

EXHIBIT F

28 U.S.C. §§ 2071–72

§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.