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Rules and Rulemaking: The Need for Clarification of Procedural Requirements and the Opportunities for Substantive Challenges

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**Rules and Rulemaking:
The Need and Prospects for Clarification of Procedural Requirements
and the Opportunities for Substantive Challenges
A Panel Discussion**

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RULES AND RULEMAKING:
THE NEED AND PROSPECTS FOR CLARIFICATION OF PROCEDURAL REQUIREMENTS
AND THE OPPORTUNITIES FOR SUBSTANTIVE CHALLENGES

A Panel Discussion

Paper by Don Walker

Overview

The traditional format for a seminar paper doesn't really fit this topic, since it is to be presented as a panel discussion. In addition, we anticipated that the Texas Supreme Court would provide new law on the topic with decisions in two cases: *Texas State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520 (Tex. App. — Austin, 2014, grant of petition withdrawn as improvidently granted); and, *Teladoc, Inc., v. Texas Medical Bd*, 453 S.W.3d 606, 616 (Tex. App. — Austin, 2014, pet. denied). As their petition histories show, however, neither case reached that end. But we should anticipate that the issues are likely to catch the Court's attention, again. With that in mind, this paper includes some results from my research and some thoughts on the issues, which could be useful going forward.

Also with an eye on going forward, there are arguments in the amicus briefs that I submitted in *Witcher* and *Teladoc*, which address additional issues. The full briefs may be accessed from the Court's website. The table of contents from each brief is included in the paper as Tabs A and B, to provide what amounts to a list of issues and arguments that are not addressed in the court of appeals opinions or the parties' briefs.

Curiosity

But first, a curiosity about what I think is a puzzling incongruity.

To set the stage, there are several aspects that are the same in *Witcher* and *Teladoc*, as well as all other cases of this type. Cases of this type are those in which the plaintiff seeks relief against a state agency based on the assertion that a “state agency statement of general applicability” is a “rule,” when the agency made no attempt to follow statutory rulemaking procedures.

What’s the Same

In every such case, the parties agree that there was no attempt to follow the statutory rulemaking procedures.

In every case, the state agency takes the position that the alleged statement is not a rule. Accordingly, the agency position is that the alleged rule has no binding legal effect.

In every case, the end result is a court declaration that the alleged statement has no binding legal effect.

The Incongruity - It doesn’t matter which party wins, because the alleged statement has no legal effect whether the court declares the alleged statement is a rule or is not a rule.

The alleged statement has no legal effect if it is adjudged not to be a rule, obviously.

But equally so, the alleged statement has no legal effect if it is adjudged to be a rule, because the court always declares that the “rule” is void or invalid due to the procedural void. A void or invalid rule has no binding legal effect.

Why then, do private and executive agency parties, and the judiciary, spend 2-4 and more years of time and money to reach a legal outcome that always is the same as what the defendant had conceded at the outset?

Thoughts on Some of the Issues

I. What is a Rule?

The courts, with the exception of the Texas Supreme Court in *WBD Oil*, have focused solely on the definition of “rule” from APA §2001.003(6): “a state agency statement of general applicability....” The statutory definition is an abstract concept. In actual practice or application, however, a rule is much more than an abstract concept.

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