

**SUBJECT:** Revising judicial rulemaking authority

**COMMITTEE:** Judicial Affairs — committee substitute recommended

**VOTE:** 8 ayes — Thompson, Hartnett, Capelo, Deshotel, Garcia, Hinojosa, Jim Solis, Uresti  
1 nay — Shields

**WITNESSES:** For —Walt Borges, Texas Watch  
Against —Alex Albright; Gilbert J. Low; Richard R. Orsinger; Judge Mike Wood  
On —Richard C. Hile, Texas Trial Lawyers Association; Denise Davis

**BACKGROUND:** Under current law, the Texas Supreme Court and the Court of Criminal Appeals have full authority to promulgate suitable rules, forms, and regulations for court administration and necessary rules of procedure and evidence.

**DIGEST:** CSHB 1461 would amend the rulemaking procedures for the Texas Supreme Court and the Court of Criminal Appeals by requiring that rule changes be reported to the Legislature, that they be accompanied by a fiscal note, that meetings of any group named by the courts to consider changes in rules be subject to open meetings and public information laws, and that input on rule revisions be sought from lower courts.

CSHB 1461 would require the two courts to submit to the Legislature a copy of a proposed rule or amendment to an existing rule within 30 days of the opening of a legislative session. The rule could not take effect earlier than 90 days after the legislative session ended. CSHB 1461 would authorize the courts to adopt interim rules when the Legislature is not in session if needed for the proper administration of justice, as long as specific reasons why the courts could not comply with CSHB 1461 would be published in an opinion. The courts would be required to prepare a fiscal note for a proposed rule or amendment to an existing rule outlining potential costs and containing a detailed report on the potential five-year, economic impact on persons who

use the civil and criminal justice system. The comptroller would be authorized to assist in the preparation of this note on request.

The Office of Court Administration would prepare an opinion poll on the rule to be sent to appeals court judges, district judges, county judges, statutory county court judges, and statutory probate court judges within 15 days after the proposed rule was sent to the Legislature. Results would be reported within 75 days after the legislative session began.

CSHB 1461 would take effect September 1, 1999.

**SUPPORTERS  
SAY:**

CSHB 1461 would improve cooperation between the judiciary and the Legislature in drafting procedural rules. In the last two years, the Texas Supreme Court has adopted several rules that should have been considered in cooperation with the Legislature. This bill would ensure that Legislature is notified of potential rule changes in a timely way.

The courts would not be inconvenienced by legislative reporting requirements, since most rules drafted by the courts are the product of years of deliberation. For the few rules that are prompted by circumstances requiring faster action, the bill would provide interim rulemaking powers to both courts.

The bill would not make substantive change to the current system. The courts still would retain the authority to draft rules of procedure and evidence, subject only to legislative notification. The procedures outlined in CSHB 1461 merely would codify the importance of keeping the Legislature in the loop.

Many feel that the courts have overstepped their rulemaking authority in several areas. For example, the Texas Supreme Court has promulgated rules on campaign finance reform for judicial elections that clearly are outside the generally accepted parameters for court-established rules of procedure and evidence. Such issues involving the election system are best left to the Legislature. The Supreme Court waited to announce its campaign finance rules until after the deadline for bills to be filed, which suggests that the court may not be fully cooperating with the legislative branch or following the Texas Constitution's separation of powers.

The court's own adoption of certain tort reform rules in 1997, when it became apparent that the legislation implementing these tort reform rules would be indefinitely stalled, underscores the need for clearer guidelines like those proposed in CSHB 1461.

OPPONENTS  
SAY:

The Texas Supreme Court and the Court of Criminal Appeals currently operate under a rulemaking system that considers proposals from an advisory committee composed of a diverse membership of judges, attorneys, and academia. The members represent all areas of practice from different parts of the state. The courts also seek input from the State Bar associations and sections. This system has worked well and does not need to be changed.

Most, if not all, attorneys who serve on these committees volunteer their services. Some of the best known and most capable lawyers in the state of Texas volunteered their time in drafting the new discovery rules. The state benefits but does not pay for the high level of legal expertise it receives under the current system. If the system is changed, proposed rules would be reviewed every two years by the Legislature. No lawyer is going to volunteer to draft rules that would need to be reviewed by the Legislature in two years time.

All states give the courts the power to write their own rules on procedure and evidence. This bill would undercut the court's current authority. As part of this authority, the Supreme Court should be allowed to write ethics rules for judges that touch upon campaign finance. The court is well within its power to prescribe campaign rules for judges and electoral contests.

NOTES:

The committee substitute changed the original bill by deleting a Sunset provision, changing "emergency rulemaking power" to "interim rulemaking power," and deleting a provision that would have required the Office of Court Administration to employ a public access liaison to oversee and administer open records requests.

HJR 54 by Dunnam, which proposes a constitutional amendment relating to the rulemaking power of the Supreme Court, was reported favorably by the Judicial Affairs Committee on April 15.