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## **Texas Rules of Appellate Procedure Update**

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## Texas Rules of Appellate Procedure Update

### Texas Rule of Appellate Procedure 49.3

#### I. Background

The results of the November 2018 election resulted in a bevy of new justices taking seats on Courts of Appeals all over the state of Texas. For example, the Dallas Court of Appeals welcomed eight new justices to the 13-member court, and both Houston Courts of Appeals welcomed five new justices to each of their 9-member courts. While a changing of the guard is generally not a cause for concern for litigants who voted for the individuals taking these benches, TRAP 49.3 left litigants with little to no options to have their recently issued opinions reheard.

TRAP 49.3 originally read:

*A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.*

Any motion for rehearing from a panel opinion wherein only one justice remained was summarily denied. Litigants' only recourse for rehearing was the filing of a motion for en banc consideration, which is granted in only the rarest circumstances where: (1) en banc consideration is necessary to maintain uniformity of the court's decision; or (2) extraordinary circumstances exist. *See* Tex. R. App. P. 41.2; *Chakrabarty v. Ganguly*, 573 S.W.3d 413, 415–16 (Tex. App.—Dallas 2019, no pet.) (“We will rehear a case en banc where it is necessary to secure uniformity of the Court's decisions and in other extraordinary circumstances, as we deem necessary.”).

## II. Amendment Process

Recognizing that TRAP 49.3, as written, could continue to disenfranchise litigants, Justice Tracy Christopher from the 14<sup>th</sup> Court of Appeals requested, on her own behalf, that the rule be revised to account for this issue. Accordingly, the Supreme Court Advisory Committee referred the matter to the Appellate Rules Subcommittee requesting a review of the rule and both proposed amendments submitted by Justice Christopher and the State Bar Court Rules Committee.

The subcommittee reviewed the two proposals and invited input from the full committee, specifically focusing on giving weight to the original panel opinion and the method of selecting replacement justices. *See Appendix*. Believing these issues to be “politically fraught,” the subcommittee requested discussion of these issues prior to drafting any proposed change to the rule. *Id.*

## III. Amended Rule

On December 8, 2020, the Texas Supreme Court and the Court of Criminal Appeals jointly ordered amendments to Texas Rule of Appellate Procedure 49.3.

TRAP 49.3, as amended, reads:

*A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. **Unless two justices who participated in the decision of the case agree on the disposition of the motion for rehearing, the chief justice of the court of appeals must assign a justice to replace any justice who participated in the panel decision but cannot participate in deciding the motion for rehearing.** If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.*

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