

# Permissive Interlocutory Appeals

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## CPRC § 51.014(d)

Allows the trial court to grant permission to seek to appeal an order that involves a controlling question of law as to which there is a substantial ground for difference of opinion if an immediate appeal from the order may materially advance the ultimate termination of the litigation.

# History



# First Version of § 51.014(d)

- In effect from 2005 through 2011
  - Required the parties to agree that:
    - The order involved a controlling question of law as to which there is a substantial ground for difference of opinion
    - An immediate appeal may materially advance termination of the litigation
  - Appellate court did not have discretion to deny the appeal
  - Not a lot of takers

# Second Version of § 51.014(d)

- Amended in 2011 to remove the requirement for agreement
  - Required the trial court to grant permission and to make findings about the factors
  - Gave appellate court discretion to grant or deny permission

## *Sabre Travel (2019)*

- The Supreme Court acknowledged appellate courts' discretion
- But the Court encouraged courts to exercise their discretion to accept these appeals
- This encouragement did not appear to have the desired effect

# *Industrial Specialists (2022)*

- Fractured Court
  - Plurality Opinion by Justice Boyd (joined by Justice Devine and Justice Huddle)
  - Concurrence by Justice Blacklock (joined by Justice Bland)
  - Dissent by Justice Busby (joined by Chief Justice Hecht and Justice Young)
  - Justice Lehrmann did not participate

# *Industrial Specialists*

- Court of appeals denied permission to appeal
- In the Supreme Court both parties argued that the court of appeals abused its discretion
- Two Issues
  - Scope of appellate court's discretion
  - Sufficiency of the appellate court's opinion

# *Industrial Specialists*

- 5 justices agreed that:
  - “section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.”

# *Industrial Specialists*

- The 3-justice plurality also concluded:
  - “We cannot impose a firm limit on a court of appeals’ discretion under section 51.014(f)”
  - The court of appeals’ opinion adequately explained the basis for its denial by stating that it found that the statutory requirements were not met
  - But a mere statement that the court has considered the petition and denies it may not be enough

# Industrial Specialists

- Dissent
  - Would have held that the court of appeals abused its discretion by not explaining *why* it found that the statutory requirements were not met
  - Would have held that the court of appeals abused its discretion in concluding that the requirements were not met
  - Still recognizes discretion to deny permission even if requirements are met

# 2023 Statutory and Rules Amendments

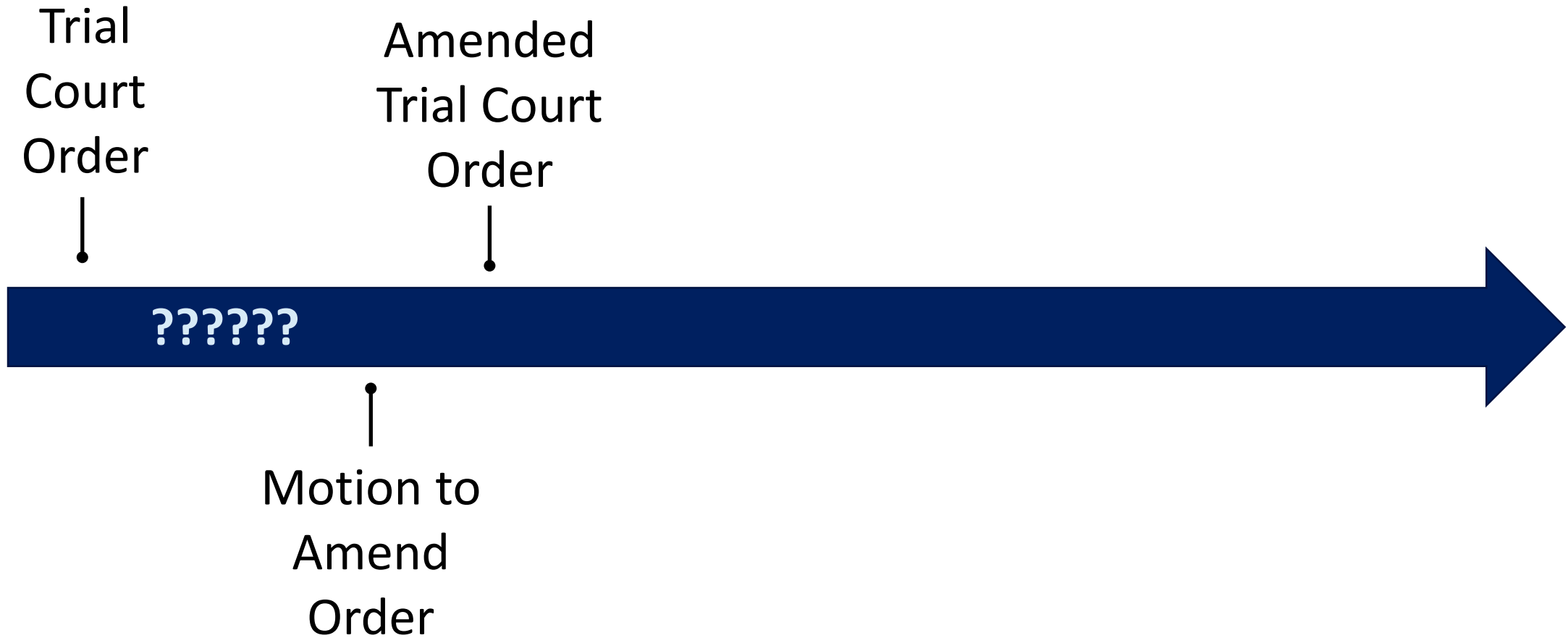
- The Legislature enacted sections 51.014(g) and (h)
  - Subsection (g) requires the appellate court to state the specific reason for denying permission to appeal
  - Subsection (h) addresses the Supreme Court's ability to review an appellate court's denial of permission to appeal
- The Supreme Court adopted amendments to TRAP 28.3
  - New Rule 28.3(l) addresses the appellate court's explanation of a decision denying permission to appeal and Supreme Court review
  - Other amendments address the contents of the petition

# Procedure

# Procedure

- CPRC § 51.014(f), (g), and (h)
- TRCP 168
- TRAP 28.3

# Procedure – Trial Court



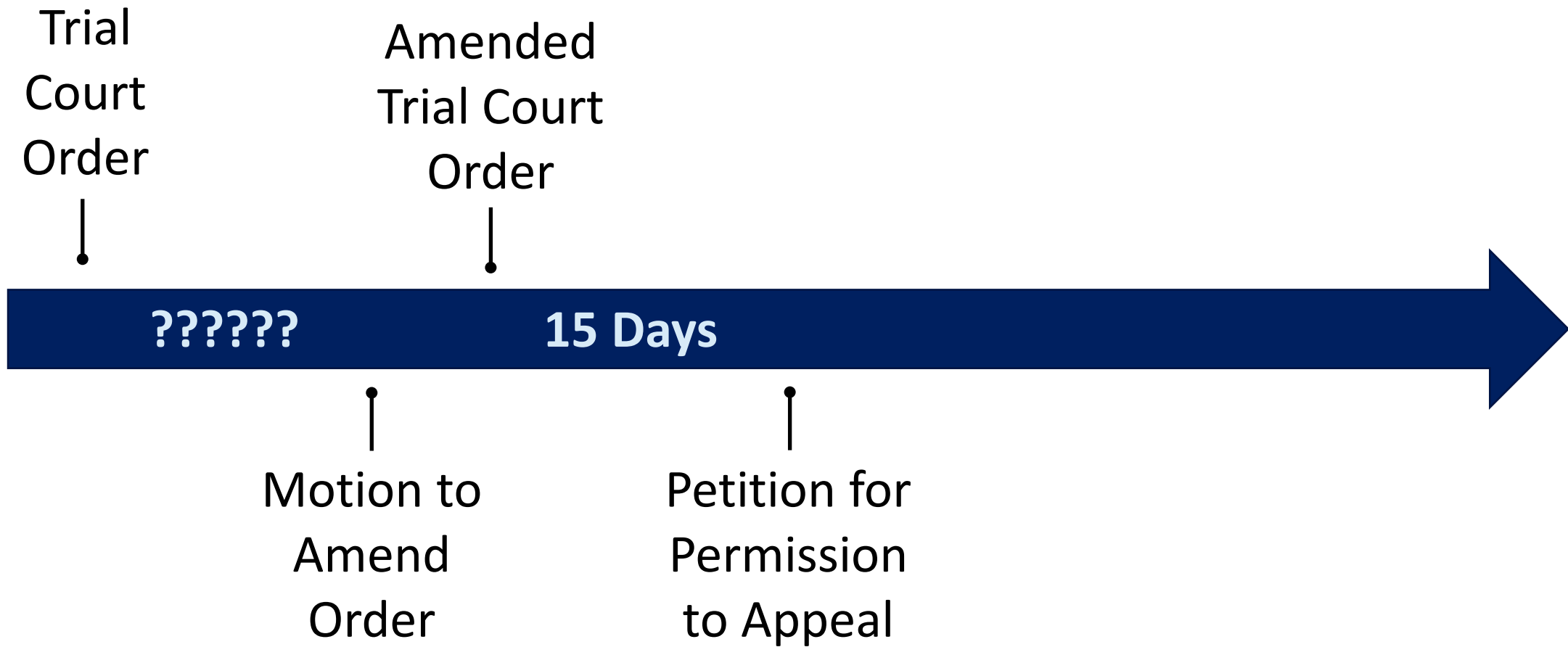
# TRCP 168

- Permission must be stated in the order to be appealed
- An order previously issued can be amended to include permission

# Trial Court's Permission

- Must identify the controlling legal question as to which there is a substantial basis for difference of opinion
- Must substantively rule on the controlling issue of law
- Must state why an immediate appeal may materially advance the termination of the litigation
- Does not have to explain why there is substantial basis for a difference of opinion

# Procedure – Court of Appeals



## CPRC § 51.014(f)

An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

## CPRC § 51.014(g)

If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).

## CPRC § 51.014(h)

The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) de novo. If the supreme court concludes that the requirements to permit an appeal under Subsection (d) are satisfied, the court may direct the court of appeals to accept the appeal.

# TRAP 28.3

- Procedure after the trial court grants permission is governed by TRAP 28.3
  - Petition for Permission to Appeal
    - Deadline
    - Contents
    - Length
  - Response and Reply
  - Generally decided without oral argument

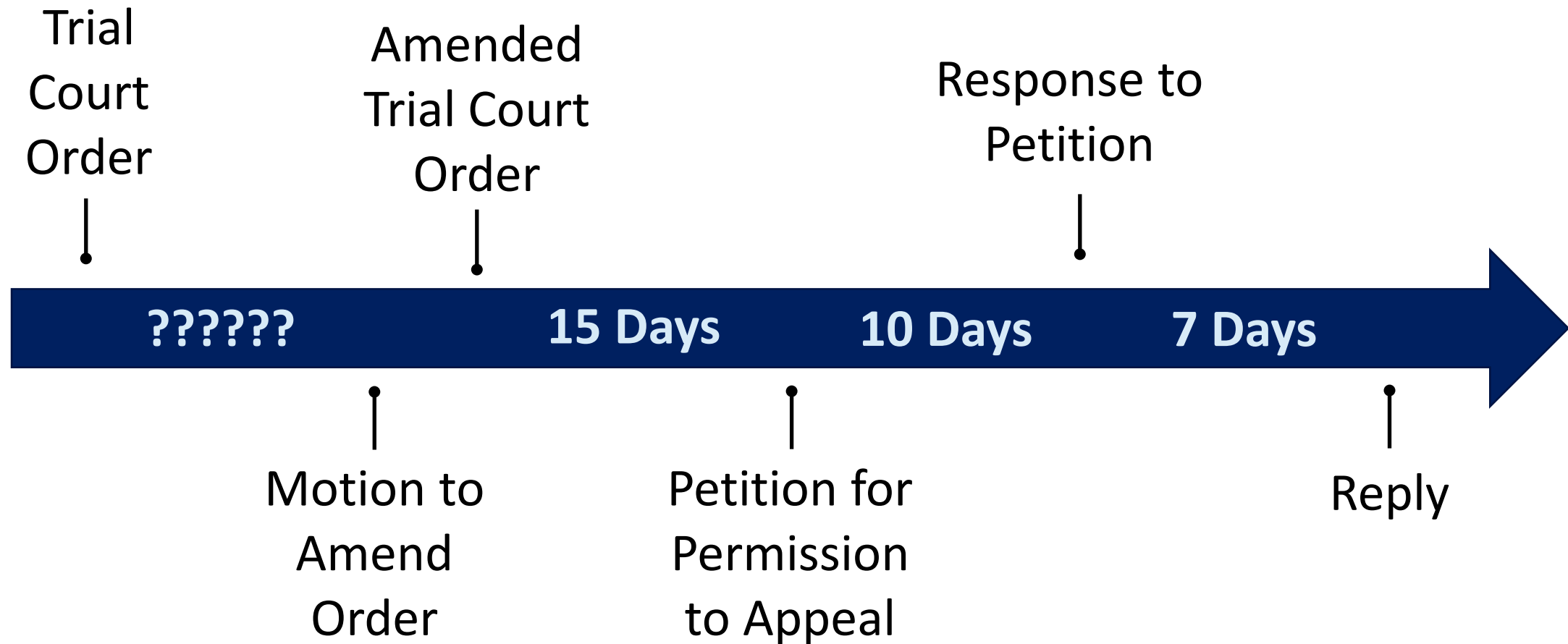
# Petition for Permission to Appeal

- Include information required in TRAP 25 for a notice of appeal
- Argue “clearly and concisely” why the order at issue “involves a controlling question of law as to which there is a substantial ground for difference of opinion.”
- Explain “how an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

# Petition for Permission to Appeal

- Attach:
  - A copy of the order from which appeal is sought
  - A copy of every file-marked document that is material to the order from which appeal is sought and that was filed in the trial court; and
  - A properly authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought; a statement that the transcript has been ordered and will be filed when it is received; or a statement that no evidence was adduced in connection with such order.

# Procedure – Court of Appeals



# The Good ...



# Substantive Denials Are Helpful

- The appellate courts are largely following the requirement to “explain” their reasons for denying permission to appeal.
- These opinions are providing additional guidance about the statutory factors and the appellate courts’ discretion.

# Question of Law

- Probably the clearest statutory element
- Courts consistently hold that if the decision turns on the resolution of fact issues, it does not involve a question of law.
  - *State v. LBJBrookhaven Investors, LP*: “Furthermore, the ‘controlling question[s] of law’ presented in the State’s application turn on resolution of fact questions that are inappropriate in a permissive appeal.”
  - *Fali Holdings, Inc. v. State*: the question of law identified by the trial court—admissibility of evidence—was a question of fact

# “Controlling” Question of Law

- Not as much development on the meaning of “controlling”
- Appears to turn on how important the question is to the overall issues in the case
  - “Deeply affects the ongoing process of the litigation”
  - Resolution will materially advance the case
  - Viability of a claim rests on resolution

# “Controlling” Question of Law

- Trial court must actually decide the question
  - *IBM v. Lufkin Industries* (Tyler)
    - Trial court denied summary judgment and identified three controlling questions of law
    - But the order did not include a substantive ruling on any of the issues
  - *In re Estate of Ward* (Fort Worth)
    - Trial court denied MSJ and a plea to the jurisdiction
    - Identified a controlling question of law
    - Did not state the basis of its ruling so that the court of appeals could not tell how the trial court decided controlling question of law

# “Controlling” Question of Law

- Trial court must actually decide the question
  - *AccessDirect-A Preferred Provider Network, Inc. v. RCG E. Texas, LP* (Tyler)
    - Nothing in the record showed how the trial court ruled on the specific legal issue
    - “Any opinion issued by this Court would necessarily be advisory.”

# Substantial Ground for Difference of Opinion



*"And don't go whining to some higher court."*

# Substantial Ground for Difference of Opinion

- Issue of First Impression
  - Yes – *Byrd v. Phillip Galyen, P.C.* (Fort Worth)
  - No – *Devillier v. Leonards* (Houston [1st])

# Substantial Ground for Difference of Opinion

- Settled Law – Developing consensus – No
  - *VCC, LLC v. Allied World Specialty Ins. Co.* (Houston [1st])
  - *Fali Holdings, Inc. v. State* (Fort Worth)
  - *Culberson Midstream Equity, LLC v. Energy Transfer LP* (Dallas)
  - *In re Estate of Hansson* (Waco)
  - *Helena Chem. Co. v. Bales* (El Paso)

# Substantial Ground for Difference of Opinion

- *VCC, LLC*
  - Trial court expressly acknowledged settled controlling law but chose to disregard it, finding it “just wrong”
  - One concurrence called out the odd result and suggested the Legislature should reconsider this statutory requirement
  - Other concurrence noted that appellant will eventually have a remedy for the clear error
  - Supreme Court has asked for a response to the petition for review

# May Materially Advance Termination of the Litigation

- Courts tend to look at this element in conjunction with the requirement of a “controlling” question of law
- Varying approaches
  - *StarNet Ins. Co. v. RiceTec, Inc.* (Houston [1st])
    - Satisfied – Question was the duty to defend, and the trial court stated that resolution of this issue would affect the remaining damages claims

# May Materially Advance Termination of the Litigation

- Varying approaches
  - *Boone v. Whittenburg* (Amarillo)
    - Generalized assertion that resolution might enhance settlement possibilities is not sufficient
    - Presence of other legal issues that would remain for trial regardless of the decision precludes this element
  - *IBM v. Lufkin Industries, Inc.* (Tyler)
    - Not sufficient where trial court found that an immediate appeal “may materially advance the ultimate termination of the litigation because it will foreclose duplicative litigation costs and remove years of litigation expense and effort from this case.”

# May Materially Advance Termination of the Litigation

- Varying approaches
  - *Estate of Hansson* (Waco) and *Estate of Fisher* (Texarkana)
    - If the order at issue may “result soon” in an appealable order, an immediate appeal is not likely to materially advance the termination of the litigation
  - *Zurich Am. Ins. Co. v. MB2 Dental Solutions, LLC* (Dallas)
    - An appeal may materially advance termination of the litigation only if, after the appeal, one of the parties will be able to move for judgment without further litigation in the trial court
    - Relies on earlier case (*ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*)

# Appellate Courts' Discretion

- Amendments retain the appellate courts' discretion to deny permission to appeal
- Supreme Court has not decided a case after the amendments made its review de novo
- *Murphy v. Harris* (Fort Worth)
  - Court of appeals expressly exercised its discretion to deny permission
  - Court concluded that the appellant's delay in seeking permission counseled against granting permission

# Scope of the Appeal

- *Elephant Insurance Co., LLC v. Kenyon* (Tex.)
  - Appeal includes “all fairly included subsidiary issues”
- *Milberger Landscaping, Inc. v. City of San Antonio* (El Paso)
  - Court considered subsidiary evidentiary rulings

# Scope of the Appeal

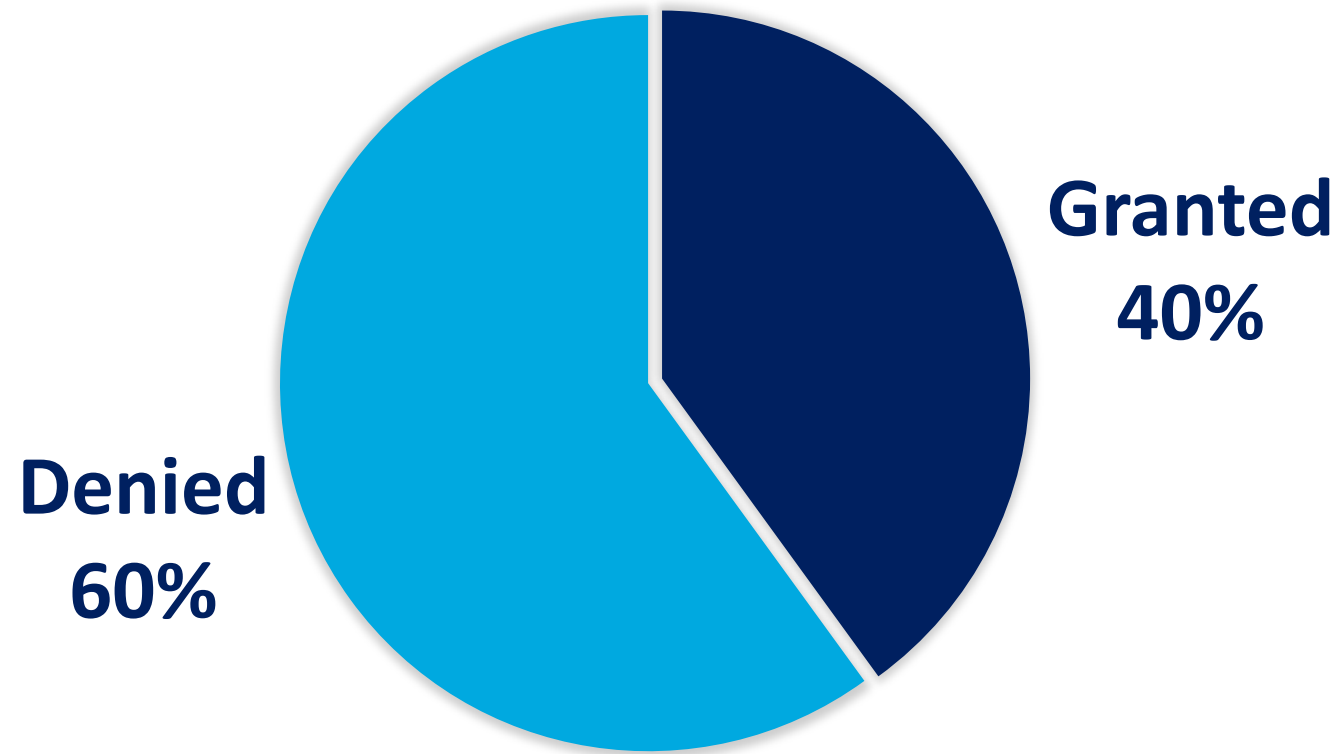
- *B&T Dependable Services, LLC v. Santos* (San Antonio)
  - Trial court identified 3 controlling questions
  - Petitioners attempted to frame the issue more narrowly
  - Court of appeals held that by addressing only one element of their defense, they failed to carry their burden to show entitlement to summary judgment

... The Bad (ish) ...

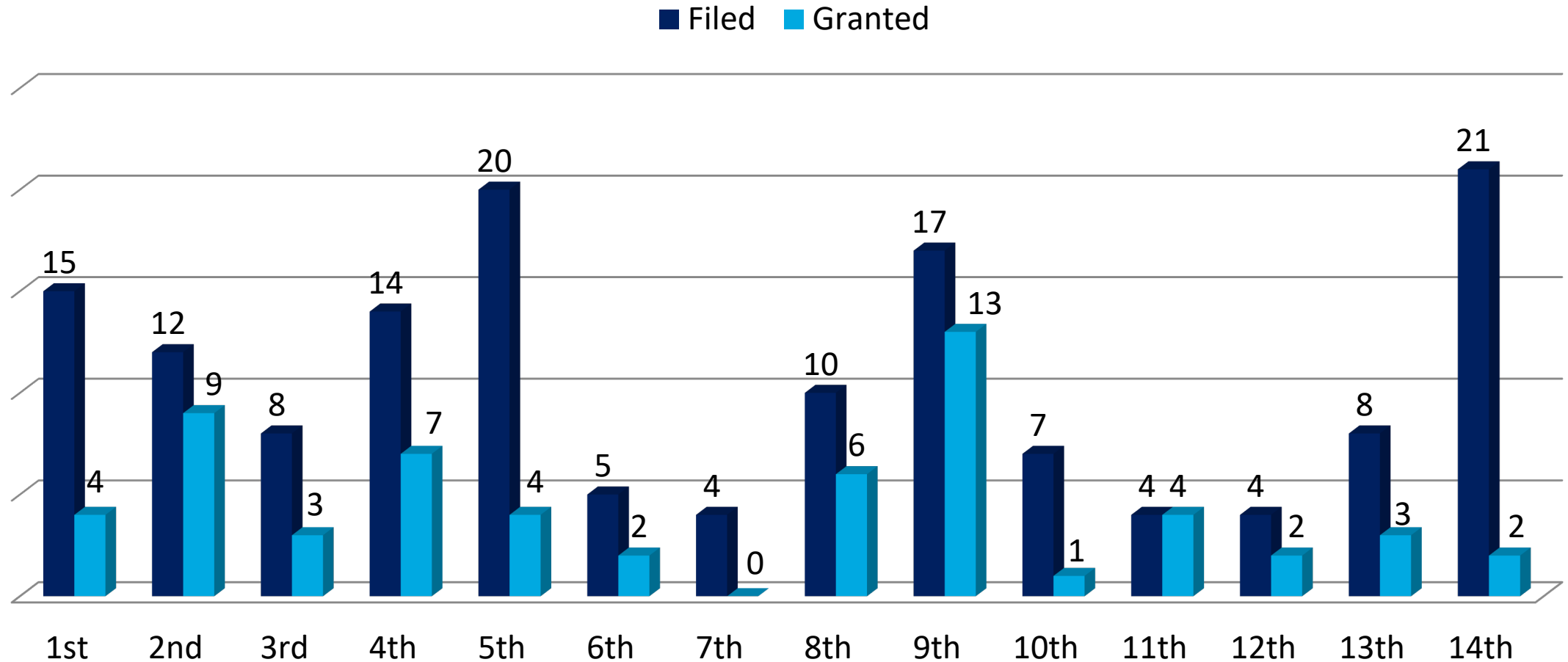
# Statistics Since 2023 Amendments

- The raw statistics in the last 18 months do not appear to show an increase in the grant rate for permission to appeal
- The rate appears to be flat

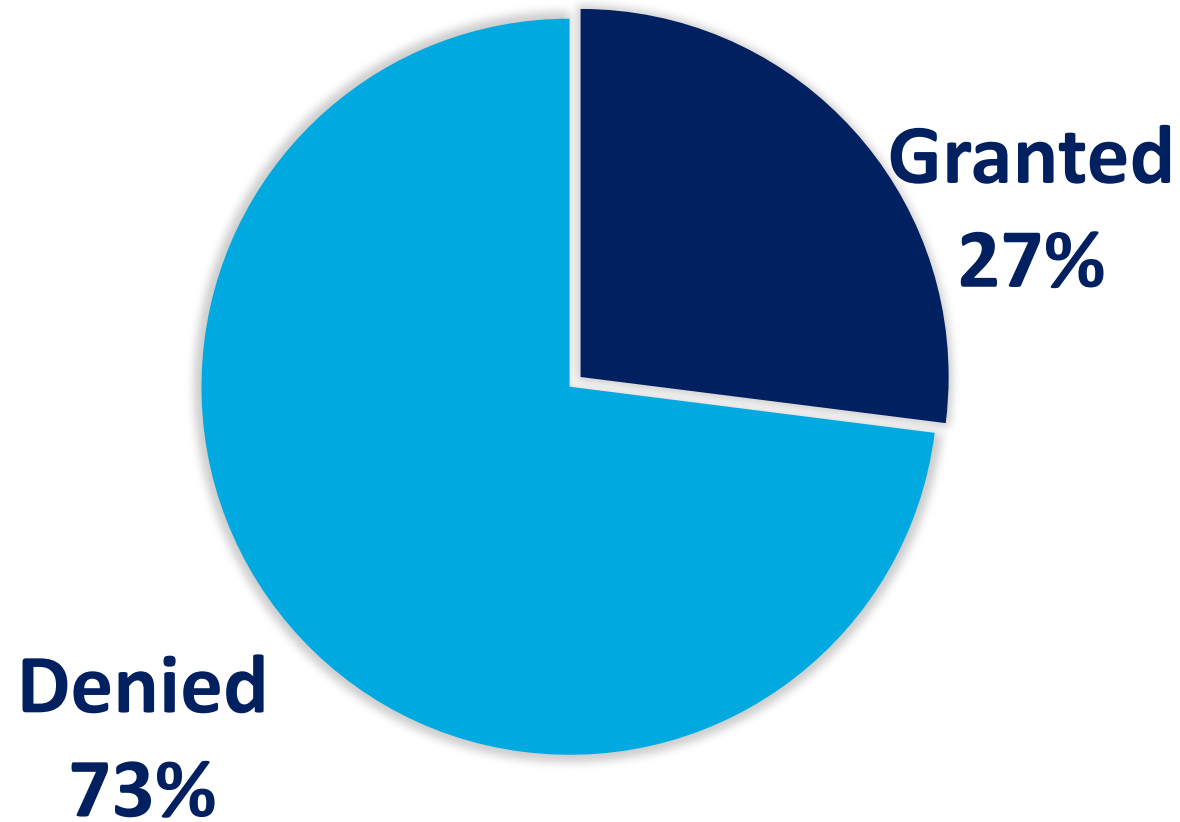
# 2011-2015 Statistics - Statewide



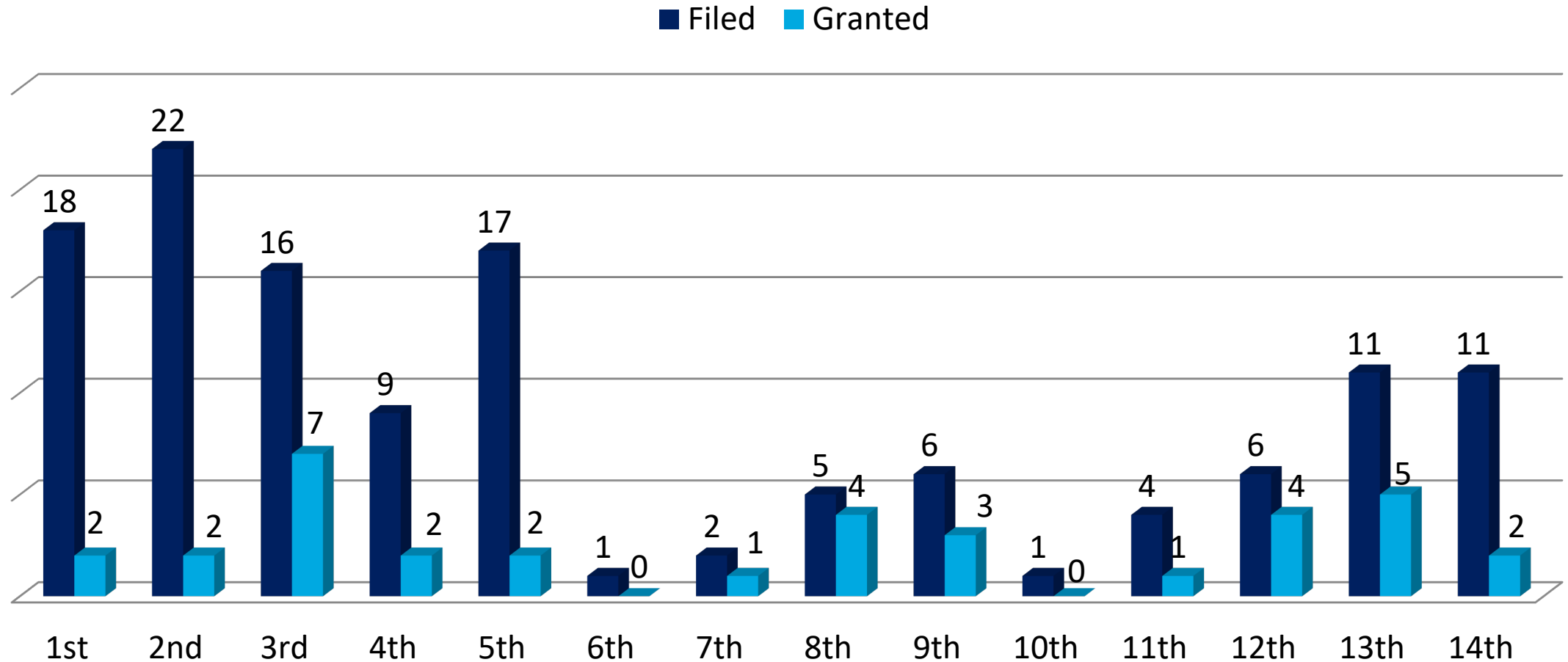
# 2011-2015 Statistics – By COA District



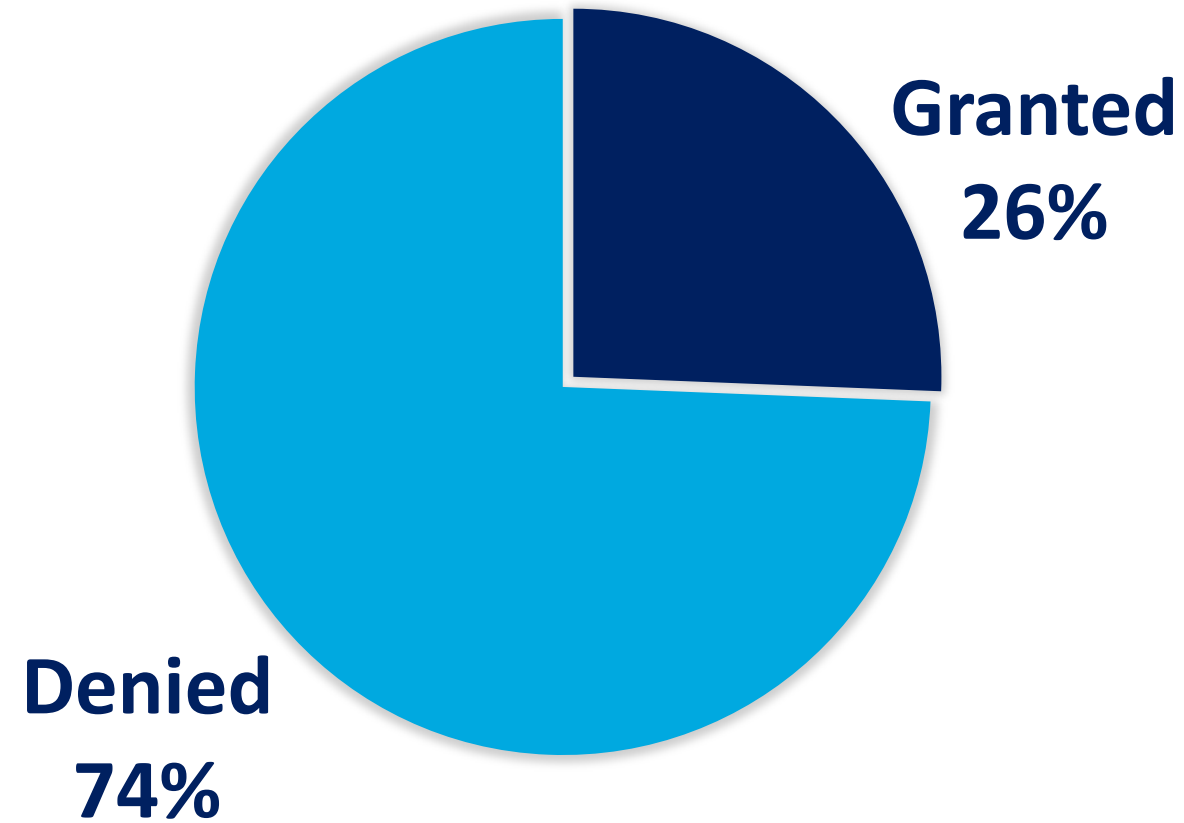
# 2019-2022 Statistics - Statewide



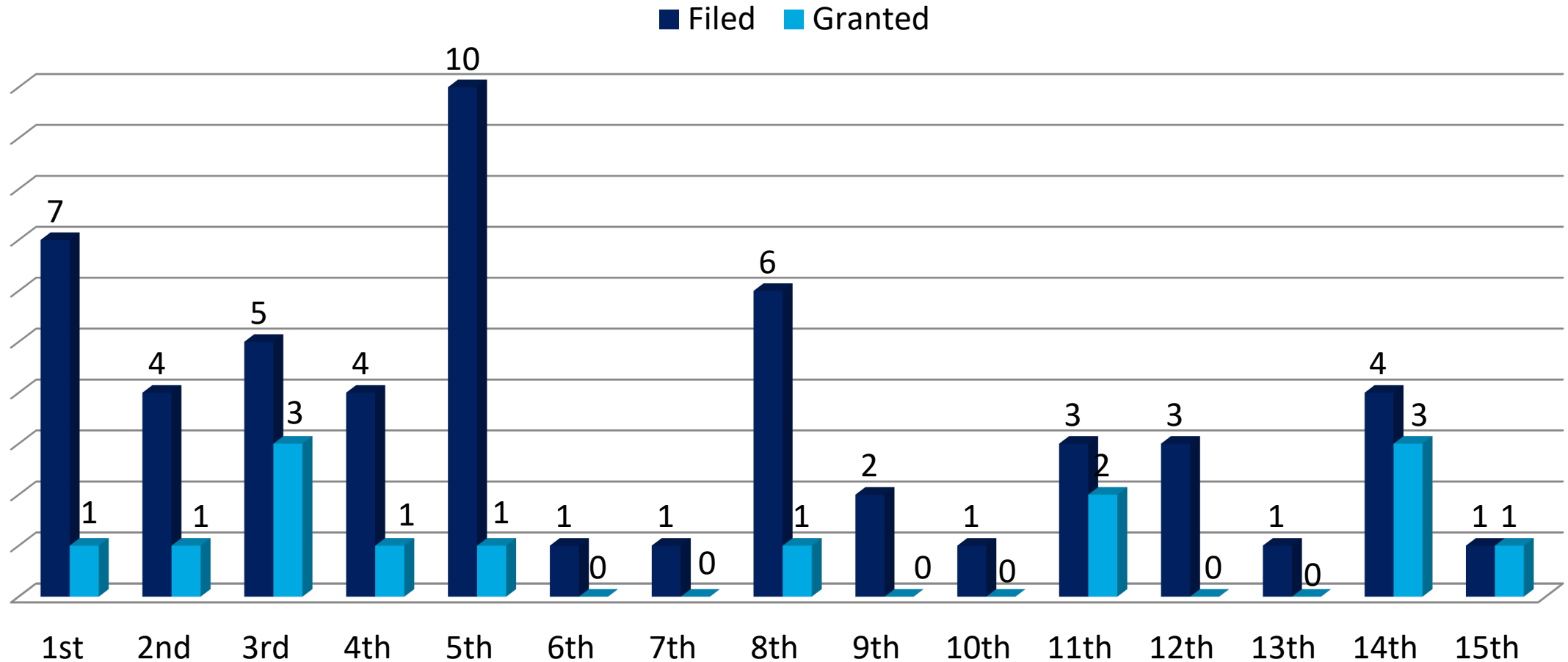
# 2019-2022 Statistics – By COA District



# 2023-2025 Statistics - Statewide



# 2023-2025 Statistics – By COA District



... and the Not So  
Ugly?

# Limitations of the Statistics

- Difficulty gathering the statistics
- Procedural defects still account a sizeable portion of the denials
- There are likely grants that we were not able to find
- It appears that the grant rate has remained steady

# Lessons

- Exact compliance with statute and rules is key
- Checklists in the materials
- Make sure the trial court has actually decided the question at issue
- Give the court of appeals reasons to grant permission beyond just the statutory requirements
- Help the court of appeals understand why the trial court's decision is wrong