

**BASIC TRAINING:
INTERLOCUTORY APPEALS
IN STATE COURT**

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CHAPTER 4

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BASIC TRAINING : INTERLOCUTORY APPEALS IN STATE COURT

I. INTRODUCTION.

A party may not appeal an interlocutory order unless its appeal is expressly authorized by statute. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352-53 (Tex. 2001). Notwithstanding this prohibition, interlocutory appeals are not uncommon in Texas appellate practice. Indeed, a growing number of Texas statutes provides for the immediate appeal of orders that traditionally have not been appealable until final judgment.

This paper identifies the main types of orders subject to interlocutory appeal and then outlines the procedures necessary to perfect such an appeal in the courts of appeals and the Texas Supreme Court. Also included is a section on the permissive-appeal statute and the recent cases interpreting this provision.

This paper does not discuss mandamus relief or other extraordinary remedies. For an outstanding discussion of these topics, I highly recommend an article written by appellate specialist Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, & Other Extraordinary Remedies*, at 2-6, STATE BAR OF TEX., 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE (Fall 2003).

II. SECTION 51.014(a)—A TOP TEN LIST OF SORTS.

Section 51.014(a) of the Civil Practice and Remedies Code is the primary interlocutory appeal statute. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1)-(10). Section 51.014(a) expressly provides for the interlocutory appeal of ten types of orders issued by district courts, county courts at law, and county courts.

Because Section 51.014(a) creates exceptions to the general rule that only final judgments and orders may be appealed, Texas courts strictly construe this provision. *See Bally Total Fitness*, 53 S.W.3d at 355. Accordingly, a practitioner filing an interlocutory appeal under this section should, if possible, demonstrate that his order falls squarely within one of the exceptions authorizing immediate review; otherwise, the appellate court has no jurisdiction to review the order.

Although the exceptions in Section 51.014(a) are to be “strictly construed,” Texas courts sometimes permit the immediate appeal of interlocutory orders that do not technically fall within the express language of Section 51.014(a). Other times, interlocutory orders that appear to be subject to the express exceptions in Section 51.014(a) are not immediately appealable.

Appellate courts focus on the character and function of the order, and not its title, in determining whether an interlocutory order is appealable. *See In re Tex. Natural Res. Conservation Comm’n*, 85 S.W.3d 201, 205 (Tex. 2002). Nevertheless, determining whether an appellate court may exercise jurisdiction over an interlocutory order often remains difficult.

To determine whether a particular interlocutory order is or is not appealable, a practitioner is best served by scouring Texas case law and then comparing his order to those orders that courts have or have not reviewed on interlocutory appeal. In aid of this task, after discussing the type of orders that generally fall within the language of Section 51.014(a), included below is an illustrative list of interlocutory orders that are not subject to immediate appeal.

A. Section 51.014(a)(1)-(2)—Trustees and Receivers.

The first two exceptions in Section 51.014(a) deal with orders relating to the appointment of a receiver or a trustee. Section 51.014(a)(1) permits an interlocutory appeal from an order that appoints a receiver or trustee. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1). Section 51.014(a)(1) does not, however, permit an interlocutory appeal from an order *denying* an appointment of a trustee or receiver. *See Holman v. Stephen F. Austin Hotel*, 599 S.W.2d 679, 679 (Tex. Civ. App.—Austin 1980, writ dismissed) (per curiam). Likewise, Section 51.014(a)(1) does not permit appeals from the following types of interlocutory orders related to trustees and receivers:

- an order appointing a *successor* trustee. *Epstein v. Hutchison*, No. 01-03-00797-CV, 2004 WL 1689685, at *2-*3 (Tex. App.—Houston [1st Dist.] July 23, 2004, no pet. h.) (mem. op.); *In re Estate of Dillard*, No. 07-00-0504-CV, 2001 WL 139082, at *2 (Tex. App.—Amarillo Feb. 5, 2001, no pet.).
- an order appointing a *successor* receiver. *Swate v. Johnson*, 981 S.W.2d 923, 925 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

Section 51.014(a)(2) permits an interlocutory appeal from an order that overrules a motion to vacate an order that appoints a receiver or trustee. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(2). This section does not permit an interlocutory appeal from an order that overrules a motion to vacate the appointment of a receiver who was not appointed by a Texas court pursuant to Texas law. *See Flanigan v. Arriba Ltd.*, No. 14-02-01138-CV, 2003 WL 21664659 (Tex. App.—Houston [14th Dist.] July 17,

2003, no pet.) (mem. op.). And this section does not provide for an interlocutory appeal of an order dissolving a receivership. *See Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

An interlocutory appeal under Section 51.014(a)(1) or Section 51.014(a)(2) stays the commencement of trial in the trial court pending the resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b).

B. Section 51.014(a)(3)—Class Certification Orders.

Section 51.014(a)(3) permits an interlocutory appeal from an order that “certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure.” TEX. CIV. PRAC. & REM. CODE § 54.104(a)(3). Obviously, an order certifying a class is immediately appealable under this section. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 687 (Tex. 2002). Similarly, an order certifying a settlement class is an order subject to interlocutory review. *See McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 231 (Tex. 2001). And an order denying class certification may be appealed under this section as well. *See Christian v. ICG Telecom Can., Inc.*, 996 S.W.2d 270, 272 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

During the course of class-action litigation, a court may need to issue additional interlocutory orders that alter, amend, modify, or decertify a class. Whether such an order is subject to interlocutory appeal depends on whether the order “alters the fundamental nature of the class.” *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996) (per curiam).

Determining whether an order alters the fundamental nature of a class, however, is not a simple task. An order decertifying a class is, not surprisingly, an interlocutory order that alters the fundamental nature of the class. *See Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235, 238 (Tex. App.—Corpus Christi 2001, no pet.); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1987, no writ). Likewise, an order that modifies a class from an opt-out class to a mandatory class is subject to interlocutory appeal. *De Los Santos*, 933 S.W.2d at 495.

In contrast, an order amending a class definition to enlarge the size of a class does not alter the fundamental nature of the class and is not subject to interlocutory appeal—even though it may significantly alter the nature of the class litigation itself. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001) (citing *Pierce Mortuary Colls., Inc. v. Bjerke*, 841 S.W.2d 878, 880-81 (Tex. App.—Dallas 1992, writ denied)); *see also De Los Santos*, 933 S.W.2d at 495

(“Changing a class from opt-out to mandatory does not simply enlarge its membership; it alters the fundamental nature of the class.”).

Texas courts have concluded Section 51.014(a)(3) does not permit immediate appeals from the following types of interlocutory class orders:

- an order denying a party the right to opt out of a class. *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 756 (Tex. 2003).
- an order modifying a class definition. *See Bally Total Fitness*, 53 S.W.3d at 355 (citing *Koch Gathering Sys., Inc. v. Harms*, 946 S.W.2d 453, 455-56 (Tex. App.—Corpus Christi 1997, writ denied)).
- an order refusing to decertify a class. *See Bally Total Fitness*, 53 S.W.3d at 353 (“While an order that grants a motion to decertify actually alters the original certification decision, an order refusing to decertify does not change the status quo.”).
- an order approving notice to a class. *Citgo Ref. & Mktg., Inc. v. Garza*, 94 S.W.3d 322, 327, 331 (Tex. App.—Corpus Christi 2002, no pet.).

If a court exercises its jurisdiction to review a class order on interlocutory appeal, the court may consider all matters pertaining to class certification encompassed within the certification order—even class size and notice requirements. *See Bally Total Fitness Corp. v. Jackson*, 2 S.W.3d 327, 329 (Tex. App.—San Antonio 1999), *aff’d*, 53 S.W.3d 352 (Tex. 2001); *see In re M.M.O.*, 981 S.W.2d 72, 79 (Tex. App.—San Antonio 1998, no writ).

Under Section 51.014(a)(3), an interlocutory appeal filed on or after September 1, 2003, stays all proceedings in the trial court pending resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b); *see Kondos v. Lincoln Prop. Co.*, 110 S.W.3d 716, 723 (Tex. App.—Dallas 2003, no pet.) (noting that the trial court decided summary judgment motions filed by the parties while the interlocutory appeal of the class certification order was pending in clear violation of Section 51.014(b)). This stay provision in Section 51.014(b) potentially conflicts with Rule 29.5 of the Rules of Appellate Procedure, which provides that a trial court “may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits.” TEX. R. APP. P. 29.5. Recently, the Appellate Rules Subcommittee of the Supreme Court Advisory Committee has recommended amending Rule 29.5 to conform to the stay provision in Section 51.014(b). This proposed rule change is set forth in Appendix C.

C. Section 51.014(a)(4)—Temporary Injunctions.

Section 51.014(a)(4) permits an interlocutory appeal from an order that grants or denies temporary injunctive relief. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4). In addition, this section permits an immediate appeal of an order that grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65 of the Civil Practice and Remedies Code.

Surprisingly, an interlocutory order that modifies a temporary injunction is appealable under this section. *Ahmed v. Shimi Ventures L.P.*, 99 S.W.3d 682, 688 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (“An order *modifying* a temporary injunction order is not exactly an order that ‘grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction.’ . . . Nonetheless, this Court has construed section 51.014(a)(4) to grant interlocutory review of an order modifying a temporary injunction, given the similarity of that order to the orders listed in section 51.014(a)(4). . . . Allowing an interlocutory appeal of such an order is especially appropriate when, as here, the modified order implicitly vacates and then replaces the original one: that situation is very much like a dissolution, followed by a granting, over both of which rulings section 51.014(a)(4) expressly allows an interlocutory appeal.” (emphasis in original)).

Unlike temporary injunctions, however, temporary restraining orders may not be appealed under Section 51.014(a)(4)—notwithstanding the fact that a temporary restraining order “is one entered as part of a motion for a temporary injunction.” See *In re Tex. Natural Res. Conservation Comm’n*, 85 S.W.3d 201, 205 (Tex. 2002) (quoting *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992)); *Chambles v. Valencia*, No. 02-04-139-CV, 2004 WL 1471508, at *1 (Tex. App.—Fort Worth July 1, 2004, no pet. h.) (mem. op.); *Watson v. Bank of Am., N.A.*, No. 05-04-00262-CV, 2004 WL 1050864 (Tex. App.—Dallas May 7, 2004, no pet. h.) (mem. op.) (per curiam).

As the Supreme Court has observed, “[w]hether an order is a non-appealable temporary restraining order or an appealable temporary injunction depends on the order’s characteristics and function, not its title.” *Qwest Communications Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000). In other words, if an order operates more like a temporary injunction than it does a temporary restraining order, then the order is appealable even if it is denominated as a “temporary restraining order.” *In re Tex. Natural Res. Conservation Comm’n*, 85 S.W.3d at 205. On the other hand, if an order operates more like a temporary restraining order than it does a temporary injunction, then the order is not appealable. *Id.*

Obviously, a practitioner deciding whether to appeal an interlocutory order under this section must appreciate the legal distinctions between temporary injunctions and temporary restraining orders. A couple of rules of thumb: First, a temporary restraining order attempts to maintain the status quo pending an imminent hearing on a motion for temporary injunction. See TEX. R. CIV. P. 680; *In re Tex. Natural Res. Conservation Comm’n*, 85 S.W.3d at 205. In contrast, an order that changes the status quo or grants all the relief sought in a request for temporary injunctive relief is more like a temporary injunction order. Second, a temporary restraining order should be limited to 14 days from the date of the court’s order, see TEX. R. CIV. P. 680, 687(e); a temporary injunction operates until dissolved by another interlocutory order or until a final hearing on the merits. See *Del Valle*, 845 S.W.2d at 809; *Templeton Southwest Ins. Agency, Inc. v. Bouche Trucking, Inc.*, No. 08-03-00262-CV, 2003 WL 22725509, at *2 (Tex. App.—El Paso Nov. 20, 2003, no pet.) (“The purpose of a temporary injunction is to preserve the status quo of matters that are the subject of pending litigation until a decision on the merits is reached. . . . A function of injunctive relief is to restrain motion and to enforce inaction.”).

Unfortunately, even with these rules of thumb, it is often difficult to determine whether an order is more like a temporary injunction or a temporary restraining order—even for the Texas Supreme Court. Compare *In re Tex. Natural Res. Conservation Comm’n*, 85 S.W.3d at 205-07, with *id.* at 208-09 (Baker, Hankinson, & O’Neill, JJ., dissenting).

For family law practitioners, it is important to note that temporary orders in a suit affecting the dissolution of a marriage—except orders appointing a receiver—are not subject to interlocutory appeal. See TEX. FAM. CODE § 6.507.

Before the 2003 amendments to Section 51.014(b), an interlocutory appeal of a temporary injunction order had the effect of staying the commencement of trial in the trial court pending resolution of the appeal. See TEX. CIV. PRAC. & REM. CODE § 51.014(b) (Vernon Supp. 2001). However, an appeal under Section 51.014(a)(4) currently does not stay proceedings in the trial. See *id.* Thus, a trial court “retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits.” TEX. R. APP. P. 29.5. The trial court, however, “must not make an order that is inconsistent with any appellate court temporary order or interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or

that may be granted on appeal.” TEX. R. APP. P. 29.5(a), (b).

D. Section 51.014(a)(5)—Immunity of Governmental Employee.

In short, official immunity is an affirmative defense that protects governmental employees from suit when the employee is (1) acting in the scope of his employment, (2) performing a discretionary duty, and (3) acting in good faith. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Section 51.014(a)(5) authorizes an interlocutory appeal from an order denying a motion for summary judgment “that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5); *see Univ. of Tex. Southwestern Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 188 (Tex. 2000) (per curiam).

This section permits an interlocutory appeal from an order denying a governmental employee’s motion for summary judgment under any “immunity statute.” *See Newman v. Obersteller*, 960 S.W.2d 621, 623 (Tex. 1997) (recognizing right to interlocutory appeal from an order denying an employee’s summary judgment motion under former Section 101.106 of the Civil Practice and Remedies Code, which provided that a judgment or a settlement of a claim by a governmental unit barred any similar action against the government employee).

Appellate courts may disagree regarding whether Section 51.014(a)(5) authorizes interlocutory review of an order denying summary judgment to an employee who is sued in his individual capacity. At least two appellate courts have noted that “application of section 51.014(a)(5) does not depend on whether a person is sued in his individual or official capacity.” *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887, 892 (Tex. App.—Fort Worth 2001, pet. denied); *see Thomas v. White*, 102 S.W.3d 318, 320 (Tex. App.—Beaumont 2003, pet. denied). But a third appellate court reached an ostensibly different conclusion. *See Ware v. Miller*, 82 S.W.3d 795, 800 (Tex. App.—Amarillo 2002, pet. denied) (“[T]he denial of the pleas to the jurisdiction asserted by the county judge and the commissioners in their official capacities are proper issues for consideration on interlocutory appeal. However, the denial of the challenges to Miller’s standing made by those parties in their individual capacities is not something we may review in this interlocutory appeal.”).

Section 51.014(a)(5) does permit an interlocutory appeal from an order denying a governmental unit’s motion for summary judgment if it is “based on” the immunity of its employee—even if the employee is not a

named party in the lawsuit. *See City of Beverly Hills v. Guevara*, 904 S.W.2d 655, 656 (Tex. 1995); *Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993) (per curiam).

Section 51.014(a)(5) does not authorize interlocutory appeals from the following types of summary judgment orders:

- an order granting summary judgment based on the qualified immunity of some, but not all, of the defendant employees—in the absence of any severance. *Gibson v. Kaza*, No. 09-95-413-CV, 1996 WL 492592, at *1 (Tex. App.—Beaumont Aug. 29, 1996, no writ).
- an order granting summary judgment based on immunity if third-party actions have not been severed and are still pending in the trial court. *See Willo Prods. Co. v. Tex. Dep’t of Criminal Justice*, No. 11-00-00329-CV, 2000 WL 34234566, at *1-*2 (Tex. App.—Eastland Nov. 30, 2000, no pet.).

Under Section 51.014(a)(5), an interlocutory appeal filed on or after September 1, 2003, stays all further proceedings in the trial court pending resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b). But the automatic stay provision only applies if the motion for summary judgment is filed and the governmental defendant requests submission or a hearing on the motion “not later than the later of (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or (2) the 180th day after the date the defendant files (A) the original answer; (B) the first other responsive pleading to the plaintiff’s petition; or (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5) . . . , the responsive pleading that raises that defense.” TEX. CIV. PRAC. & REM. CODE § 51.014(c).

Again, this stay provision potentially conflicts with Rule 29.5 of the Texas Rules of Appellate Procedure, which provides that the trial court “may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits.” TEX. R. APP. P. 29.5. Recently, the Appellate Rules Subcommittee has recommended amending Rule 29.5 to conform to Section 51.014(b). As noted above, this proposed rule change is set forth in Appendix C.

E. Section 51.014(a)(6)—Media Defendant.

Section 51.014(a)(6) provides for an interlocutory appeal of an order that “denies a motion for summary

judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of the Texas Civil Practice & Remedies Code].” TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6).

This section permits a media defendant—but not a plaintiff—to appeal the denial of a summary judgment motion that is based in whole or in part on free speech grounds. *See TSM AM-FM TV v. Meca Homes, Inc.*, 969 S.W.2d 448, 451 (Tex. App.—El Paso 1998, pet. denied) (“[T]he legislative history of the statute reveals that Section 51.014(a)(6) was not intended to inure to the benefit of a plaintiff who claimed to have been libeled or slandered by the media. The purpose of the section was to allow a newspaper, radio station, or television station that was sued for libel to make an immediate appeal of a judge’s refusal to grant a summary judgment.”). This section does not permit a media defendant to appeal an order *granting* a motion for summary judgment based on free speech grounds that is not a final appealable order. *See KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 786-87 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *New Times, Inc. v. Wheeler*, No. 05-97-01756-CV, 1998 WL 205865, at *2 (Tex. App.—Dallas Apr. 29, 1998, pet. denied).

Once an appellate court exercises its jurisdiction to review an interlocutory order this section, it is unclear whether the court will review the entire order or only the portion related to the denial of summary judgment on free speech grounds. Although courts of appeals have reached different conclusions regarding this issue, most courts permit review of the entire order. *Compare K-Six Television, Inc. v. Santiago*, 75 S.W.3d 91, 96 (Tex. App.—San Antonio 2002, no pet.); *Am. Broadcasting Cos. v. Gill*, 6 S.W.3d 19, 26 (Tex. App.—San Antonio 1999, pet. denied); *and Dolcefino v. Randolph*, 2001 WL 931112, at *3-*4 (Tex. App.—Houston [14th Dist.] Aug. 16, 2001, pet. denied) *with Fowkes*, 981 S.W.2d at 787 (limiting interlocutory review to the claims “defended in whole or in part on free speech grounds”).

An interlocutory appeal under Section 51.014(a)(6) stays the commencement of trial in the trial court pending the resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b).

F. Section 51.014(a)(7)—Special Appearances.

The purpose of a defendant’s special appearance is to object to a court’s exercise of jurisdiction over the person or property of the defendant on the ground that such party or property is not amenable to process issued by Texas courts. *See* TEX. R. CIV. P. 120a. Section 51.014(a)(7) permits an interlocutory appeal from an order granting or denying a special appearance under Texas Rule of Civil Procedure 120a. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7); *see BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002). Section 51.014(a)(7) expressly excludes an interlocutory appeal of any order “in a suit brought under the Family Code.” *Id.*

Orders regarding service of citation, proper parties to the suit, and misnomer or misidentification of parties do not address whether a defendant is amenable to process in Texas courts, are not equivalent to a denial of a special appearance, and, therefore, are not properly reviewed under Section 51.014(a)(7). *See Moody v. Howard-McAneer Equip. Co.*, No. 05-03-01438-CV, 2003 WL 22839278 (Tex. App.—Dallas Dec. 1, 2003, no pet.) (mem. op.) (per curiam).

An interlocutory appeal under Section 51.014(a)(7) stays commencement of trial in the trial court pending the resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b).

G. Section 51.014(a)(8)—Governmental Immunity.

Section 51.014(a)(8) permits an interlocutory appeal from orders granting or denying a plea to the jurisdiction filed by a government unit as defined in Section 101.001 of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). As the Supreme Court recently explained, however, the reference to “plea to the jurisdiction” is “not to a particular procedural vehicle but to the substance of the issue raised. Thus, an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment.” *Tex. Dep’t of Criminal Justice v. Simons*, No. 02-0479, 2004 WL 1533264, at *8 (Tex. July 9, 2004).

The courts of appeals do not agree, however, on how to define “governmental unit.” Many courts have strictly interpreted this term to exclude any interlocutory appeals filed by government employees sued in their official capacities. *Tex. Parks & Wildlife Dep’t v. E.E. Lowrey Realty, Ltd.*, No. 10-02-00317-CV, 2004 WL 1632760, at *1-*2 (Tex. App.—Waco July 21, 2004, no pet. h.) (concluding that government employees who were sued in their official capacities did not fall within the

term “governmental unit” and, therefore, could not maintain an interlocutory appeal under Section 51.014(a)(5)); *see Castleberry Indep. Sch. Dist. v. Doe*, 35 S.W.3d 777, 780 (Tex. App.—Fort Worth 2001, pet. dismissed w.o.j.).

Other courts of appeals—recognizing that a lawsuit against a government employee in his official capacity is, in all respects, a suit against the government itself—have exercised jurisdiction to review interlocutory orders granting or denying government employees’ pleas to the jurisdiction. *See De Mino v. Sheridan*, Nos. 01-03-00794-CV, 01-04-00099-CV, 2004 WL 1794558 (Tex. App.—Houston [1st Dist.] Aug. 12, 2004, no pet. h.) (“Here, the trial court granted Sheridan’s plea to the jurisdiction only as to claims asserted against Sheridan in his official capacity as an employee of UH, a governmental unit. Thus, the trial court’s ruling was, in effect, the equivalent of a ruling granting a plea to the jurisdiction in favor of UH.”); *Potter County Attorney’s Office v. Stars & Stripes Sweepstakes, L.L.C.*, 121 S.W.3d 460, 465-66 (Tex. App.—Amarillo 2003, no pet.); *Ware v. Miller*, 82 S.W.3d 795, 800 (Tex. App.—Amarillo 2002, pet. denied); *Frona Indep. Sch. Dist. v. King*, 15 S.W.3d 653, 657 n.3 (Tex. App.—Amarillo 2000, no pet.).

In the Third Court of Appeals, whether an employee is entitled to interlocutory review of an order granting or denying a plea to the jurisdiction actually depends on the employee’s importance. In *Perry v. Del Rio*, 53 S.W.3d 818, 822-823 (Tex. App.—Austin 2001, pet. dismissed), the court of appeals concluded that several individual state officials—the Governor, the Lieutenant Governor, and the Secretary of State—could bring an immediate appeal of the denial of a plea to the jurisdiction under Section 51.014(a)(8). Two months later, the court backpedaled a bit and concluded that several city officials—including the city attorney and members of the city council—could not seek interlocutory review under Section 51.014(a)(8) because they were not “several of the highest officials in the state” and, thus, were not “governmental units.” *See Gallagher v. Young*, No. 03-01-00189-CV, 2001 WL 1298906, at *1-*2 (Tex. App.—Austin Oct. 25, 2001, no pet.).

In any event, it is clear that Section 51.014(a)(5) does not authorize an interlocutory appeal from an order denying a plea to the jurisdiction “that does not raise an issue that can be [considered] jurisdictional.” *Tex. Dep’t of Criminal Justice v. Simons*, No. 02-0479, 2004 WL 1533264, at *8-*9 (Tex. July 9, 2004) (“Since notice under Section 101.101 [of the Texas Civil Practice and Remedies Code] is not jurisdictional, an interlocutory appeal from the denial of a plea to the jurisdiction based

on lack of such notice is not allowed.”). Similarly, this section does not permit an interlocutory appeal of an order denying a motion asserting sovereign immunity from liability, as opposed to challenging the trial court’s jurisdiction to hear a case arising from a governmental unit’s immunity from suit. *See Baylor Coll. of Med. v. Tate*, 77 S.W.3d 467, 472-73 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Under Section 51.014(a)(8), an interlocutory appeal filed on or after September 1, 2003, stays all proceedings in the trial court pending the resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b). But the stay provision only applies if the plea to the jurisdiction is filed and set for submission or a hearing “not later than the later of (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or (2) the 180th day after the date the defendant files (A) the original answer; (B) the first other responsive pleading to the plaintiff’s petition; or (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5) . . . , the responsive pleading that raises that defense.” TEX. CIV. PRAC. & REM. CODE § 51.014(c).

Again, this stay provision potentially conflicts with Rule 29.5 of the Rules of Appellate Procedure, which provides that a trial court “may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits.” TEX. R. APP. P. 29.5. But, as noted above, the Appellate Rules Subcommittee of the Supreme Court Advisory Committee has recommended amending Rule 29.5 to conform to this stay provision. The proposed rule change is set forth in Appendix C.

H. Section 51.014(a)(9)-(10)—Expert Reports Filed in Health Care Liability Lawsuits.

In all health care liability lawsuits filed on or after September 1, 2003, a plaintiff must serve an expert report on each physician or health care provider against whom he asserts a claim. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). The expert report or reports must be served within 120 days of the date the suit was filed. *Id.*

If the plaintiff fails to serve the required expert report on a defendant physician or health care provider within the 120-day deadline, the defendant may file a motion to dismiss. *Id.* § 74.351(b). If the trial court grants the motion to dismiss, the court is required to dismiss the claim with prejudice and award reasonable attorney’s fees and costs. *Id.* § 74.351(b)(1)-(2).

If the trial court denies all or any part of the relief requested by a health care defendant in its motion to dismiss for failure to file a timely expert report, then the defendant may seek an interlocutory appeal under Section 51.014(a)(9) of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). The defendant may not, however, seek an interlocutory appeal from an order granting an extension of time to file an expert report. *Id.* § 74.351.

If the health care defendant intends to challenge the sufficiency, as opposed to the timeliness, of an expert report, he must do so within 21 days of the service of the report—otherwise, the defendant waives all objections to the sufficiency of the expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351. A trial court may grant a motion challenging the adequacy of an expert report only if the court conducts a hearing and determines that the report does not represent an “objective good faith effort” to provide the health care defendant with fair notice of the applicable standards of care, the asserted grounds for liability, and the basis for causation. *See id.* §§ 74.351(l), 74.351(r)(6).

If a trial court grants the relief sought in a motion challenging the adequacy of the plaintiff’s expert report, the plaintiff may seek interlocutory review under Section 51.014(a)(10). *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(10).

An interlocutory appeal under Section 51.014(a)(9) or Section 51.014(a)(10) stays the commencement of a trial pending resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b).

III. OTHER INTERLOCUTORY APPEAL STATUTES.

In addition to Section 51.014(a), numerous other statutes provide for the immediate review of different types of interlocutory orders.

A. Section 171.098 of the Civil Practice & Remedies Code—*i.e.*, the Texas Arbitration Act.

Section 171.098(a) authorizes interlocutory appeals from the following arbitration orders:

- an order denying a party’s application to compel arbitration made under an alleged agreement to arbitrate. *See* TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1).
- an order granting a party’s application to stay arbitration if the party demonstrates that there is no agreement to arbitrate. *Id.* § 171.098(a)(2).
- an order confirming or denying confirmation of an arbitration award. *Id.* § 171.098(a)(3).

- an order modifying or correcting an arbitration award. *Id.* § 171.098(a)(4).
- an order vacating an arbitration award without a rehearing. *Id.* § 171.098(a)(5).

Section 171.098(a) does not permit an interlocutory appeal of the following orders:

- an order granting a motion to compel arbitration. *See Mohamed v. Auto Nation USA Corp.*, 89 S.W.3d 830, 833-34 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
- an order denying a motion to compel arbitration under the Federal Arbitration Act. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992); *Merrill Lynch Trust Co. FSB v. Alaniz*, Nos. 13-04-073-CV, 13-04-150-CV, 2004 WL 1746342 (Tex. App.—Corpus Christi Aug. 5, 2004, no pet. h.).
- an order appointing an arbitrator other than the arbitrator named in the parties’ agreement to arbitrate. *See Cartwright v. Cartwright*, No. 01-01-00946-CV, 2002 WL 501642, at *1 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
- an order deferring a ruling on a motion to compel arbitration until discovery is completed. *See In re MHI P’ship, Ltd.*, 7 S.W.3d 918, 920-21 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).
- an order delaying the granting of a motion to compel arbitration until certain conditions have occurred. *See Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C.*, No. 01-02-00219-CV, 2002 WL 31030747 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
- an order denying a request to stay or abate trial court proceedings to permit an arbitration. *See Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd.*, 95 S.W.3d 511, 513 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

B. Section 15.003 of the Civil Practice & Remedies Code—*i.e.*, Venue in Multiple Plaintiffs Cases.

In any suit filed on or after September 1, 2003, each plaintiff in any lawsuit “in which there is more than one plaintiff”—whether the plaintiffs are included by joinder, intervention, or otherwise—must establish proper venue independently. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(a). If a plaintiff cannot establish venue, then the plaintiff’s claims must be transferred to a proper county for venue purposes unless the plaintiff demonstrates that:

- (1) joinder or intervention of the plaintiff is proper under the Rules of Civil Procedure;
- (2) maintaining venue as to that plaintiff in the county does not unfairly prejudice another party;
- (3) there is an essential need for the plaintiff's claims tried in the county in which the suit is pending; and
- (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom suit is brought.

TEX. CIV. PRAC. & REM. CODE § 15.003(a)(1)-(4).

Prior to the amendment of Section 15.003 in 2003, venue decisions were not usually subject to interlocutory review. *See* TEX. CIV. PRAC. & REM. CODE § 15.064(a) (“The court shall determine venue questions from the pleadings and affidavits. No interlocutory appeal shall lie from the determination.”). Now, however, any party that is “affected by” a trial court’s determination that a plaintiff did or did not establish proper venue or did or did not meet the four-part test under this section may seek interlocutory review of that decision. *Id.* § 15.003(b) (effectively overruling *Am. Home Prods. v. Clark*, 38 S.W.3d 92 (Tex. 2000)).

Since most, if not all, parties are “affected by” venue determinations, any party should be permitted to file an interlocutory appeal under this section—even if the party seeking review did not figure prominently in the court’s initial venue determination. As one appellate expert has predicted:

In essence, venue decisions will be subject to immediate interlocutory appeal in multiple plaintiff cases but not single plaintiff cases.

See Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, & Other Extraordinary Remedies*, at 9, STATE BAR OF TEX., 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE (Fall 2003).

An appellate court reviews this venue determination de novo and must render its judgment not later than the 120th day after the date the appeal is perfected. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(c)(1)-(2). An interlocutory appeal under Section 15.003(b) stays the commencement of trial pending resolution of the appeal. *Id.* § 15.003(d).

C. Section 26.051 of the Civil Practice & Remedies Code—Orders Granting Class Certification After Denying Pleas to the Jurisdiction Based on an Agency’s Primary or Exclusive Jurisdiction.

A trial court or a state administrative agency may have jurisdiction to resolve a particular claim. A court should allow an administrative agency to decide an issue if the agency has primary jurisdiction—*i.e.*, the agency “(1) . . . is typically staffed with experts trained in handling the complex problems in the agency’s purview; and (2) great benefit is derived from an agency’s uniformly interpreting its laws, rules, and regulations” *Suburu of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). If an agency has exclusive jurisdiction—*i.e.*, the legislature has granted the agency sole authority to make initial determinations in a dispute—a party “must exhaust all administrative remedies before seeking judicial review of the agency’s action.” *Id.* Otherwise, a trial court lacks subject matter jurisdiction. *Id.*

If a state agency has exclusive or primary jurisdiction over a particular claim or if a plaintiff fails to exhaust administrative remedies, a defendant may file a plea to the jurisdiction. In a proposed class action case, a trial court must hear and rule on such a plea to the jurisdiction before the court rules on any motion to certify the class. *See* TEX. CIV. PRAC. & REM. CODE § 26.051(a). If the court denies the plea but then certifies a class, a “person may, as part of an appeal of the order certifying the class action, obtain appellate review of the order denying the plea to the jurisdiction.” *Id.* § 26.051(b). This remedy is in addition to any right to appeal an interlocutory order granting or denying a plea to the jurisdiction under any other Texas statute. *See id.* § 26.051(c).

D. Juvenile Court Orders.

Texas statutes provide for immediate review of a number of interlocutory orders issued by juvenile courts:

- an order appealed by or on behalf of a child regarding the child’s delinquency or need for supervision following an adjudication hearing under Section 54.03 of the Family Code. *See* TEX. FAM. CODE § 56.01(c)(1)(A).
- an order appealed by or on behalf of a child regarding the modification of a prior juvenile court order following a disposition hearing under Section 54.05 of the Family Code. *See id.* § 56.01(c)(1)(C).

- an order issued under Chapter 55 of the Family Code committing a child to a facility for the mentally ill or mentally retarded. *See id.* § 56.01(c)(1)(D).

Unlike a typical interlocutory appeal that is generally final in the court of appeals, an appeal under these rules “may be carried to the Texas Supreme Court by writ of error or upon certificate, as in civil cases generally.” *Id.* § 56.01(a). An interlocutory appeal under these sections does not suspend the order of the juvenile court. *See id.* § 56.01(g).

E. Texas Health & Safety Code Orders.

A few sections of the Texas Health and Safety Code provide for the appeal of interlocutory orders. These sections not only specify which orders may be appealed, but also set forth special procedural rules for perfecting and prosecuting the appeals.

First, an interlocutory order requiring, renewing, or modifying court-ordered mental health services may be reviewed by interlocutory appeal. *See* TEX. HEALTH & SAFETY CODE § 574.070(a). Second, an order requiring court-ordered mental health services or administration of psychoactive medication may be immediately appealed. *See id.* § 574.108(a). And third, an interlocutory order requiring, renewing, or modifying the management plan of a person with a communicable disease may be reviewed by interlocutory appeal. *See id.* § 81.191(a).

Under these sections, a notice of appeal must be filed no later than the 10th day after the order is signed. *See id.* §§ 81.191(b), 574.070(b). Failure to meet this short deadline may result in the dismissal of the appeal. *See In re J.A.M.*, No. 13-02-680-CV, 2003 WL 2012507, at *1 (Tex. App.—Corpus Christi May 1, 2003, no pet.). And, surprisingly, these Health & Safety Code statutes suggest that these interlocutory orders may be appealed to the Texas Supreme Court. *See* TEX. HEALTH & SAFETY CODE §§ 81.191(e), 574.070(e) (“The court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket.”). In addition, courts of appeals or the supreme court “may suspend all rules relating to the time for filing briefs and docketing cases” in these interlocutory appeals. *Id.* §§ 81.191(e), 574.070(e).

F. Orders Sealing or Unsealing Court Records.

Texas Rule of Civil Procedure 76a(8) provides that any order or portion of any order “relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in

the hearing preceding issuance of such order.” TEX. R. CIV. P. 76a(8). Thus, under the terms of Rule 76a(8), orders sealing or unsealing court records, technically, are not interlocutory orders. Nevertheless, Texas courts treat these orders as interlocutory appeals.

In *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157 (Tex. 1992) (per curiam), the Supreme Court concluded that the proper method of complaining of an order under Rule 76a(8) is by interlocutory appeal:

Any party aggrieved by the trial court’s decision, finding, or failure to find made pursuant to Rule 76a, including the decision whether the document is a “court record,” as that term is defined by the rule, may seek review by interlocutory appeal.

Id. at 158; *Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774, 775 (Tex. 1992) (per curiam). Thus, the procedural rules governing interlocutory appeals, and not the rules for “final judgments” should apply in these cases.

Rule 76a(8) also expressly provides that an appellate court may abate any appeal under this section and order the trial court to hold further hearings, make additional findings, or direct that additional notice be given to the public. TEX. R. CIV. P. 76a(8).

G. And the Rest.

In addition, the following interlocutory orders may be immediately appealed under Texas statutes:

- an order denying or failing to grant a motion for summary judgment based on immunity from suit as to any claim by a donor that the issuance of a charitable gift annuity constitutes engaging in the business of insurance. *See* TEX. INS. CODE § 102.151.
- an order denying or failing to grant a motion for summary judgment based on immunity from suit as to any claim that a non-profit corporation’s role as trustee of a trust constitutes engaging in the trust business in a manner requiring a state charter. *See* TEX. REV. CIV. STAT. art. 1396-2.31; TEX. BUS. ORG. CODE § 2.106.
- an order of a court or an administrative hearing official requiring or denying the disclosure of a portion of an environmental or health and safety audit report that is otherwise privileged under the Texas Environmental, Health, and Safety Audit Privilege Act. *See* TEX. REV. CIV. STAT. art. 4447cc.

- an order determining whether an action filed by the attorney general or by an individual on behalf of the public who has been damaged or injured by an unlawful method, act, or insurance practice may be maintained as a class action. *See* TEX. INS. CODE § 541.259.
- an order entered by a trial court setting a bond to be paid by a taxpayer contesting a bond issuance or an order dismissing a taxpayer for not timely filing the required bond in a public bond issue suit. *See* TEX. GOV'T CODE §§ 1205.068(a)(1), 1205.103-.104. An interlocutory order appealed under these statutory provisions may be further appealed to Supreme Court. *Id.* § 1205.068(d).

IV. AN APPEAL FROM AN INTERLOCUTORY ORDER IS AN ACCELERATED APPEAL GOVERNED BY SPECIAL RULES.

An appeal of an interlocutory order permitted under the statutes discussed above are “accelerated appeals.” TEX. R. APP. P. 28.1. Accelerated appeals have shortened appellate deadlines and are governed by slightly different procedural rules. Below are the appellate deadlines and the procedural rules governing interlocutory appeals that differ from the rules governing ordinary civil appeals.

Notice of Appeal. A notice of appeal must be filed within 20 days after the order is signed—not the usual 30 days—and must note that the appeal is accelerated. *See* TEX. R. APP. P. 26.1(b), 25.1(d)(6). And filing a motion for new trial in the trial court will not extend the time to perfect the appeal. *See* TEX. R. APP. P. 28.1. A trial court may file findings of fact and conclusions of law within 30 days of the date of the order. *Id.*

Docketing Statement. The appellant should note that his interlocutory appeal is accelerated in the docketing statement. *See* TEX. R. APP. P. 32.1(g).

Record. An appellate court may hear an interlocutory appeal “on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers.” TEX. R. APP. P. 28.3. In an accelerated appeal, the appellate record is due within 10 days of the date of the notice of appeal is filed—not the usual 60 days after the judgment is signed. *See* TEX. R. APP. P. 35.1(b).

Briefs. Although highly unusual, an appellate court may submit an interlocutory appeal without briefing. *See* TEX. R. APP. P. 28.3. In an interlocutory appeal, the appellant’s brief is due 20 days—not 30 days—after the later of the date the clerk’s record was filed or the date the reporter’s record was filed. TEX. R. APP. P. 38.6(a). The appellee’s brief is due 20 days after the appellant’s

brief is filed. TEX. R. APP. P. 38.6(b). The reply brief is due 20 days after the appellee’s brief just as in other civil appeals. TEX. R. APP. P. 38.6(c). The requirements for the content of the briefs is the same as in any other civil appeal.

Effect of Appeal. Perfecting an interlocutory appeal does not suspend the order unless the order is superseded on appeal or the appellant is entitled to supersede without security. *See* TEX. R. APP. P. 29.1, 29.2. However, only the appellate court in which the appeal is pending may enforce the order—unless the appellate court itself refers an enforcement proceeding to the trial court for further proceedings. *See* TEX. R. APP. P. 29.4.

Further Proceedings. In general, while an interlocutory appeal is pending, the trial court retains jurisdiction of the case “and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits.” TEX. R. APP. P. 29.5. The exceptions to this general rule were noted in Parts II and III *supra*. The trial court, however, cannot issue an order that “is inconsistent with any appellate court temporary order or interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.” TEX. R. APP. P. 29.5(a)-(b).

Order of Decision. An appeal of an interlocutory order takes precedence over ordinary civil appeals. TEX. R. APP. P. 40.1(b).

Motion for Rehearing. An appellate court may deny the right to file or shorten the time to file a motion for rehearing in an interlocutory appeal. *See* TEX. R. APP. P. 49.4. A motion for rehearing is usually due within 15 days after the appellate court’s judgment is rendered. TEX. R. APP. P. 49.1.

V. THE PERMISSIVE APPEAL STATUTE.

In 2001, the Texas Legislature enacted a permissive appeal statute in Section 51.014(d) of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f). Section 51.014(d) provides:

- (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:
 - (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

- (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
- (3) the parties agree to the order.

TEX. CIV. PRAC. & REM. CODE § 51.014(d).

To invoke this permissive appeal procedure, a party must file an “application” to the court of appeals not later than the 10th day after the interlocutory order is entered. *See id.* § 51.014(f). If a party timely files its application, a court of appeals “may permit an appeal to be taken from that order.” *Id.* Obviously, the court of appeals’s exercise of its jurisdiction to review an interlocutory order under this section is entirely discretionary until the Supreme Court sets parameters.

An interlocutory appeal under this section does not stay proceedings in the district court unless the parties and a judge—either the district court judge or a judge of the court of appeals—orders a stay of proceedings. *See id.* § 51.014(e).

Although Section 51.014(d)-(f) permits a permissive appeal of an interlocutory order, the Rules of Appellate Procedure do not set forth any specific procedures for dealing with permissive appeals. As at least one court of appeals’s justice has noted, the lack of an appellate rule governing permissive appeals has created numerous procedural “uncertainties” as to permissive interlocutory appeals. *See Diamond Prods. Int’l v. Handsel*, No. 14-03-00998, 2004 WL 1607689, at *3-*4 (Tex. App.—Houston [14th Dist.] July 20, 2004, no pet. h.) (Frost, J., concurring) (“The administration of justice for permissive interlocutory appeals would be well served if this uncertainty in current appellate practice and procedure were eliminated. One way to do so would be to amend the Texas Rules of Appellate Procedure to include a procedure for permissive interlocutory appeals.”). For an outstanding discussion of the problems arising due to the lack of an appellate rule regarding the permissive appeal statute (as well as a comparison of the Texas statute with the federal permissive appeal statute), I recommend a paper by appellate practitioner Dana Livingston Cobb, *Permissive Interlocutory Appeals in State Court*, UNIV. TEX. 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS at 10-17 (2002).

Fortunately, albeit three years after the enactment of Section 51.014(d), the Appellate Rules Subcommittee, by memo dated August 11, 2004, has recommended to the Supreme Court Advisory Committee the adoption of new Rules of Appellate Procedure to govern permissive appeals under Section 51.014(d)-(f). The proposed rules distinguish between civil cases that are appealed as of

right and civil cases appealed with permission and sets forth the procedures for filing permissive appeals. The Appellate Rules Subcommittee’s proposed rule changes are included as Appendix B.

The proposed rule changes address most of the problems arising from the enactment of Section 51.014(d)-(f). The remainder of this part of the paper discusses the current (or safest) procedure for filing a permissive appeal under the current rules governing interlocutory appeals of right, problems with the current procedures, and the fix in the proposed rule changes.

A. Notice of Appeal vs. Application vs. Petition.

To perfect an interlocutory appeal filed as of right, an appellant must file a notice of appeal within 20 days after the appealable interlocutory order is signed. TEX. R. APP. P. 26.1(b). To perfect a permissive appeal, Section 51.014(f) simply requires the filing of an “application” within 10 days of the date of the interlocutory order. TEX. CIV. PRAC. & REM. CODE § 51.014(f). So the questions arise: Is an appellant required to file an “application” within 10 days of the district court’s order *and* a notice of appeal within 20 days of the order? If filing a notice of appeal is required, should the appellant file the notice within 20 days or within 10 days of the order?

The Texas Rules of Appellate Procedure currently suggest that an appellant should file the application and a notice of appeal. Rule 25.1(a) provides that an appeal “is perfected when a written notice of appeal is filed with the trial court clerk.” TEX. R. APP. P. 25.1(a). Similarly, Rule 25.1(b) states that the “filing of a notice of appeal by any party invokes the appellate court’s jurisdiction over all parties to the trial court’s final judgment or order appealed from.” TEX. R. APP. P. 25.1(b).

Appellate practitioners have recommended filing the notice of appeal within 10 days of the appealable order just to be on the safe side. *See Warren W. Harris & Lynne Liberato, State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31, 32 (2002) (“[U]ntil a rule or the courts determine that a notice of appeal is unnecessary, it is advisable to file a notice of appeal within the 10-day period for bringing the permissive appeal.”).

Current case law simply adds the confusion. In *In re D.B.*, 80 S.W.3d 698 (Tex. App.—Dallas 2002, no pet.), for example, the Fifth Court of Appeals strictly construed Section 51.014(f) and dismissed a permissive appeal because, among other reasons, appellant filed a “notice of accelerated appeal” 12 days after the date of the trial court’s order instead of an “application” within 10 days of the date of the order. *Id.* at 701-02 (“[E]ven

if we were to construe D.B.'s 'notice of accelerated appeal' to be an application filed pursuant to section 51.014(d) and (f), it would still be filed two days late."). The court held that Section 51.014(f) set the deadline for perfecting the appeal and that this deadline trumped any deadline in the Texas Rules of Appellate Procedure. *See id.* at 702. In addition, the court concluded that the 10-day deadline could not "be extended by fifteen days on proper motion pursuant to rule of appellate procedure 26.3, as can other interlocutory appeals under other provisions of section 51.014." *Id.* at 701-02.

In contrast, in *Diamond Products International v. Handsel*, the Fourteenth Court of Appeals approved of a notice of appeal filed within 10 days of the trial court's order. 2004 WL 1607689, at *1. After recognizing that an appellate court's jurisdiction is invoked whenever an appellant files "an instrument in a bona fide attempt to invoke the appellate court's jurisdiction," the court stated:

It is clear that a notice of appeal is a bona fide attempt to invoke this court's jurisdiction. . . . Therefore, when an appellant has filed a timely notice of appeal, the failure to file an application for permission to appeal pursuant to section 51.014(f) does not deprive this court of jurisdiction over the appeal.

Id. (quoting *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997)). Since the parties had fully briefed the issues on appeal, the court found it "unnecessary under these circumstances" to require the appellant to file an application for permission to appeal. *Id.* at *2.

And in *Stolte v. County of Guadalupe*, No. 04-04-00083-CV, 2004 WL 1159388 (Tex. App.—San Antonio May 26, 2004, no pet.), the Fourth Court of Appeals disagreed with the Fifth Court of Appeals's decision in *D.B.* and concluded that the extension of time provided in Rule 26.3(b) does apply in permissive appeals.

The court of appeals based its decision on the Texas Supreme Court's decision in *Verburgt*:

A party who fails to file a perfecting instrument by the deadline may, within fifteen days after the date the instrument was due, move for an extension of time. *See* Tex. R. App. P. 26.3. "[A] motion for extension of time is necessarily implied when an appellant acting in good faith files [a perfecting instrument] beyond the time allowed by [the rules], but within the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline"

Id. at *2 (quoting *Verburgt*, 959 S.W.2d at 617).

In *Stolte*, the appellant filed the notice of appeal 19 days after the trial court's order. *Id.* at *1. Relying on *Verburgt*, and noting its disagreement with *D.B.*, the court of appeals accepted the notice of appeal as a bona fide attempt to invoke the jurisdiction of the appellate court and then implied an extension of time under Rule 26.3 in the permissive interlocutory appeal. *Id.* at *3.

Proposed Rule 25.2—Appeal by Permission. The Appellate Rules Subcommittee has proposed new rules of appellate procedure to govern permissive appeals. The proposed rules distinguish between regular civil appeals filed as of right (Proposed Rule 25.1)—which are governed by the notice of appeal requirements in current Rule 26—and civil appeals filed by permission.

The new proposed rule resolves the uncertainty created by the "notice of appeal" language in the current version of the appellate rules and the "application" language in Section 51.014(f) by creating a totally new perfecting instrument—*i.e.*, a "petition for permission to appeal." *See* App. B.

Proposed Rule of Appellate Procedure 25.2 would require a petition for permission to appeal to be filed "not later than the 10th day after the date a district court signs a written order granting permission to appeal." *Id.* The proposed rule makes clear that a "notice of appeal need not be filed." *Id.* The date a court of appeals grants a petition for permission to appeal would function as the date of the notice of appeal for determining the further appellate deadlines.

Although Proposed Rule 25.2 does not answer the current uncertainty regarding whether a motion for an extension of time is available (or may be implied) under current Rule 26, the Rules Advisory Committee has also proposed "additional alternative" rules for consideration. One of these rules would address extensions of time:

- (c) Extension of Time. The appellate court may extend the time to file the petition for permission to appeal if, within 15 days after the deadline for filing the petition the party:
 - (a) files in the trial court the petition for permission to appeal; and
 - (b) files in the appellate court a motion complying with Rule 10.5(b).

App. B.

It is critical to note, however, that until the proposed rules are adopted as part of the Texas Rules of Appellate

Procedure, prudent appellate practitioners should file a notice of appeal in the trial court and an application for permission to appeal in the court of appeals within 10 days of the trial court's order.

B. The Appellate Record.

Under the rules governing accelerated appeals (including interlocutory appeals), the clerk's record and reporter's record must be filed within 10 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(b). In permissive appeals, however, there is no notice of appeal—only the trial court's order allowing the appeal and the application for permission to appeal. The application for permission to appeal is due 10 days after the trial court's order is signed too. TEX. CIV. PRAC. & REM. CODE § 51.014(f).

If one assumes that the trial court's order functions as the notice of appeal in permissive appeals, then the appellate record and the application for permission to appeal are due at the same time. If one assumes that the application for permission to appeal acts as the notice of appeal, then, obviously, the appellate record is due 10 days after the application is filed. Either way, the party filing the application for permission to appeal is rarely, if ever, going to be able to cite to the appellate record in the application for permission to appeal.

And the court of appeals is sent the appellate record even though the application for permission to appeal has no record cites and even though the court has not decided whether it will consider the case.

Proposed Rule. The new rule proposed by the Rules Subcommittee fixes this problem by making the record due after the court of appeals grants the petition for permission to appeal:

- (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:
 - (a) request in writing that the official reporter prepare the reporter's record;
 - (b) notify the trial court clerk that permission to appeal has been granted and file any written designation specifying items to be included in the clerk's record

App. B. But the proposed rule also provides that “the appellate record must be filed within 10 days after entry of the order granting permission to appeal.” See App. B.

Thus, the proposed rule—as currently drafted—requires the appellant to request the reporter's record and list any items to be included in the clerk's record on or near the very day that the appellate record must be filed with the court of appeals. Such a rule would make little practical sense. Hopefully, this issue will be straightened out before the enactment of the proposed rule.

C. Filing Fees.

Proposed Rule. The proposed rule would require the appellant to pay “any required fees” within 10 days after the entry of the order granting permission to appeal. See App. B. The wording of the proposed rule suggests that no fee is due until after the court of appeals grants the petition for permission to appeal. But I doubt the courts of appeals would interpret the proposed rule that way.

A court could consider a petition for permission to appeal to be a motion for leave to file an appeal under Section 51.014(d) and require the appellant to submit the fee for filing a motion. If the court granted the petition, then the court could require the appellant to submit the “required fee” for filing an appeal. On the other hand, a court could consider the petition to be the appeal itself and require the appellant to submit the fee for filing an appeal. If the court granted the petition, then the court arguably could require the appellant to remit a second “required fee”—as the Supreme Court does with grants of petitions for review. Who knows? Different courts of appeal may adopt different fees for filing a petition for permission to appeal. Regardless, the prudent appellate practitioner should call the clerk's office at the court of appeals and ask what fee to include with the petition for permission to appeal.

D. The Application or the Petition for Permission to Appeal.

As noted above, Section 51.014(d)-(f) states that an application for permission to appeal should meet three requirements: (1) the trial court's order must involve a controlling question of law that warrants a substantial ground for a difference of opinion; (2) the immediate appeal of the order will advance the ultimate resolution of the suit; and (3) the parties agree to the order. TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f); see *In re D.B.*, 80 S.W.3d 698, 701 (Tex. App.—Dallas 2002, no pet.) (dismissing appeal because, among other reasons, “the record does not show that the parties agreed to the order” and because, rather than file an application, “D.B. filed a docketing statement, a ‘notice of accelerated appeal,’ and a brief, none of which cited section 51.014(d)”).

Section 51.014(d)-(f) does not set forth the length of an application, the necessary contents of an application, or any other rules regarding requisites for the form of an application. And Texas courts have provided little to no guidance regarding the proper format of an application. Several courts have stressed that an application must include facts and argument explaining why the trial court's order involves a controlling question of law as to which there is a substantial ground for differences of opinion. *See, e.g., Stolte v. County of Guadalupe*, No. 04-04-00083-CV, 2004 WL 1159388, at *4 (Tex. App.—San Antonio May 26, 2004, no pet.) (“The application contains no facts or argument explaining why we should grant permission to appeal; it merely attaches the trial court's order. We will not grant permission to appeal on the basis of this application.”); *Richardson v. Kays*, No. 02-03-241-CV, 2003 WL 22457054, at *2 (Tex. App.—Fort Worth Oct. 30, 2003, no pet.) (per curiam) (mem. op.) (denying appellate review because “the parties’ joint application for this permissive appeal does not mention, discuss, or analyze why the issue of the Richardsons’ standing to sue involves a controlling question of law as to which there is a substantial ground for difference of opinion.”); *but see Diamond Prods. Int’l v. Handsel*, No. 14-03-00998, 2004 WL 1607689, at *2 (Tex. App.—Houston [14th Dist.] July 20, 2004, no pet. h.) (“The parties did not present facts or argument explaining why we should grant permission to appeal; however, the reasoning of the parties is apparent from the briefing.”).

But few courts have discussed what it means for an issue to amount to “a controlling question of law as to which there is a substantial ground for difference of opinion.” A number of courts of appeals have dismissed applications for permission to appeal in memorandum opinions or orders without even mentioning “controlling question of law” or “substantial ground for difference of opinion.” For example, the entirety of one court's memorandum opinion is set forth below:

Before the Court is appellant's application for interlocutory appeal pursuant to Civil Practice & Remedies Code section 51.014(d). TEX. CIV. PRAC. & REM. CODE § 51.014(d) (Vernon Supp. 2003). The trial court entered an order for interlocutory appeal to which appellant and appellee agreed. The application pending before this Court was timely filed. Accordingly, this Court “may permit an appeal to be taken” from the trial court's order. TEX. CIV. PRAC. & REM. CODE § 51.014(f) (Vernon Supp. 2003). The Court DENIES the application for interlocutory appeal under

section 51.014(d) of the Civil Practice & Remedies Code. The Court DISMISSES the appeal.

Zale Lipsky Univ. Hosp. v. T.M.S., No. 05-03-01235-CV, 2003 WL 22048866, at *1 (Tex. App.—Dallas Sept. 3, 2003, no pet.) (per curiam) (mem. op.); *Farmer, Fuqua & Huff, P.C. v. Abrams Ctr. Nat'l Bank*, No. 05-03-00256-CV, 2003 WL 588726, at *1 (Tex. App.—Dallas Feb. 28, 2003, no pet.) (mem. op.) (same); *First Permian, L.L.C. v. Graham*, No. 07-03-0532-CV, 2003 WL 23163389, at *1 (Tex. App.—Amarillo Jan. 14, 2003, no pet.) (order) (“Pending before the court is the application of First Permian, L.L.C. and Energen Resources Company for interlocutory appeal under 51.014(d) of the Texas Civil Practice & Remedies Code. Having reviewed the application, the clerk's record and the pertinent statutory provisions, we deny the application.”).

On the other hand, one court of appeals exercised its jurisdiction over a permissive appeal with absolutely no discussion of the requirements of Section 51.014(d)-(f). *See, e.g., Dixon v. Amoco Prod., Co.*, No. 12-02-00309-CV, 2004 WL 187282, at *4 n.1 (Tex. App.—Tyler Jan. 30, 2004, pet. filed) (simply noting in a footnote that the “appeal was filed pursuant to section 51.014(d)-(f) of the Texas Civil Practice and Remedies Code”).

In drafting an application for permission to appeal, the appellate practitioner is wise to keep the advice of two experienced appellate specialists in mind:

Because the court of appeals' decision to grant permission to appeal is discretionary, the application for permission to appeal should focus on why the court of appeals should grant permission to appeal, much as a party may convince the Texas Supreme Court to accept a petition for review. Judicial economy should be the central focus, showing that an immediate appeal has a good chance of preventing a full trial, an appeal, a remand for new trial, and possibly a later second appeal. The application should include citation to authority—which for the time being will be federal cases—showing that immediate appeals have been granted in similar circumstances. In short, the application should focus on the “controlling question of law,” the “substantial ground for difference of opinion,” and how the “immediate appeal from the order may materially advance the ultimate termination of the litigation.”

See Warren W. Harris & Lynne Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31, 31 (2002).

In the absence of any definition of “controlling question of law as to which there is a substantial ground for difference of opinion,” the statutory requirements for Supreme Court review on petition for review are an excellent surrogate. The jurisdictional bases for review in the Supreme Court require the case to involve a “material question of law” that is either “important to the jurisprudence of the state” or important to the state in general:

- (a) The supreme court has appellate jurisdiction . . . extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:
- (1) a case in which the justices of a court of appeals disagree on a question on law material to the decision;
 - (2) a case in which one of the courts of appeals hold differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
 - (3) a case involving the construction or validity of a statute necessary to a determination of the case;
 - (4) a case involving state revenue;
 - (5) a case in which the railroad commission is a party; and
 - (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction

TEX. GOV'T CODE § 22.001(a). Thus, these requirements encompass not only important and “controlling questions of law,” but also issues presenting “substantial grounds for difference of opinion.” Moreover, the fact that these types of cases might ultimately warrant Supreme Court review might justify the court of appeals’s exercise of discretionary jurisdiction.

The one case discussing whether an application for permission to appeal presents a “controlling question of law” with “substantial ground for difference of opinion” mildly supports this notion. In *Dimock v. Dimock*, No. 02-04-099-CV, 2004 WL 966326, at *1 (Tex. App.—Fort Worth May 6, 2004, no pet.) (mem. op.), the Second Court of Appeals set forth its “analysis” in a single sentence:

The case-by-case resolution of the enforceability of a particular postnuptial partition agreement does not involve a “controlling question of law as to which there is a substantial ground for difference of opinion.”

Id. Although the reasoning is sparse to say the least, the court’s analysis takes into account the importance of the issue to the jurisprudence of the state as well as the likelihood that the issue will repeat itself, thereby creating a likely conflict in the decisions of the courts or the justices of the courts.

Another excellent strategy for drafting petitions for permission to appeal is to liken the trial court’s order to similar federal court orders that federal appellate courts have reviewed under the federal permissive appeal provision—*i.e.*, 28 U.S.C. 1292(b). See Dana Livingston Cobb, *Permissive Interlocutory Appeals in State Court*, UNIV. TEX. 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, at 15-16 & App. C (2002) (listing examples of cases reviewable under Section 1292(B)). The Texas permissive appeal statute was based on the federal statute. See *id.* at 2 (quoting untranscribed audiotapes of the *Hearings on Tex. H.B. 978 Before the House Comm. on Civil Practices*, 77th Leg., R.S. (Feb. 21, 2001) (statement of Rep. Craig Eiland)).

Finally, it is becoming clear that courts are loath to review any application for permission to appeal if the case presents disputed fact issues. See *Diamond Prods. Int’l v. Handsel*, No. 14-03-00998, 2004 WL 1607689, at *2 (Tex. App.—Houston [14th Dist.] July 20, 2004, no pet. h.) (“The statute does not contemplate permissive appeals of summary judgments where the facts are in dispute.”); *Dimock*, 2004 WL 966326, at *1 (“Resolution of this issue pivots on fact issues that must be resolved in the trial court. . . . Accordingly, we deny the application for interlocutory appeal.”). Practitioners seeking review under Section 51.014(d) should be certain to state in the application for permission to appeal that the controlling question of law does not involve any material questions of disputed fact.

Proposed Rule. Although Proposed Rule 25.2 does not define “controlling questions of law” or “substantial ground for difference of opinion,” it does set forth rules governing the format and the contents of a petition for permission to appeal. *See* Tab B. In addition, the rule would resolve a number of the uncertainties that exist as a result of having no appellate rule.

Contents of Petition. The proposed rule lists the necessary contents for a petition:

The petition must:

- (1) identify the trial court and state the case’s trial court number and style;
- (2) give a complete list of all parties to the order complained of and the names and addresses of all trial and appellate counsel;
- (3) identify the order granting permission to appeal by stating the date of the order and attaching to the petition a copy of the order stating the district court’s permission to appeal or stating that the statutory conditions are met;
- (4) identify the interlocutory order complained of by the appellant by stating the date of the order and attaching a copy of the order to the petition;
- (5) state that all parties agree to the order granting permission to appeal;
- (6) state the court of appeals to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the petition must state that the petition is addressed to either of those courts; and
- (7) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the appeal is authorized and should be allowed and the relief sought.

See App. B. The Appellate Rules Subcommittee also proposed an alternative to requirement (7), which more closely tracks the language of Section 51.014(d):

- (7) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves controlling questions of law as to which there is substantial

ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

See App. B.

Note that requirements (3) and (4) suggest that a court may issue an order authorizing permission to appeal an earlier order the trial court issued that decided the controlling question of law.

Length of Petition. The most surprising aspect of the proposed rules to implement Section 51.014(d)-(f) is the rule governing the length of the petition. After requiring the petition to include the issues presented, the facts necessary to understand the issues presented, the reasons why the order involves “controlling questions of law as to which there is substantial ground for difference of opinion,” the reasons why an immediate appeal may materially advance the ultimate resolution of the case, and the relief sought, the rule then limits the petition to just 5 pages:

Except by the court’s permission, a petition must not exceed 5 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition.

See Tab B. Given the number of elements required to be included, drafting an effective and persuasive petition in 5 pages would likely challenge the most experienced of appellate practitioners.

Other papers. Under the proposed rule, if any party timely files a petition for permission to appeal, “another party may file a response or another petition not later than 7 days after the initial petition is served.” App. B. Since petitions for permission to appeal should be agreed ventures by all the parties, a response should be rare indeed. The proposed rule does not outline the required format for a response.

Further Proceedings in the Trial Court. Finally, the proposed rules amend Appellate Rule 29.5 to conform with the complex stay provisions for permissive appeals outlined in Sections 51.014(b) and (c) of the Texas Civil Practice and Remedies Code:

While appeal from an interlocutory appeal is pending, the trial court retains jurisdiction of the case and *unless prohibited by statute* may

make further orders, including one dissolving the order *complained of on appeal*. *If permitted by law, the trial court may proceed with a trial on the merits.* . . .

App. B (emphasis in original).

One question that remains open is whether issues reviewed by permission will be reviewable by the Texas Supreme Court as are other interlocutory orders.

Thus far, this paper has only examined interlocutory appeals filed in the court of appeals. The rules governing appeals of interlocutory orders to the Texas Supreme Court are reviewed below.

VI. SUPREME COURT REVIEW OF INTERLOCUTORY ORDERS.

Jurisdiction over interlocutory appeals is generally final in the courts of appeals:

(b) Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in the following civil cases:

. . . .

(3) an appeal from an interlocutory order appointing a receiver or trustee *or from other interlocutory appeals that are allowed by law*;

TEX. GOV'T CODE § 22.225(b)(3) (emphasis added).

The exceptions in Subsection (d) provide for Supreme Court review of types of interlocutory orders: (1) orders that certify or refuse to certify a class brought under Rule 42 of the Rules of Civil Procedure, *see* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3); and (2) orders that deny a media defendant's motion for summary judgment based in whole or in part on free speech grounds, *see id.* § 51.014(a)(6). *See* TEX. GOV'T CODE § 22.225(d). Given the Court's discretionary review, a practitioner attempting to appeal such interlocutory orders to the Supreme Court should stress the importance of the issues presented to the state's jurisprudence in the petition for review, as in any other petition for review.

The exceptions provided by Subsection (c) are often referred to as "dissent" and "conflicts" jurisdiction. *See* TEX. GOV'T CODE § 22.225(c). Dissent jurisdiction permits the Supreme Court to review any case involving an interlocutory order in which "justices of the court of appeals disagree on a question of law material to the

decision." *Id.* Consequently, if a justice authors a dissenting opinion—even a justice dissenting on denial of *en banc* review—regarding a question of law that is material to the decision, then the Supreme Court may exercise its discretionary review over the decision. *See Am. Type Culture Collection v. Coleman*, 83 S.W.3d 801, 805 (Tex. 2002). And the Court has not hesitated to exercise this jurisdiction to review important issues. *See, e.g., Tex. Dep't of Criminal Justice v. Simons*, No. 02-0479, 2004 WL 1533264, at *5 (Tex. July 9, 2004); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002).

"Conflicts jurisdiction" permits the Supreme Court to review cases when "one of the courts of appeals holds differently from a prior decision of another court of appeals." TEX. GOV'T CODE §§ 22.225(a)(2), 22.225(c). Prior to September 2003, two decisions were considered to "hold differently" or conflict if "the rulings in the two cases are 'so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.'" *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 687 (Tex. 2002) (quotations omitted).

Conflicts jurisdiction was strictly construed. Indeed, as Justice Hecht observed in 2001, the Court's exercise of its conflicts jurisdiction was "more rare than a blue moon, a total eclipse of the sun or the birth of a Giant Panda in captivity." *See Wagner & Brown v. Horwood*, 53 S.W.3d 347, 350 (Tex. 2001) (Hecht, J., dissenting from denial of mot. for reh'g on pet. for review).

Effective September 1, 2003, however, the definition of conflicts jurisdiction has been dramatically changed. One court now "holds differently" from another "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE § 22.001(e).

The Supreme Court has yet to interpret this statute or exercise its new conflicts jurisdiction. But one thing is clear: What was once more rare than a blue moon is now virtually unlimited. It is difficult to locate a case that is not inconsistent with some other case decided by the courts of appeals or the Supreme Court. Thus, the key to conflicts review should be whether the issue "should be clarified to remove unnecessary uncertainty in the law and unfairness to the litigants." *Id.* Does this test sound familiar? Similar, perhaps, to issues of "such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction." TEX. GOV'T CODE § 22.001(a). If so, then the Supreme Court can exercise its discretionary conflicts jurisdiction over interlocutory

orders just as it would exercise its discretionary review over a petition for review filed from a final judgment.

In addition to the statutory exceptions to the Court's jurisdiction to review interlocutory orders, the Supreme Court also has jurisdiction to determine whether the court of appeals properly exercised its jurisdiction over an interlocutory order. *See Tex. Dep't of Criminal Justice v. Simons*, No. 02-0479, 2004 WL 1533264, at * (Tex. July 9, 2004); *Qwest Communications Corp. v. AT&T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000) (per curiam) ("This Court has jurisdiction to determine whether a court of appeals correctly decided its jurisdiction over an interlocutory appeal.").

VII. CONCLUSION.

Interlocutory appeals may be rather routine today, but an appellate practitioner should recognize that these accelerated appeals have shortened deadlines and are governed by different rules. Failure to appreciate the difference in appealing an interlocutory order could be fatal to an appeal.

As for permissive appeals, the Supreme Court Rules Advisory Committee should move quickly to recommend the adoption of some version of the proposed rules discussed above to the Texas Supreme Court, thereby removing many of the uncertainties currently surrounding the permissive appeal process. Until then, practitioners should follow the existing appellate rules for interlocutory appeals—remembering, however, that he must file an application for permission to appeal and a notice of appeal within 10 days of the trial court's order.

APPENDIX A

TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 51.014

§ 51.014. Appeal From Interlocutory Order

- (a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:
- (1) appoints a receiver or trustee;
 - (2) overrules a motion to vacate an order that appoints a receiver or trustee;
 - (3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;
 - (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;
 - (5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;
 - (6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;
 - (7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;
 - (8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.
 - (9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351; or
 - (10) grants relief sought by a motion under Section 74.351(l).
- (b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) also stays all other proceedings in the trial court pending resolution of that appeal.
- (c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

- (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or
- (2) the 180th day after the date the defendant files:
 - (A) the original answer;
 - (B) the first other responsive pleading to the plaintiff's petition; or
 - (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.
- (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:
 - (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;
 - (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
 - (3) the parties agree to the order.
- (e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.
- (f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014.

APPENDIX B

PROPOSED CHANGES TO APPELLATE RULE

25.1 Civil Cases - Appeal as of Right

- a. *Notice of Appeal.* An appeal is perfected when a written notice of appeal is filed with the trial court clerk *within the time allowed by Rule 26.* If a notice of appeal

[25.2 Civil Cases - Appeals by permission]

- b. *Petition for Permission to Appeal.* To request permission to appeal an interlocutory order that is not otherwise appealable as of right, a party must file a petition for permission to appeal not later than the 10th day after the date a district court signs a written order granting permission to appeal.

- c. *Contents of Petition.* The petition must:

- (1) identify the trial court and state the case's trial court number and style;
- (2) give a complete list of all parties to the order complained of and the names and addresses of all trial and appellate counsel;
- (3) identify the order granting permission to appeal by stating the date of the order and attaching to the petition a copy of the order stating the district court's permission to appeal or stating that the statutory conditions are met;
- (4) identify the interlocutory order complained of by the appellant by stating the date of the order and attaching a copy of the order to the petition;
- (5) state that all parties agree to the order granting permission to appeal;
- (6) state the court of appeals to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the petition must state that the petition is addressed to either of those courts; and
- (7) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the appeal is authorized and should be allowed and the relief sought.

- [(7) State concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves controlling questions of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.]

- d. *Other papers.* If any party timely files a petition, another party may file a response or another petition not later than 7 days after the initial petition is served.

- e. *Length of Petitions.* Except by the court's permission, a petition must not exceed 5 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition.

- f. *Grant of Petition; Fees; Filing the Record.*
- (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:
 - (a) request in writing that the official reporter prepare the reporter's record;
 - (b) notify the trial court clerk that permission to appeal has been granted and file any written designation specifying items to be included in the clerk's record; and
 - (c) pay any required fees.
 - (2) *A notice of appeal need not be filed.* The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.
 - (3) The appellate record must be filed within 10 days after entry of the order granting permission to appeal.

COMMENT: This new Rule 25.2 is intended to govern discretionary appeals from trial court orders pursuant to Civil Practice and Remedies Code Section 51.014 (d)-(f). (italics in original)

- [C. Extension of Time. The appellate court may extend the time to file the petition for permission to appeal if, within 15 days after the deadline for filing the petition, the party:
- (a) files in the trial court the petition for permission to appeal; and
 - (b) files in the appellate court a motion complying with Rule 10.5(b).]

APPENDIX C

PROPOSED CHANGE TO APPELLATE RULE 29.5

Rule 29.5 *Further Proceedings in Trial Court.* While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and *unless prohibited by statute* may make further order, including one dissolving the order *complained of on appeal.* *If permitted by law, the trial court may proceed with a trial on the merits. But the court*

COMMENT to 2004 Change: Rule 29.5 is amended to conform to Sections 51.014 (b) and (c) of the Civil Practice and Remedies Code which provide complex procedures for staying proceedings in cases governed by Section 51.014 (a). (italics in original)