

**CHUTES AND LADDERS: UNUSUAL PATHS IN AND OUT
OF THE APPELLATE COURTS**

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Chapter 8

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SELECTED PUBLICATIONS

Help! The Other Side Has Filed a Petition for Review — What Do I Do Now? State Bar of Texas, Practice Before the Supreme Court of Texas, April 2003.
The 2002 Amendments to the Texas Rules of Appellate Procedure With Commentary, 15 APPELLATE ADVOCATE 5 (Fall 2002) (co-author with Prof. William V. Dorsaneo III and W. Wendell Hall).
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Texas Supreme Court Practice, State Bar of Texas, Advanced Personal Injury Law Course, Summer 2002.
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CHUTES AND LADDERS: UNUSUAL PATHS IN AND OUT OF THE APPELLATE COURTS

By Pamela Stanton Baron

I. INTRODUCTION AND SCOPE

The object of the children's board game, Chutes and Ladders®, is to be the first player to reach square 100 by moving a playing piece through ten levels of ten squares each. A player who has neither good luck nor bad luck will move the number of squares shown on the spinner each turn until reaching square 100. If all players proceeded in this manner, the game would have very little interest to children or adults. But, scattered among the squares are ladders and chutes. If a player lands on a square at the bottom of a ladder, the player climbs the ladder to a higher square on the board, sometimes a much higher square. If a player lands at the top of a chute, the opposite occurs — the player slides down the chute to a lower square, sometimes a much lower square.

The Texas appellate system is somewhat like Chutes and Ladders®. In most regular appeals, the parties march in order from trial court to court of appeals to the Texas Supreme Court. Administrative appeals are similar, except that trial is before the agency and three levels of appeals follow — in the district court, the court of appeals, and the Texas Supreme Court. In some situations, however, parties are allowed to proceed directly to a higher court for review. For example, it is possible for a party to proceed directly from the trial court to the Texas Supreme Court in a direct appeal or even to start a case in the highest court when the court has original exclusive jurisdiction. In some administrative appeals, a party proceeds directly from the agency to the court of appeals. In a move that has no counterpart in Chutes and Ladders®, it is also possible for a party to be sent laterally to a sister court through certification. In most of these cases, however, the court may refuse to take the case and push it back down the chute to be heard at a different level.

This paper addresses these unusual paths in and out of the appellate courts, where a case skips one or more traditional levels of review.

II. ORIGINAL EXCLUSIVE JURISDICTION: CASES STARTING IN THE TEXAS SUPREME COURT

In Chutes and Ladders®, the longest possible ladder allows a player to skip from square 28 to square 84. In the Texas appellate court system, there is an even longer ladder. It is possible for a party to start at the finish in those cases where the Texas Supreme Court has exclusive original jurisdiction. These cases are narrowly defined and exceedingly rare.

A. Writs issued to officers of executive departments

The Supreme Court has exclusive writ jurisdiction over officers of the executive departments. By statute:

Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Tex. Gov't Code § 22.002(c).

Under this statute, "when a relator seeks to compel an executive officer to perform duties imposed by law, generally this [Supreme] Court alone is the proper forum." *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995). The Texas Constitution identifies six executive officers (other than the governor, over whom the court may not exercise jurisdiction); these are: the lieutenant governor, the secretary of state, the comptroller of public accounts, the treasurer, the commissioner of the general land office, and the attorney general. Tex. Const. art. IV, § 1; *A & T Consultants*, 904 S.W.2d at 672. It appears that the list of six officers is exclusive; the court will not entertain exclusive original writ jurisdiction over other

officers of state government. *See City of Arlington v. Nadig*, 960 S.W.2d 641 (Tex. 1997) (per curiam) ("we do not have exclusive mandamus jurisdiction over the TWCC executive director or over the Subsequent Injury Fund administrator"); *Betts v. Johnson*, 96 Tex. 360, 73 S.W. 4, 5 (Tex. 1903) (orig. proceeding) (court does not have exclusive jurisdiction over members of state boards).

The Supreme Court has thus held that it alone could issue mandamus to require the six constitutionally-designated executive officers to release documents under the Texas Open Records Act. *A & T Consultants*, 904 S.W.2d at 673. It has also exercised exclusive original jurisdiction over these officers in other contexts. *Houston Chronicle Pub. Co. v. Mattox*, 767 S.W.2d 695 (Tex. 1989) (orig. proceeding) (seeking to compel the attorney general to render an open records opinion); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975) (orig. proceeding) (seeking to compel the comptroller to issue a warrant for payment of architects' services); *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972) (orig. proceeding) (seeking to require the comptroller to pay the costs of a party primary election); *Trinity River Auth. v. Carr*, 386 S.W.2d 790 (Tex. 1965) (orig. proceeding) (seeking to force the attorney general to approve a river authority's revenue bonds); *Gordon v. Lake*, 163 Tex. 392, 356 S.W.2d 138 (Tex. 1962) (orig. proceeding) (seeking to compel the secretary of state to file a corporate charter); *County of Cameron v. Wilson*, 160 Tex. 25, 326 S.W.2d 162 (Tex. 1959) (orig. proceeding) (seeking to require the attorney general to approve the issuance of county revenue bonds); *Union Cent. Life Ins. Co. v. Mann*, 138 Tex. 242, 158 S.W.2d 477 (Tex. 1941) (orig. proceeding) (seeking to force the attorney general and comptroller to refund illegally-assessed taxes the petitioner had paid on policy premiums it received); *Manion v. Lockhart*, 131 Tex. 175, 114 S.W.2d 216 (Tex. 1938) (orig. proceeding) (seeking to compel the treasurer to pay escheated funds to an heir); *Corsicana Cotton Mills, Inc. v. Sheppard*, 123 Tex. 352, 71 S.W.2d 247 (Tex. 1934) (orig. proceeding) (seeking to compel the comptroller and treasurer to refund erroneously paid franchise taxes); *Jernigan v.*

Finley, 90 Tex. 205, 38 S.W. 24 (Tex. 1896) (orig. proceeding) (seeking to force the comptroller to issue a warrant for county school funds).

If a writ proceeding is filed against these six officers in district court, the district court must dismiss the petition for want of jurisdiction. *A & T Consultants*, 904 S.W.2d at 673.

B. Mandamus jurisdiction over state boards or commissions when time is of the essence on a matter of importance

The Texas Supreme Court has exclusive mandamus jurisdiction over executive officers; it has non-exclusive original jurisdiction over other officers of state government. Tex. Gov't Code § 22.002. The Court recently held that state officers over which it exercises mandamus jurisdiction include state boards and commissions, like the Public Utility Commission. *In re TXU*, 63S.W.3d 130 (Tex. 2001).

In *TXU*, the utility sought mandamus relief from an interim agency order directly in the Texas Supreme Court; it later filed an administrative appeal in district court. The justices disagreed on whether the court could, or should, exercise mandamus jurisdiction under these circumstances. A majority of the court, however, voted to deny mandamus relief. Four separate opinions issued: (1) Chief Justice Phillips, joined by Justice Enoch and Justice Godbey, sitting by assignment, recognized that the court had mandamus jurisdiction over state commissions but held that TXU had an adequate remedy in the district court administrative appeal; (2) Justice Baker and Rodriguez held that the court lacked mandamus jurisdiction over state commissions; (3) Justice Brister, sitting by assignment, reached the merits without addressing the jurisdictional issue and opined that TXU was not entitled to relief; and (4) Justice Hecht, joined by Justices Owen and Jefferson, dissented on the grounds that the court had jurisdiction over state commission orders because the proceeding "involves questions which are of general public interest and call for a speedy determination" and on the grounds that TXU was entitled to relief on the merits.

The effect of the four opinions may be that the Texas Supreme Court will entertain mandamus actions over state board and commission orders when time is of the essence and the remedies in the lower court are not adequate.

C. Mandamus jurisdiction over the Legislative Redistricting Board

Under Tex. Const. art. III, § 28, the Supreme Court may issue mandamus to require performance of duties by Legislative Redistricting Board. In *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570, 575 (Tex. 1971, orig. proceeding), the Supreme Court exercised original jurisdiction over a mandamus proceeding against the redistricting board filed first in that court without addressing whether its jurisdiction was exclusive. Because four of the five members of the board are executive officers over which the court exercises exclusive jurisdiction (the Lieutenant Governor, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office), presumably the court's jurisdiction over the board is also exclusive.

D. Mandamus jurisdiction over multidistrict litigation transfer orders

Under Judicial Administrative Rule 11, cases across the state may be consolidated for pretrial proceedings. The order of the presiding judge granting or denying a request for appointment of a pretrial judge is reviewable by mandamus to the Supreme Court. The rule does not state that such jurisdiction is exclusive, and there are no reported cases addressing this issue.

Further, newly-enacted House Bill 4 creates a judicial panel on multidistrict litigation with the authority to transfer and consolidate cases. The Texas Supreme Court is required to adopt rules allowing some or all of the orders of the judicial panel on multidistrict litigation to be subject to appellate review by extraordinary writ, presumably mandamus. Tex. Civ. Prac. & Rem. Code § 74.163(a)(1) (eff. Sept. 1, 2003). The rules as currently proposed would vest the Supreme Court with exclusive original mandamus jurisdiction to review orders granting or denying transfers under the statute.

E. Cases involving issuance and payment of certain bonds

Many statutes provide for mandamus in the Supreme Court to enforce the obligations of state officials with respect to public debt. Tex. Agric. Code § 58.036 ("Payment of the bonds and performance by the [Texas Agricultural Finance Authority] or the [Agricultural] commissioner of its or his functions and duties under this chapter

and the Texas Constitution may be enforced in the state supreme court by mandamus or other appropriate proceeding."); Tex. Gov't Code § 404.126(d) ("Payment of the notes and performance of official duties prescribed by the state constitution and by this subchapter may be enforced in the state supreme court by mandamus or other appropriate proceeding."); Tex. Gov't Code § 465.028 ("The [Texas National Research Laboratory Commission] or any financing corporation, as applicable, may include this pledge and agreement of the state in an agreement with the owners of those bonds. Payment of the bonds and performance by the commission or any financing corporation, as applicable, of its functions and duties under this section and the Texas Constitution may be enforced in the state supreme court by mandamus or other appropriate proceeding."); Tex. Gov't Code § 1205.002(b) ("This chapter does not prohibit an issuer from applying to the Texas Supreme Court for a writ of mandamus to the attorney general for the approval of a bond, and the court is authorized to issue the writ.").

III. CASES PROCEEDING DIRECTLY FROM THE TRIAL COURT TO THE TEXAS SUPREME COURT

In Chutes and Ladders® it is possible to land on a square and climb a long ladder to a much higher square. It is also possible to then proceed a few squares to an equally long chute landing the player right back where he or she started. Similarly, in the Texas appellate court system, a case may proceed directly from the trial court to the Texas Supreme Court. While the most common mechanism for skipping the court of appeals is the direct appeal, case law as well as other statutes permit direct review of a trial court's order in the Supreme Court. Because, in most of these cases, review is discretionary, it is possible that a party who perfects a direct appeal to the state's highest court will be sent down the chute back to the court of appeals.

A. Direct appeals

In a direct appeal, an appeals proceeds directly from the trial court to the Texas Supreme Court. Because a direct appeal is available in only very narrowly defined circumstances, it should be a relatively rare event. The numbers show otherwise.

In the fiscal year ended August 31, 2002, the Supreme Court issued opinions in four causes pending on direct appeal, accepted jurisdiction over another two direct appeals, and dismissed eight attempted direct appeals for want of jurisdiction. In the prior fiscal year, the court issued opinions in twelve direct appeals, accepted another eight, and dismissed one for want of jurisdiction.

One possible explanation for the large volume of activity is recent legislation giving the court direct appeal jurisdiction over certain agency orders. But a selective look at statistics from prior years suggests that recent activity is not unusually high. In the fiscal year ended August 31, 1998, the court passed on ten direct appeals, accepting jurisdiction over seven cases and dismissing three. These statistics suggest that direct appeal jurisdiction will continue to be a significant part of the court's docket.

1. Constitutional grant of direct appeal jurisdiction

In 1940, the Texas Constitution was amended to provide:

The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.

Tex. Const. art. V § 3-b.

Under this provision, then, the Legislature may authorize two types of direct appeals: (1) from an order of a trial court granting or denying injunctive relief based on the constitutionality or unconstitutionality of a state statute; or (2) from an order of a trial court granting or denying injunctive relief based on the validity or invalidity of a state agency's administrative order. The provisions are not self-effectuating, and the Legislature has taken different paths in implementing the two types of direct appeals.

2. Statutes providing for direct appeals of administrative agency orders

Although the Legislature has the power to

authorize the Supreme Court to hear direct appeals of trial court injunctive orders in administrative agency cases, currently that full authority is neither granted by statute nor used in any significant respect.

a. Prior statute co-extensive with constitutional grant

In 1944, the Texas Legislature enacted a statute granting the Supreme Court direct appeal jurisdiction over administrative agency orders co-extensive with the constitutional grant; the language of the statute adopted, in fact, tracked the constitutional language except that it used the phrase "State Board or Commission" rather than "state agency." See *Bryson v. High Plains Underground Water Conservation Dist.*, 156 Tex. 405, 297 S.W.2d 117 (1956) (quoting statute). The court interpreted this language as imposing three requirements to a direct appeal of an agency order: (1) the validity of an administrative order issued by a State Board or Commission under a statute of this State was properly raised in the trial court, (2) such question must be determined by the order of such court granting or denying an interlocutory or permanent injunction, and (3) the question must be presented to the Supreme Court for decision. *Id.* This statute was subsequently repealed in 1983. Acts 1983, 68th Leg., ch. 839 § 2. It was never replaced. With one exception, discussed below, the Supreme Court has no direct appeal jurisdiction over agency orders.

b. Current direct appeal authority limited to PUC securitization orders

Currently, the Texas Legislature has authorized by statute direct appeals of only one type of administrative order — a financing order issued by the Public Utility Commission. The statute also provides the scope of review and gives the direct appeal priority over other cases:

The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the . . . Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be

based solely on the record before the commission and briefs to the court and shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

Tex. Util. Code § 39.303(f).

Under this statute, the availability of a direct appeal does not turn on whether the trial court granted or denied injunctive relief based on the validity or invalidity of the financing order. No request for, nor grant or denial of, injunctive relief is required. This raises an interesting question: Did the Legislature's grant of direct review authority exceed that permitted under the Texas Constitution, which only allows direct appeal when injunctive relief is granted or denied? The answer to that question turns on the effect of the 1980 amendment to article V, section 3, which deleted the limitation giving the Supreme Court only "appellate jurisdiction." 1 George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 381 (1977). Under the current version, the court exercises "the judicial power of the state." Did the amendment make the direct appeal provision of the Constitution superfluous or does it continue to be a restriction on the court's jurisdiction?

The Texas Supreme Court has decided several securitization cases, hearing them as direct appeals. See *TXU Elec. Co. v. Public Util. Comm'n*, 51 S.W.3d 275 (Tex. 2001); *City of Corpus Christi v. Public Util. Comm'n*, 51 S.W.3d 231 (Tex. 2000). No party has raised the question of whether the statutory grant of jurisdiction violated the constitution.

3. Availability of direct appeals of certain injunctive orders

Ever since the adoption of the constitutional amendment in 1940 permitting direct appeals, the Legislature has authorized the Supreme Court to hear direct appeals of cases in which the trial court grants or denies injunctive relief on the grounds of the constitutionality or unconstitutionality of a state statute. See Tex. Rev. Civ. Stat. § 1738a, Acts 1943, 48th Leg., ch. 14 §1 (eff. Jan. 1, 1944), subsequently repealed and recodified as Tex. Gov't Code § 22.001(c). A few other statutes provide for direct

appeals but appear to be merely repetitive of the primary statute.

Direct appeals are considered to be rare because the statute imposes a number of prerequisites which the courts have strictly enforced. *Assoc. of Texas Prof. Educators v. Kirby*, 788 S.W.2d 827, 828 n.1 (Tex. 1990) (describing direct appeals as "rare cases"). In the author's opinion, assuming that direct appeals were once rare, they no longer are unusual when the Supreme Court hears about ten direct appeals a year.

a. The principal direct appeal statute: Tex. Gov't Code § 22.001(c) and its prerequisites

The vast majority of direct appeals are brought under this statute, which provides:

An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

Tex. Gov't Code § 22.001(c).

The Supreme Court strictly construes its direct appeal jurisdiction. *Texas Workers' Comp. Comm'n v. Garcia*, 817 S.W.2d 60, 61 (Tex. 1991). "The jurisdiction of this Court on direct appeal is a limited one." *Gardner v. Railroad Comm'n*, 160 Tex. 467, 468, 333 S.W.2d 585, 585 (1960).

In interpreting the statute, the court has recognized the following prerequisites to the exercise of its jurisdiction: (1) the order must be from a district or county court; (2) the order must grant or deny injunctive relief; (3) the grant or denial must be on the grounds of the constitutionality or unconstitutionality of a state statute and not on some other basis; (4) the Supreme Court must have subject matter jurisdiction over the case; (5) there cannot be disputed issues of fact; and (6) the constitutional issue must be preserved for review. Each of these requirements is discussed more fully in the following paragraphs.

(1) An order from a district or county court

While Section 22.001(c) only requires an order from a "trial court," the Supreme Court by rule has limited its jurisdiction to orders of district and county courts. Tex. R. App. P. 57.1.

(2) An order granting or denying injunctive relief

The order must grant or deny temporary or permanent injunctive relief. A grant or denial or declaratory relief, even though similar in effect, is not a grant or denial of injunctive relief and cannot provide a basis for direct appeal jurisdiction. *Texas Workers' Comp. Comm'n v. Garcia*, 817 S.W.2d at 61 ("Whatever the similarities in effect, however, the simple granting of declaratory relief against a state agency is not sufficient to invoke our direct appeal jurisdiction."). In one of the many *Edgewood* cases, the trial court's order postponed consideration of the grant or denial of injunctive relief until after the Legislature had a chance to adopt school finance reforms. The order thus did not grant or deny injunctive relief and could not provide direct appeal jurisdiction. *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491, 493 (Tex. 1991). The court nonetheless held that it had mandamus jurisdiction over the case to enforce its earlier mandate. *Id.*

The fact that the injunctive relief has little or no effect beyond an accompanying declaratory judgment does not affect the court's direct appeal jurisdiction; an injunction is an injunction. *Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999). In short, form matters.

A party may non-suit its request for an injunction for the purpose of blocking direct appeal as a remedy. *Texas Workers' Comp. Comm'n v. Garcia*, 817 S.W.2d at 61-62 (fact that party withdrew request for injunction "irrelevant" — "The effect of the trial court's order, not the parties' litigation strategy, is what determines this Court's direct appeal jurisdiction."). When the direct appeal is from a temporary injunction, the plaintiff's non-suit taken while the appeal is pending will moot the direct appeal. *General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569 (Tex. 1990).

(3) "On the grounds"

Further, it is not enough that the court grant or deny injunctive relief and that a party has raised constitutional issues; there must be a direct connection between the two. *Bryson v. High Plains Underground Water Conservation Dist.*, 156 Tex. 405, 297 S.W.2d 117 (1956) ("we do not have jurisdiction of a direct appeal simply because a statute was assailed on constitutional grounds in the trial court").

Thus, if the trial court grants an injunction on some other grounds — such as to preserve the status quo — there is no direct appeal jurisdiction. *Mitchell v. Purolator Security, Inc.*, 515 S.W.2d 101 (Tex. 1974). Similarly, if the injunction is denied other than on constitutional grounds — such as a failure to show harm, the availability of an adequate remedy at law, or a lack of standing — there is no basis for a direct appeal. *Corona v. Garrison*, 154 Tex. 124, 125, 274 S.W.2d 541, 541 (1955); *Holmes v. Steger*, 161 Tex. 242, 243, 339 S.W.2d 663, 663 (1960); *Gardner v. Railroad Comm'n*, 160 Tex. 467, 473, 333 S.W.2d 585, 588 (1960) (giving examples, such as orders based on res judicata or compliance with a writ of prohibition). If the trial court never reaches the question of constitutionality, there is not direct appeal jurisdiction. *Gibraltar Savings Ass'n v. Falkner*, 162 Tex. 633, 351 S.W.2d 534 (1961) (conditional claim of unconstitutionality never reached).

When the basis of the trial court's action is not shown in the order granting or denying injunctive relief, the court ordinarily will hold that it lacks direct appeal jurisdiction. *Martinez v. Rodriguez*, 608 S.W.2d 162 (Tex. 1980) (no basis stated in order; order could be based on other grounds)

Occasionally, the court will look beyond the order to the pleadings to determine whether the trial court's order effectively ruled on the constitutional issue. *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex. 1969) (looking to pleadings to determine that trial court's order constituted denial of injunctive relief based on constitutionality).

Further, the ruling must address a state statute and not some rule of merely local application. *See Itz v. Penick*, 493 S.W.2d 506 (Tex. 1973) (interpreting trial court's action as ruling on state statute and not local school board rule). The Supreme Court has held that its disciplinary rules are to be treated as statutes and can form a basis for direct appeal jurisdiction. *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397 (Tex. 1988). Presumably, the same logic would apply to all rules of procedure adopted by the court.

(4) Subject matter jurisdiction

The Supreme Court must have subject matter jurisdiction over the case. The court has no jurisdiction over criminal matters. Consequently, it cannot exercise direct appeal jurisdiction over a trial

court order declaring a criminal statute unconstitutional. *Dearing v. Wright*, 653 S.W.2d 288 (Tex. 1983).

The court will also not exercise jurisdiction over moot or unripe cases. *Patterson v. Planned Parenthood*, 971 S.W.2d 439 (Tex. 1998) (challenge to statute not ripe as asserted injury was contingent); *Upham v. White*, 639 S.W.2d 301 (Tex. 1982) (direct appeal mooted by federal court action in redistricting case); *General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569 (Tex. 1990) (case mooted by non-suit); *Richards v. Mena*, 820 S.W.2d 372 (Tex. 1991) (direct appeal of temporary injunction mooted by trial court's issuance of permanent injunction).

(5) No disputed facts

The Supreme Court lacks jurisdiction in a direct appeal to resolve disputed facts. *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988); *cf. Farmer v. Cassity*, 152 Tex. 570, 571; 262 S.W.2d 392, 393 (1953). The court's rule governing direct appeals states that the court may not take jurisdiction over "any question of fact." Tex. R. App. P. 57.2; *see also Dodgen v. Depuglio*, 146 Tex. 538, 543, 209 S.W.2d 588, 592 (1948) (rejecting contention that court lacked jurisdiction after concluding that "no contested issue of fact is involved").

The court will conclude that a party has voluntarily waived any constitutional objections that require the court to resolve disputed facts. *O'Quinn v. State Bar of Texas*, 763 S.W.2d at 399.

(6) Preservation of error

It seems rather evident that the constitutional issue must be preserved for review by the Supreme Court. *Bryson v. High Plains Underground Water Conservation Dist.*, 156 Tex. 405, 297 S.W.2d 117 (1956) (issue must have been properly raised in the trial court, determined by the trial court, and presented to the Supreme Court for decision).

b. Other direct appeal statutes

Two other statutes provide for direct appeal. Tex. Gov't Code § 1205.067 provides that, in declaratory judgment actions brought by issuers of public securities, "A party may take a direct appeal to the supreme court as provided by Section 22.001(c)." Because the statute references the direct appeal statute, presumably the appeal must

meet all the requirements of Section 22.001(c), including the grant or denial of injunctive relief, as opposed to a grant or denial of declaratory judgment.

Recently enacted House Bill 4 also contains a direct appeal provision. Section 23.01 provides:

(e) There is a direct appeal to the supreme court from an order, however characterized, of a trial court granting or denying a temporary or otherwise interlocutory injunction of a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of Article 10 of this Act [the damages cap provision]. The direct appeal is an accelerated appeal. (f) This section authorizes the authority granted by Section 3-b, Article V, Texas Constitution.

House Bill 4 does not reference Section 22.001(c) and appears to stand as an independent grant of direct appeal jurisdiction. The only significant difference between House Bill 4 and Section 22.001(c) appears to be the addition of a phrase modifying the word order: "however characterized," which may give the court more flexibility than exists under current case law in determining whether the trial court's order grants or denies injunctive relief on constitutional grounds.

4. Extended jurisdiction

When the Supreme Court has direct appeal jurisdiction over any issue, it acquires "extended" jurisdiction over all other questions of law properly preserved and presented. *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001); *State v. Hodges*, 92 S.W.3d 489, 492 (Tex. 2002) (exercising jurisdiction over alternative statutory construction argument raised by cross-point).

5. Direct appeal jurisdiction: mandatory or not?

Under Section 22.001(c) a direct appeal "may be taken" to the Supreme Court. Must the Supreme Court accept it? Under the court's rule governing direct appeals, the answer is maybe not. Tex. R. App. P. 57.2 provides that:

The Supreme Court may decline to exercise jurisdiction over a direct appeal

of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is of such importance to the jurisprudence of the state that a direct appeal should be allowed.

There is an interesting omission from this language — the rule does not address rulings on permanent injunctions, which are subject to direct appeal under the statute. The court has thus provided for discretionary jurisdiction over interlocutory orders only.

The larger question remains whether the court has the power to make direct appeals discretionary. Chief Justice Phillips alluded to this question in his dissenting opinion on rehearing in *Dow Chem. Co. v. Alfaro*, when he wrote:

Although this rule and its predecessor rule of civil procedure [stating that direct appeal jurisdiction is discretionary] . . . have been in existence since 1943, this court has never before, either by rule or opinion, asserted that its jurisdiction over direct appeals was discretionary. . . . Is this court entitled to an exemption from statutory mandates because of its importance, its superior wisdom, or its crowded docket?

786 S.W.2d 674, 708-09 (Tex. 1990) (Phillips, C.J., dissenting). The court has not specifically addressed this question.

Other statutes providing for direct appeal may, in fact, preclude the exercise of discretion. The securitization statute allows an appeal only to the Supreme Court and states that the appeal "shall be heard" by the court. It would appear to be mandatory. Tex. Util. Code § 39.303(f). House Bill 4 states that "[t]here is a direct appeal." This language is also arguably non-discretionary.

6. Procedures governing direct appeals

The rule governing direct appeals, Tex. R. App. P. 57, is a bit sketchy. A direct appeal is an odd creature — it is mostly like an appeal to the court of appeals, but it is also somewhat different. Recognizing this fact, Rule 57.1 provides that "the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court" except when "inconsistent with a statute or this rule." What

this means in practice is that the party filing a direct appeal should follow the rules governing either a regular appeal to the court of appeals (in the case of a final judgment on permanent injunction) or an interlocutory appeal to the court of appeals (in the case of an order on temporary injunction). It is assumed the reader is familiar with these rules. While a few rules will be highlighted in this section, the reader should consult other sources for the basics of perfecting and pursuing an appeal to the court of appeals.

a. Appealing party must elect

"[A]n appellant must choose between an appeal to the court of . . . appeals and a direct appeal to the Supreme Court and cannot pursue both." *Corpus Christi v. Public Util. Comm'n*, 572 S.W.2d 290 (Tex. 1978). Any party taking an appeal may so elect. Once any party files a direct appeal in the Supreme Court, the parties may not pursue an appeal to the court of appeals while the direct appeal is pending. Tex. R. App. P. 57.5. If the Supreme Court dismisses the appeal, the parties have ten days to perfect an appeal in the court of appeals. *Id.*

b. Perfecting the appeal

The party filing a direct appeal (the appellant) should file a notice of appeal in the trial court just as in any other appeal. Tex. R. App. P. 25.1. The notice, however, should designate that appeal is taken to the Supreme Court, Tex. R. App. P. 25.1(d)(4), and a copy should be filed with the Supreme Court, together with a docketing statement. Tex. R. App. P. 25.1(e) and 32.1. The appellant should also request a reporter's record and a clerk's record. Tex. R. App. P. 35.

The time for filing a notice of appeal will depend on whether appeal is from a final judgment or an interlocutory order. Rule 26.1, Tex. R. App. P., sets out the time schedule for perfecting appeal in both types of cases. It is important to remember that an appeal from an interlocutory order has an accelerated time schedule; the appellant should observe those time deadlines carefully.

The time for filing the record is governed by Tex. R. App. P. 35. The parties may file an agreed record and an agreed statement of the case (basically a stipulation of facts) under Tex. R. App. P. 34.2 and 34.3. Because no factual questions are presented for

decision in a direct appeal, an agreed record may be an efficient way to proceed. *See Orange County v. Ware*, 819 S.W.2d 472 (Tex. 1991) (stating that the material facts had been stipulated); *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941 (Tex. 1996) (to same effect).

There is a \$125 filing fee for a direct appeal. Tex. Gov't Code § 51.005(b).

c. Perfecting a cross-appeal

Any party that seeks to alter the trial court's order or judgment must perfect its own appeal. Tex. R. App. P. 25.1(c). This is true for direct appeals as well. *Cf. Corning v. Carter*, 997 S.W.2d 560, 567 n.5 (Tex. 1999) (noting the filing by the plaintiffs of a cross direct appeal). Upon the filing of a notice of appeal by one party, other parties may file notices of appeal until the deadline or 14 days after the first notice of appeal, whichever is later. Tex. R. App. P. 26.1(d).

d. Supersedeas, continuing trial court jurisdiction, and similar issues

The effect of perfecting an appeal will vary depending on whether the direct appeal is from a final judgment or a temporary order.

(1) Direct appeal from a final judgment

If the direct appeal is taken from a final judgment, the ordinary rules apply to superseding the judgment. *See* Tex. R. App. P. 24. Additionally, the trial court loses jurisdiction over the case once its plenary power has expired. It will not have continuing jurisdiction over the case or the order from which appeal is taken.

For an excellent paper on supersedeas, please see Elaine A. Carlson, *Enforcing and Superseding the Judgment While on Appeal*, University of Texas School of Law, 13th Annual Conference on State and Federal Appeals (June 2003).

(2) Direct appeal of a temporary order

When a direct appeal is taken from an interlocutory order, the general rule is that the order is not superseded and the trial court has continuing jurisdiction over the case and the order being appealed.

The filing of a direct appeal does not suspend the trial court's temporary order unless the order is superseded or the appealing party (such as a

governmental unit) is entitled by statute to supersede the order without security by filing a notice of appeal. Tex. R. App. P. 29.1.

The trial court has discretion whether to suspend the order, Tex. R. App. P. 26.2, and any supersedeas order is subject to the bonding and other requirements of Tex. R. App. P. 24. Supersedeas applies only to interlocutory orders granting relief and not to orders denying relief. Tex. R. App. P. 29.2; *see Comments to 1997 change*. A refusal by the trial court to permit supersedeas is reviewable on motion to the appellate court under an abuse of discretion standard. Tex. R. App. P. 26.2.

Once appeal is perfected, the Supreme Court may also issue any orders necessary to protect the rights of the parties pending appeal and may require appropriate security. Tex. R. App. P. 29.3; *Richards v. LULAC*, 863 S.W.2d 449 (Tex. 1993) (issuing stay of injunctive relief pending appeal to permit parties to meet bond obligations). The court may not, however, issue such orders if the traditional supersedeas procedures are adequate to protect the rights of the parties. Tex. R. App. P. 29.3

Once the appeal is perfected, only the appellate court may enforce the interlocutory order. Tex. R. App. P. 29.4. The appellate court may refer enforcement proceedings to the trial court, however, for taking of evidence or making findings and recommendations to the appellate court. *Id.*

While the trial court retains jurisdiction over the entire case, it has limited jurisdiction over the interlocutory order. It can modify or dissolve the order appealed from, but it cannot make an order that is inconsistent with any temporary order of the appellate court or that interferes with the appellate court's jurisdiction or the effectiveness of any relief the appellate court might grant. Tex. R. App. P. 29.5; *St. Louis S.W. Ry. v. Voluntary Purch. Groups, Inc.*, 929 S.W.2d 25, 33 (Tex. App.—Texarkana 1996, no writ) (trial court may not issue order granting same relief on same topic as pending on appeal); *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 236-237 (Tex. 2001) (vacating severance order that interferes with effectiveness of relief on appeal when order would delete appellant as party from the case in which it alleged injury).

The trial court may proceed to trial on the merits in the case. Tex. R. App. P. 29.5. This will have the effect of mooted the temporary order and the direct appeal. *Richards v. Mena*, 820 S.W.2d 372 (Tex.

1991) (direct appeal of temporary injunction mooted by trial court's issuance of permanent injunction).

e. Statement of probable jurisdiction and response

The one significant procedural requirement applicable only to direct appeals is the filing of a statement of probable jurisdiction. Tex. R. App. P. 57.3 The statement must be filed at the time the record is filed. *Id.* It must "plainly" set out the basis for direct appeal jurisdiction. *Id.*

The appellee has ten days to respond. *Id.*

f. Court's action accepting or declining jurisdiction.

The Supreme Court will then either note probable jurisdiction or dismiss the appeal. Tex. R. App. P. 57.4. If the court notes probable jurisdiction, the parties file briefs just like they would in the court of appeals and will follow the court of appeals' briefing rules and time deadlines. *Id.* The court's order noting probable jurisdiction will likely set out a briefing schedule for the parties.

If the Supreme Court dismisses the appeal, the parties have ten days to perfect an appeal in the court of appeals. Tex. R. App. P. 57.5.

g. Briefing

Parties should follow the briefing rules for court of appeals' briefs set out in Tex. R. App. P. 38. Just as in the court of appeals, the appellee may raise as cross-points alternative grounds supporting the judgment or order below. *See State v. Hodges*, 92 S.W.3d 489, 492 (Tex. 2002) (exercising jurisdiction over alternate statutory construction argument raised by cross-point).

B. Appeal from trial court orders relating to civil investigative demands

Several statutes appear to provide that the Supreme Court has jurisdiction over an order by a district court to enforce a civil investigative demand issued by the attorney general or other state entity invested with the authority to issue CIDs. Tex. Bus. & Comm. Code § 17.62 (consumer fraud CID) ("Any final order entered is subject to appeal to the Texas Supreme Court."); Tex. Educ. Code § 61.794 (CIDs issued to educational institutions) ("A final order entered under this subsection may be appealed to the Supreme Court of Texas."); Tex. Hum. Res. Code § 36.054 (Medicaid fraud CID) ("A final order issued

by a district court under [this section] is subject to appeal to the supreme court."). The language would appear to create a direct appeal right. No cases have addressed this question.

C. Certain mandamus actions of statewide importance in which time is of the essence

If the Supreme Court and the court of appeals share concurrent jurisdiction over the original proceeding, ordinarily the petition must first be presented to the court of appeals. Tex. R. App. P. 52.3(e); *see In re Chaney & Assoc., Inc.*, 41 Tex. Sup. Ct. J. 612 (Apr. 16, 1998) (denying petition with notation to Tex. R. App. P. 52.3(e)); *In re Wyatt*, 41 Tex. Sup. Ct. J. 156 (Dec. 11, 1997) (same). If not first presented to the court of appeals, the petition to the Supreme Court must state a compelling reason for the omission. Tex. R. App. P. 52.3(e).

This exception is a narrow one, most often recognized in election cases, where the time constraints of the election or printing of ballots preclude a review at both the court of appeals and the Supreme Court. *See, e.g., LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992, orig. proceeding); *Sears v. Bayoud*, 786 S.W.2d 248, 249 & 250 n.1 (Tex. 1990, orig. proceeding) (urgency of time constraints of election justified failure to file first in the court of appeals). It is also apparently possible to skip review by the court of appeals when the case is of statewide importance and time is of the essence, as in the recent redistricting case. *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (impending federal court deadline justified first review in the Supreme Court).

D. Certain interlocutory appeals of statewide importance in which time is of the essence

In a few instances, the Supreme Court has granted relief by mandamus for what should have been an interlocutory appeal to the court of appeals.

In *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997), and 924 S.W.2d 932 (Tex. 1996) (per curiam), at issue was whether the Republican Party could bar from its convention participation by an organization of homosexual Republicans. The trial court had issued a temporary injunction grounded on violation of the organization's free speech rights and on breach of contract.

Because the order was not based on the constitutionality of a state statute, the Supreme Court

did not have direct appeal jurisdiction. Nonetheless, it did not require the Republican Party to seek relief from the Third Court of Appeals in Austin. An interlocutory appeal is available for review of temporary injunctions; like class certifications, review is final in the court of appeals. The Supreme Court gave a number of reasons why mandamus review was available: (1) because of the “unique and compelling circumstances” of the case; (2) the state’s highest court should determine issues of statewide importance involving a statewide political convention; (3) the case involves First Amendment Rights of the Republican Party (although not reached by the Court); (4) the case could become moot unless immediate court action was taken; and (5) “the quick eruption and short time frame of this constitutional controversy compelled mandamus review.”

The court seems to take a similar approach in cases involving state sports championships and similar competitions. The Supreme Court reviewed by mandamus what looked very much like a temporary injunction in *In re University Inter-scholastic League*, 20 S.W.3d 690 (Tex. 2000) (per curiam). There the court did not offer a jurisdictional explanation for its ordering the trial court to vacate an order that, among other things, directed the UIL to advance a certain baseball team in the state tournament. *See also In re Lubbock Indep. School Dist.*, No. 02-0308, 45 Tex. Sup. Ct. J. 550 (order issued April 10, 2002) (without argument and opinion, Supreme Court orders district court to dissolve injunction declaring a winner of a state academic competition; no interlocutory appeal had been taken to the court of appeals).

E. Mandamus jurisdiction over certain disciplinary proceedings

Mandamus may be taken to the Supreme Court to enforce a rule governing trial court judgments and action by the Supreme Court clerk in disciplinary proceedings to determine whether or not the actions of an attorney constituted professional misconduct. Tex. R. Disc. Proc. 3.09.

IV. CASES PROCEEDING DIRECTLY FROM AN ADMINISTRATIVE AGENCY TO THE COURT OF APPEALS

In a few situations known mostly to administrative law practitioners, a party may bypass the district court and challenge an agency ruling directly in the court of appeals. The

equivalent in Chutes and Ladders® would be starting in the middle of the board rather than the beginning. Some of the vehicles for by-passing the district court are discretionary; consequently, a party may be “chuted” back to the district court to proceed by traditional administrative appeal.

Under the Texas Constitution, the Texas Legislature is authorized to enact statutes giving the courts of appeals “such other jurisdiction, original and appellate, as may be prescribed by law.” Tex. Const. art. V, § 6. The Legislature has exercised that power through several statutes permitting appeal of an administrative agency order directly to the Third Court of Appeals in Austin. Ordinarily, appeals of administrative orders must first be heard in the district court of Travis County.

The Third Court has recognized that these statutes “give this Court original jurisdiction in a matter traditionally brought in the trial court.” *Meador-Brady Mgt. Corp. v. Texas Motor Vehicle Comm’n*, 833 S.W.2d 683 (Tex. App.—Austin 1992) (per curiam), *rev’d on other grounds*, 866 S.W.2d 593 (Tex. 1993). The court refers to these appeals as “direct appeals.” *Office of Public Util. Counsel v. Public Util. Comm’n*, 2003 Tex. App. Lexis 3056 (Tex. App.—Austin Apr. 10, 2003, no pet.).

Because review of administrative agency orders essentially has three levels of appeal (district court, court of appeals, Supreme Court) rather than two, it would seem that skipping one level would speed up the process and eliminate redundancy. That may not necessarily be so. As one commentator has observed, district court review can play an important role in narrowing the issues and parties in a complex case:

When the issues are numerous and complex, the district court provides a forum for the parties to test and refine their argument prior to submitting them for “authoritative” resolution by the court of appeals. The unique opportunity to participate in a district court hearing of one, two, or even several hours can be highly instructive. Parties often use this experience to drop points and hone the more important ones in presenting the case to the court of appeals. . . .

. . . Just as issues may fall by the wayside in transition from district court to

appellate court, so, too, do parties sometimes choose to drop out on appeal.

Steven Baron, *Judicial Review of Agency Orders: Who Needs the District Court?* at C-3, Eleventh Annual Administrative Law Course (Sept. 1999). Further, the time saved in bypassing the district court may be offset in the extra time necessary for the court of appeals to resolve cases in which the parties and the issues have not been narrowed through a prior review in the district court. *See id.* at 3-5.

Additionally, the process of bringing the record directly to the court of appeals and resolving disputes concerning the record is one the court is not used to handling and can produce problems. As the Third Court noted in one of these direct appeals

Here, the parties and the Court have managed, on an ad hoc basis, to avoid procedural and factual disputes that court have derailed disposition of the cause. . . . Such potential disputes suggest that an appellate court is an unwieldy forum for initial judicial review of an administrative action.

Meador-Brady Mgt. Corp. v. Texas Motor Vehicle Comm'n, 833 S.W.2d at 685.

The details of the statutes vary in scope, in whether they are mandatory or discretionary, and in the procedures employed to arrive at the court of appeals. Each is discussed below.

A. Motor Vehicle Board final orders

The Texas Motor Vehicle Commission Code provides that:

Any party to a proceeding before the board that is affected by a final order, rule, decision, or other final action of the board is entitled to judicial review of any such final board action, under the substantial evidence rule, in a District Court of Travis County, Texas, or in the Court of Appeals for the Third Court of Appeals District, and to the extent not inconsistent herewith, pursuant to Chapter 2001, Government Code [the Texas APA]. Except as otherwise provided by this Act, an appeal initiated in the District Court of Travis County shall be removable to the Court of Appeals

upon notice of removal to any such district court by any party at any time prior to trial in the district court. Appeal initiated in or removed to the Court of Appeals shall be initiated under Chapter 2001, Government Code, as if initiated in a Travis County District Court and shall, upon the filing thereof, be thereafter governed by the Texas Rules of Appellate Procedure.

Tex. Rev. Civ. Stat. ann. art. 4413(36) § 7.01(a). The statute thus contemplates two alternative routes for taking a direct appeal of a Motor Vehicle Board order to the Third Court: filing directly in the appellate court or removal to that court from the district court.

The Third Court has heard at least one case of each of these two methods. In *Meador-Brady Mgt. Corp. v. Texas Motor Vehicle Comm'n*, 833 S.W.2d 683 (Tex. App.—Austin 1992) (per curiam), *rev'd on other grounds*, 866 S.W.2d 593 (Tex. 1993), the Commission's final order granting a license to sell motorcycles was appealed directly to the Third Court. In *Robbins Chevrolet Co. v. Motor Vehicle Board*, 989 S.W.2d 865 (Tex. App.—Austin 1999, pet. denied), after one party took an appeal of a board order to the district court, another party removed the appeal to the court of appeals.

The statute provides a few details on how the appeal should be perfected. A party must file a petition for judicial review in either the district court or the court of appeals within 30 days of the rendition of a final order by the agency. Tex. Rev. Civ. Stat. ann. art. 4413(36) § 7.01(b). The appealing party must serve citation on the director and all parties to the final order. *Id.* § 7.01(c). If the appeal originates in the court of appeals, the appellate court is to "cause citation to be issued," *id.*, not an everyday event for the courts of appeals.

The statute is mandatory; the court of appeals must accept the appeal. There is only one exception — the court of appeals may remand the case with instructions to the district court if "evidence outside the board's record is to be taken under Chapter 2001, Government Code." *Id.* § 7.01(d).

The statute also permits the court of appeals to dismiss a case for want of prosecution. The court may presume the appellant has abandoned the appeal and dismiss the proceeding if (1) the appellant fails to prosecute the appeal within six months of filing; (2) the attorney general or a party moves to dismiss; and (3) the appellant fails to demonstrate good cause for the delay after notice. *Id.* § 7.01(e).

B. Electric competition rules

In 1999, the Texas Legislature enacted legislation to deregulate the electric utility industry. The Legislature provided for direct review by the court of appeals of "competition rules" adopted by the Public Utility Commission implementing the statute:

Judicial review of competition rules adopted by the commission shall be conducted under Chapter 2001, Government Code, except as otherwise provided by this chapter. Judicial review of the validity of competition rules shall be commenced in the Court of Appeals for the Third Court of Appeals District and shall be limited to the commission's rulemaking record.

Tex. Util. Code § 39.001(e).

1. Scope of jurisdiction and standard of review

Since the passage of this provision, the Third Court of Appeals has issued six opinions in direct appeals of competition rules. In several of these cases, the court has explored the scope of its direct appeal jurisdiction. The court has interpreted the direct appeal statute as a narrow grant of jurisdiction: "We cannot hear a direct appeal from agency action except through a specific grant of statutory authority. . . . Unless jurisdiction is explicitly granted, this Court must dismiss the complaint for lack of subject matter jurisdiction." *City Public Serv. Bd. of San Antonio v. Public Util. Comm'n*, 96 S.W.3d 355, 358 (Tex. App.—Austin 2002, no pet.).

In *City Public Service Board*, the San Antonio board challenged a rate order that had relied on a previously-adopted rule creating a standard for setting wholesale transmission tariffs for both private and municipally owned utilities. The court dismissed the appeal for want of jurisdiction

because it did not challenge the *validity* of a rule, as required by the express wording of the statute, but rather the *application* of that rule in a rate proceeding. The court explained the difference:

A validity challenge tests a rule on procedural and constitutional grounds. . .

. In contrast, an applicability challenge does not question the overall legitimacy of a rule. Rather, an applicability challenge provides the party challenging the rule the opportunity to obtain a judicial declaration of the implementation of the rule to its particular fact situation.

96 S.W.3d at 358. The fact that the rule may be valid in some hypothetical factual circumstances not before the court does not transform a validity challenge into an applicability challenge. *Reliant Energy v. Public Util. Comm'n*, 101 S.W.3d 129, 137 n.11 (Tex. App.—Austin 2003, pet. filed).

In addition to outlining the difference between a validity challenge and an application challenge, the Austin Court of Appeals has also set out the standard of review in a properly-brought validity case. The court will presume the agency's rulemaking order is valid, and the challenging party bears the burden of demonstrating invalidity. *Office of Public Util. Counsel v. Public Util. Comm'n*, 2003 Tex. App. Lexis 3056 (Tex. App.—Austin Apr. 10, 2003, no pet.).

The scope of the court of appeals' review is narrowly constrained. Under the statute, review is "limited to the Commission's rulemaking record." Tex. Util. Code § 39.001(f). The record is defined by statute to include only the following:

- (1) the notice of the proposed rule;
- (2) the comments of all interested persons;
- (3) all studies, reports, memoranda, or other materials on which the commission relied in adopting the rule; and
- (4) the order adopting the rule.

Id. The Third Court cited this limitation as another reason for rejecting an applicability challenge: the court would not be able to review a rate order under the substantial evidence rule because it would be barred from considering the rate order record and would be limited solely to the record in the rulemaking proceeding. *City Public Serv. Bd. of San Antonio*, 96 S.W.3d at 360-61.

Despite the limitation to the rulemaking record, the court will consider a constitutional challenge that was not made in the rulemaking process when a party had no opportunity or need to present its challenge in that context. In *Steering Committees for the Cities Served by TXU Elec. v. Public Util. Comm'n*, 42 S.W.3d 296 (Tex. App.—Austin 2001, no pet.), the cities collectively challenged a competition rule as unconstitutionally prohibiting home-rule municipalities from taking title to electricity under certain circumstances. TXU argued that the court had no jurisdiction to consider the issue as it had not been raised before the agency. The court noted that: (1) the rule, as proposed, did not contain the provision the cities complained about on appeal; (2) there was no provision for rehearing on that issue before the agency; (3) no evidentiary review would be required in considering the constitutionality challenge; and (4) unless the cities are permitted to raise the issue for the first time on judicial review, "they are forever foreclosed from doing so." 42 S.W.3d at 302. The court permitted the challenge under these circumstances.

2. Procedure for direct appeal of competition rule

The statute sets out some procedures for the direct appeal. These statutory provisions are discussed in the paragraphs below. To the extent not inconsistent with the statutory provisions, the rules of appellate procedure apply to the direct appeal. Tex. Util. Code § 39.001(f).

A person challenging the validity of a competition rule files a notice of appeal directly with the court of appeals within fifteen days after publication of the rule in the Texas Register. *Id.* The notice must also be served on the commission. *Id.* The person challenging the rule is the appellant and the commission is the appellee. *Id.*

The commission must prepare the rulemaking record and file it in the court of appeals within 30 days after the notice of appeal is served. *Id.*

The appellant's brief and briefs of any aligned intervenors are due 30 days after the filing of the record. *Id.* The commission, as well as any parties intervening in support of the rule, have 60 days from the date of the appellant's brief to file response briefs. *Id.* The court of appeals may alter the briefing schedule "for good cause." *Id.*

The court of appeals is instructed to hear and determine the appeal "as expeditiously as possible with lawful precedence over other matters." *Id.* The court may render judgment affirming the rule or reversing and remanding, if appropriate, for further agency proceedings. *Id.*

C. **Discretionary transfers of administrative appeals from district court**

Two provisions of the Texas APA permit a district court to request the transfer of an administrative appeal to the Third Court of Appeals in certain situations. The court of appeals has discretion in determining whether to accept the transfer.

Under the statute providing for review of the validity or applicability of an agency rule by declaratory judgment:

A Travis County district court in which an action is brought under this section, on its own motion or the motion of any party, may request transfer of the action to the Court of Appeals for the Third Court of Appeals District if the district court finds that the public interest requires a prompt, authoritative determination of the validity or applicability of the rule in question and the case would ordinarily be appealed. After filing of the district court's request with the court of appeals, transfer of the action may be granted by the court of appeals if it agrees with the findings of the district court concerning the application of the statutory standards to the action

Tex. Gov't Code § 2001.038(f). A similar provision applies to contested cases:

A Travis County district court in which an action is brought under this section, on its own motion or on motion of any party, may request transfer of the action to the Court of Appeals for the Third Court of Appeals District if the district court finds that the public interest requires a prompt, authoritative determination of the legal issues in the case and the case would ordinarily be appealed. After filing of the district court's request with the court of appeals, transfer of the action may be granted by the court of appeals if it agrees

with the findings of the district court concerning the application of the statutory standards to the action.

Tex. Gov't Code § 2001.176(c).

For the transfer to occur, then, both the district court and the court of appeals must agree that (1) the public interest requires (2) a prompt, authoritative determination of the legal issues and (3) the case would ordinarily be appealed to the court of appeals after the district court rendered final judgment. These standards are subject to interpretation and currently there is no guidance in the case law. Although these provisions were adopted in 1993, a search of the Lexis on-line data base produces not a single decision in which the court of appeals has indicated that it has even received, much less accepted, a transfer request.

One commentator, however, has examined the standards for transfer in some detail. See Steven Baron, *Judicial Review of Agency Orders: Who Needs the District Court?*, Eleventh Annual Administrative Law Course (Sept. 1999). Any party contemplating a motion to transfer would be well served to review that paper prior to drafting a transfer motion.

If the court of appeals orders the transfer of a case, the district clerk must forward the record to the appellate court. Tex. Gov't Code § 2001.038(f), § 2001.176(c). If any evidentiary hearing is required, the court of appeals may direct the district court to conduct it. *Id.*

V. CASES PROCEEDING FROM A FEDERAL CIRCUIT COURT OR TO THE SUPREME COURT OF ANOTHER STATE: CERTIFIED QUESTIONS

When a court must interpret the law of another jurisdiction in deciding a case, as a general rule the court can determine that law from existing cases or can make a reasonable *Erie* guess as to how the issue would be decided. When the court is unable to determine foreign law, in a few situations statutes permit the court to certify the question to the foreign jurisdiction for an answer. There is no equivalent in Chutes and Ladders®, a game that has no lateral transfers. A certified question, though, would be like landing on a square that requires a player to continuously forfeit his or her turn until he or she completes playing an entirely different game, like Yahtzee®.

Because certified questions are considered to be asking for an advisory opinion and because a court does not have the power to act other than in a case or controversy pending before it, a court must be given the power to answer a certified question by constitution.

A. Texas Supreme Court jurisdiction to answer questions of state law certified from federal appellate courts

The Texas Supreme Court's authority to hear certified questions from federal appellate courts is relatively new, existing only since 1986.

1. A brief history

In 1985, Texas voters amended the state constitution to empower the Texas Supreme Court to accept questions certified from federal circuit courts:

(a) The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court. (b) The supreme court and the court of criminal appeals shall promulgate rules of procedure relating to the review of those questions.

Tex. Const. art. V § 3-c. The necessity for the amendment was explained: "The Texas Supreme Court has determined that under the Texas Constitution judicial power does not embrace giving advisory opinions." Senate Judiciary Committee, Bill Analysis, S.J.R. 10, § 1 R.S. (1985). The amendment was effective January 1, 1986. The court adopted a rule providing for a procedure for certified questions. Former Tex. R. App. P. 114, now Tex. R. App. P. 58.

The Texas Supreme Court answered its first certified question in 1988 in *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988). Since then, it has answered sixteen certified questions and declined to address three. All but two have been certified from the United States Court of Appeals for the Fifth Circuit; the court has answered one question each from the Second and Fourth Circuit Courts. This averages to about one certified question a year.

The certification process had a bit of a rough start. After the Texas Supreme Court declined three certified questions from the Fifth Circuit in a

three-year period, one taking eleven months to decline, a few comments from the federal justices expressed displeasure with the handling of certified questions by the Texas court. See *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 799-800 (Tex. 1992) (Doggett, J., dissenting and concurring). Adding fuel to the fire was an opinion purportedly issued by the federal court criticizing the certification process in Texas that the author later denied ever existed and another published opinion of the federal court referencing the Texas Supreme Court's "Delphic refusal" to accept a certified question. See *id.*

This early breach was eventually healed, possibly by the fact that the Texas Supreme Court accepted all subsequently certified questions from the Fifth Circuit as well as by language in later opinions indicating a more cooperative attitude. See, e.g., *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 477 (Tex. 1995) ("We welcome the opportunity to respond to certified questions from the federal courts and give deference to the requests brought us."); *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992) ("We acknowledge the Fifth Circuit's experience in this area and welcome constructive suggestions on how the interjurisdictional certification process can be improved.").

2. Limitations on certification jurisdiction

Under the constitution, the Supreme Court may only answer "questions of state law." Further, by rule, the court has restricted its jurisdiction as follows:

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with a determinative question of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

Tex. R. App. P. 58.1 Thus by constitution and by rule, the court's jurisdiction on certified question is limited to: (1) determinative (2) questions of state law (2) for which there is no controlling Texas Supreme Court precedent.

The court will limit its consideration to the questions certified "and nothing more." *Moreno v.*

Sterling Drug, Inc., 787 S.W.2d 348, 349 (Tex. 1990). Any response other than what is necessary to answer the question is dicta. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990). The court will decline to answer further questions submitted by the parties that were not certified by the federal court. *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 346 (Tex. 2001).

The question certified must be one for which there is no controlling Supreme Court precedent. The court equivocated somewhat on this requirement in *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475 (Tex. 1995). There, the question had been decided by the Texas Supreme Court in a per curiam opinion. Nonetheless, the court accepted the question because (1) only the intermediate appellate courts had considered the question with the benefit of full briefing and oral argument; (2) the per curiam decision was decided without argument and contained no analysis; (3) the per curiam opinion had been criticized by courts and commentators. 909 S.W.2d at 478.

Because the court cannot determine issues of fact and does not have jurisdiction over the whole case but only the questions certified, it will only answer the legal questions presented to it and will not attempt to apply those answers to the facts of the case. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992) ("It would exceed this court's constitutional and rule-based authority to apply our answer to the factual record before the Fifth Circuit."). The court will decline to answer questions "dependent upon issues of fact." *Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 32 Tex. Sup. Ct. J. 623 (Sept. 20, 1989) (declining question).

One separate opinion provides additional insight into reasons the court may decline to accept a certified question. These include when the factual record is not adequately developed, when the federal court has already properly resolved the legal issue, and when the court determines the matter involved is not important to the jurisprudence of the state. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 800 (Tex. 1992) (Doggett, J., dissenting and concurring).

3. Procedure for certified questions

Rule 58, the rule governing certified

questions, like the rule governing direct appeals, is a bit sketchy. Possibly for that reason, when the court accepted its first certified question in 1988, it explained in some detail its procedures once the question was received:

Upon receipt of the certified questions from the Fifth Circuit, the case was docketed and assigned a number in normal sequential order. Notice of the docketing was furnished the Attorney General, as required by Tex. R. App. P. 114(f) (the Attorney General did not intervene). Thereafter, the court, by majority vote, determined that it would accept the question and render an answer. At that time, the case was set for oral argument and the court determined to allow *Lucas*, who was urging the unconstitutionality of the statute, the role of petitioner even though the United States of America was the appealing party in the Fifth Circuit. Argument in the case was allowed as in any other cause before the court.

Lucas v. U.S., 757 S.W.2d 687, 687-88 (Tex. 1988).

a. Certification request

The certifying court must issue an order setting out the questions to be answered and a stipulation of all relevant facts, "showing fully the nature of the controversy in which the question arose." Tex. R. App. P. 58.2. A certified copy of the order must be sent to the Texas Supreme Court by the federal appellate clerk, together with a list of all parties and counsel. Tex. R. App. P. 58.3. The clerk should not forward the record unless requested by the Supreme Court. Tex. R. App. P. 58.4.

b. Fees and costs

The fee of \$125 is shared equally by the parties unless the certifying court orders otherwise. Tex. R. App. P. 58.5; Tex. Gov't Code § 51.005(b).

c. Notice by clerk; intervention by state

The Supreme Court will then determine whether to accept the question. The excerpt from the *Lucas* case above suggests that it takes a

majority vote, or five justices, to accept a certified question. The clerk will notify the parties and the certifying court of the acceptance. Tex. R. App. P. 58.6.

The clerk will also notify the Attorney General of Texas if the constitutionality of a Texas statute is at issue and the State or any of its agencies or employees is not already a party. *Id.* The State may then intervene at any reasonable time for briefing and argument, if argument is permitted. Tex. R. App. P. 58.8. The intervention is limited to the constitutional question. *Id.*

d. Briefing and argument

Once the question is accepted, the court may re-designate the parties to reflect their positions on the certified question. *Lucas*, 757 S.W.2d at 688. The petitioner must file a brief within thirty days of the notice that the question is accepted; the respondent must file an answering brief within twenty days after receiving the opening brief. Tex. R. App. P. 58.7(a). The court will entertain extension requests. *Id.*

The brief must comply with the rule governing briefs on the merits, Tex. R. App. P. 55 "to the extent its provisions apply." Tex. R. App. P. 58.7(a).

Oral argument may be granted on a party's request or on the court's own motion. Tex. R. App. P. 58.7(b). The court may decide the case without argument. Tex. R. App. P. 59.2.

e. Opinion and answer

The answer to the questions certified must be contained in a written opinion. Tex. R. App. P. 58.9. Once all motions for rehearing have been overruled, the clerk will send to the certifying court a copy of the opinion under the Supreme Court's seal. Tex. R. App. P. 58.10.

B. Texas Supreme Court jurisdiction to certify questions to the highest court of another state

There is no express authority for the Texas Supreme Court to certify a question out to other jurisdictions. However, the court, "on its own motion," has done just that. *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 955 S.W.2d 853, 853 (Tex. 1996). In the *Nishika* case, the Texas Supreme Court had before it issues of Minnesota law for which there was no controlling Minnesota

precedent. It certified the issues to the Minnesota Supreme Court.

The court apparently viewed the jurisdictional issue as limited to the question of whether the receiving court had authority to answer certified questions. Unlike Texas, the Minnesota Supreme Court is not limited to answering questions from federal appellate courts. By statute, the Minnesota court may answer "questions of law certified to it by the . . . highest appellate court or the intermediate appellate court of any other state" under conditions similar to those governing federal certified questions in Texas. *Id.* at 853 n.1.

Minnesota accepted and answered the two questions certified, and the Texas Supreme Court issued an opinion applying those answers to the facts of the case. *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733 (Tex. 1997).

Texas cannot accept questions certified by courts of other states because the constitutional grant is limited to questions certified by federal appellate courts. As the Minnesota case illustrates, some other states do permit their highest courts to accept certified questions from other state courts. See Justice Nathan Hecht and Chris Griesel, *Straight to the Top: Direct Proceedings to the Supreme Court* at 7 & n.39, State Bar of Texas, Practice Before the Texas Supreme Court (April 2003) (citing Delaware and Oregon provisions permitting highest courts of those states to accept certified questions from sister state courts).

VI. CONCLUSION

The appeals described in this paper are not everyday occurrences. Many practitioners may never have the opportunity to use these special paths in and out of the appellate courts. Yet it is important to know under what circumstances these appeals are available so that an opportunity for early review will not be passed up unknowingly. And, as Chutes and Ladders® players have long recognized, it is the ladders and the chutes that make the game interesting.

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