REQUESTS REGARDING RULES 474 - 515

RUSSELL MCMAINS

March 7 & 8, 1986

SUPREME COURT OF TEXAS ADVISORY COMMITTEE

AGENDA FOR STANDING SUBCOMMITTEE ON RULES 474-515

Russell McMains, Chairman

Meeting of March 7 and 8, 1986

Requests not addressed in November meeting:

a. Rule 492 submitted by Professor Jeremy Wicker.

b. Rule 496 submitted by Professor Jeremy Wicker.

c. Rule 499a submitted by Judge Robert Calvert.

New requests to be addressed in March meeting:

d. Rules 483, 496, 499a by Professor Jeremy Wicker.

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January 9, 1986

Mr. Russell McMains
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Corpus Christi, Texas 78403

Dear Rusty:

Enclosed are proposed changes to Rules 483, 496, and 499a submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ file

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 637, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomalies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

Rule 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party [~~all parties~~] or his [~~their~~] attorney[s] of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposit with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a

pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

Comment: The proposed amendment restores the rule to the pre-1984 version. The current version is illogical in that it requires service of a pleading or motion on all parties only if it is not required by law or the rules to be served on the adverse party. If a particular pleading or motion is required by law or the rules to be served on the adverse party, then under the terms of Rule 72 it need not be served on the nonadverse parties. It would seem that nonadverse parties would have at least as much interest -- if not more -- in a pleading or motion expressly required by law or rule to be served on the adverse party, as a pleading or motion that is not required to be served on an adverse party or any party. The current version of the rule is also troublesome in that it first prescribes the circumstance under which a pleading or motion must be served on all parties, but the remainder of the rule addresses specific procedural details of service only as regards adverse parties.

Rule 165a. Dismissal for Want of Prosecution

. . .

3. Cumulative Remedies. . . . The same reinstatement procedure and timetable are [~~is~~] applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

Comment: Grammatical correction.

Rule 182a. Court Shall Instruct Jury on Effect of Article 3716

In the caption of the rule, delete "Article 3716" and substitute:

Evidence Rule 601(b)

Comment: Article 3716 was repealed, effective September 1, 1983. The caption of the rule is amended to conform to Evidence Rule 601(b).

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail by first-class mail ~~[a-postcard]~~ notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. ~~[Failure to comply with the provisions of this rule shall not affect the finality of the judgment.]~~

Comment: The proposed amendment conforms the rule to the 1984 amendment to Rule 306a, which requires notice by first-class mail. The last sentence of the rule is deleted to conform to the 1984 amendment to Rule 306a, which provides for up to a ninety-day extension of the date on which the time period for perfecting an appeal begins to run, if the appellant proves he has failed to receive notice of the judgment.

Rule 360. Appeal by Writ of Error to Court of Appeals

. . .

5. Cost bond or Substitute. At the time of filing the petition, or within six months provided by section 4, the appellant shall file with the clerk an appeal bond, cash deposit in lieu of bond, or affidavit of inability to pay costs, [~~or a notice of appeal if no bond is required,~~] as provided by these rules for appeals.

. . .

8. Perfection. The writ of error is perfected when the petition and bond or cash deposit in lieu of bond or affidavit of inability to pay is filed or a contest is overruled [~~, or a notice of appeal, if permitted, is filed~~].

Comment: The proposed amendment deletes the reference to a notice of appeal, which had never been required in an appeal by writ of error prior to the 1984 amendments to the rules. Based on the last sentence of the comment to the 1984 amendment of Rule 360, paragraph 8 was intended to state the provisions of the last sentence of Rule 363 in a shortened and modernized form, but with no change in substance. The proposed amendment also deletes the reference to a notice of appeal in paragraph 5. See also the comment to the proposed amendment to Rule 363.

Rule 363. Appeal [~~or Writ of Error~~] Perfected

When a bond is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. When a bond for costs on appeal is not required by law, the appeal is perfected when notice of appeal is made under the provisions of Rule 356(c). [~~The writ of error is perfected when the petition and bond or cash deposit is filed or made (when bond is required), or affidavit in lieu thereof is filed, or, if contested, when the contest is overruled.~~]

Comment: The 1984 amendment to Rule 360 attempted to transfer the perfection requirements for writ of error from Rule 363 to paragraph 8 of Rule 360. The proposed amendment deletes the last sentence of Rule 363, since that subject matter is covered in Rule 360. See also the comment to the proposed amendment to Rule 360.

Rule 447. Execution on Failure to Pay Costs

Delete "Rule 506" and substitute:

Rule 507

Comment: Rule 506 was repealed effective April 1, 1984, and its subject matter transferred to Rule 507.

Rule 496. Briefs of Respondents and Others

Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 469 [414] (b), (c), (e), (f), (g), and (h) [~~, (j), and (n)~~].

Comment: The proposed amendment deletes the erroneous reference to Rule 414 (requisites of briefs in the court of appeals) and substitutes Rule 469 (requisites of application for writ of error to the Supreme Court); also, the references to subdivisions (j) and (n) are deleted.

Supreme Court Order Relating to Preparation of Transcript (following Rule 376a)

. . .

(g) . . .

The Clerk shall deliver the transcript to the appropriate Court of Appeals. [~~and shall in all cases indorse upon it before it finally leaves his hands as follows, to wit:~~]

(h) The following indorsement shall be made by the Clerk on certificates for affirmance on notice under Rule 387(a):

"Applied for by P.S. on the _____ day of _____, A.D. 19 ____, and delivered to P.S. on the _____ day of _____, A.D. 19 _____," and shall sign his name officially thereto. [~~The same indorsement shall be made on certificates for affirmance of the judgment.~~]

(i) [~~(h)~~] . . .

Comment: Since the clerk of the trial court delivers the transcript directly to the clerk of the court of appeals, instead of to the appellant, an indorsement of its delivery to the appellant is erroneous. Under Rule 387(a), however, the clerk of the trial court may be requested by the appellee to deliver certified copies of the judgment and the appeal bond or other document required to perfect an appeal. In such event, the indorsement is required.

Supreme Court Order Relating to Rule 388a, originally issued February 1, 1950

Delete "Rule 388-a" and substitute:

Rule 388a

Comment: Minor textual change

Supreme Court Order Relating to Rule 388a, originally issued April 24, 1950

Delete "Rule 443) and substitute:

Rule 442(a)

Comment: Rule 443 was repealed effective April 1, 1984, and the subject matter transferred to Rule 442(a)

Comment applicable to the remaining proposed amendments: The following rules contain express references to various articles of the civil statutes that were repealed, effective September 1, 1985. The substance of these statutes have been codified in either the Texas Government Code or the Texas Civil Practice and Remedies Code, both effective September 1, 1985. The amendments conform these rules to the two new codes. Several rules also need to be amended to conform to the Texas Business and Commerce Code and the Texas Property Code.

Rule 18a. Recusal or Disqualification of Judges

In subdivision (g), delete "Article 200a" and substitute:

sections 74.034 and 74.035 of the Texas Government Code

Rule 30. Parties to Suits

Delete "title of the Revised Civil Statutes of Texas, 1925, dealing with Bills and Notes" and substitute:

Texas Business and Commerce Code

Delete "Articles 1986 and 1987 of such statutes" and substitute:

section 17.001 of the Texas Civil Practice and Remedies Code

Rule 87. Determination of Motion to Transfer

In subdivision (a) of paragraph 2:

Delete "Section 1" and substitute:

section 15.001

Delete "Section 2" and substitute:

sections 15.011-15.017

Delete "Section 3" and substitute:

sections 15.031-15.040

Delete "Subsections (a) and (b) of Section 4" and substitute:

sections 15.061 and 15.062

Delete "Article 1995" and substitute:

the Texas Civil Practice and Remedies Code

Rule 111. Citation by Publication in Actions Against Unknown Heirs or Stockholders of Defunct Corporations

Delete "Art. 2040 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 17.004 of the Texas Civil Practice and Remedies Code

Rule 112. Parties to Actions Against Unknown Owners or Claimants of Interest in Land

Delete "Acts 1931, 42nd Leg., p. 369, ch. 216" and substitute:

section 17.005 of the Texas Civil Practice and Remedies Code

Rule 113. Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land

Delete "If the plaintiff in an action authorized under Acts 1931, 42nd Leg., p. 369, ch. 216" and substitute:

In suits authorized by section 17.005 of the Texas Civil Practice and Remedies Code, the plaintiff,

Rule 161. Where Some Defendants Not Served

Delete "Art. 2088 of the Texas Revised Civil Statutes" and substitute:

"section 17.001 of the Texas Civil Practice and Remedies Code"

Rule 163. Dismissal as to Parties Served, Etc.

Delete "Art. 2088 of the Revised Civil Statutes of Texas" and substitute:

section 17.001 of the Texas Civil Practice and Remedies Code.

Rule 186. Depositions in Foreign Jurisdictions

In paragraph 2, delete "Article 3746 of the Revised Civil Statutes of Texas" and substitute:

section 20.001 of the Texas Civil Practice and Remedies Code

Rule 385a. Court Unable to Take Immediate Action

Delete "Article 1819 of the Revised Civil Statutes, as amended" and substitute:

section 22.220(b) of the Texas Government Code

Rule 469. Requisites of Application

In line 4 of subdivision (d), delete "Subdivision 2 of Article 1728" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

In lines 6 and 7 of subdivision (d), delete "subdivision of Article 1728" and substitute:

subsection of section 22.001 of the Texas Government Code

In lines 8 and 9 of subdivision (d), delete "Subdivision 6 of Article 1728" and substitute:

subsection (a)(6) of section 22.001 of the Texas Government Code

Rule 483. Orders on Application for Writ of Error, Petition for Mandamus and Prohibition

In the second paragraph, delete "subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

Rule 499a. Direct Appeals

In the first paragraph, delete "Article 1738a" and substitute:

section 22.001(c) of the Texas Government Code

Rule 621a. Discovery in Aid of Enforcement of Judgment

Delete "Article 3773, V.A.T.S." and substitute:

section 34.001 of the Texas Civil Practice and Remedies Code

Rule 657. Judgment Final for Garnishment

Delete "subdivision 3 of Article 4076 of the Revised Civil Statutes of Texas, 1925" and substitute:

subsection 3 of section 63.001 of the Texas Civil Practice and Remedies Code

Rule 696. Application for Writ of Sequestration and Order

In the second paragraph, delete "Article 6840, Revised Civil Statutes" and substitute:

sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code

Rule 741. Requisites of Complaint

Delete "Articles 3973, 3974 and 3975, Revised Civil Statutes" and substitute:

sections 24.001-24.004 of the Texas Property Code

Rule 746. Only Issue

Delete "Articles 3973-3994, Revised Civil Statutes" and substitute:

sections 24.001-24.008 of the Texas Property Code

Rule 772. Procedure

Delete "Art. 6101 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 23.001 of the Texas Property Code

Rule 806. Claim for Improvements

Delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.024 of the Texas Property Code

Rule 807. Judgment When Claim for Improvement is Made

In lines 2 and 3, delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.042 of the Texas Property Code

In line 7, delete "Articles 7397-7399, Revised Civil Statutes" and substitute:

sections 22.022 and 22.023 of the Texas Property Code

Rule 808. These Rules Shall Not Govern When

Delete "Articles 7364-7401A, Revised Civil Statutes," and substitute:

sections 22.001-22.045 of the Texas Property Code

Rule 810. Requisites of Pleadings

Delete "Article 1975, Revised Civil Statutes," and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

Rule 811. Service by Publication in Actions Under Article 1975

In the caption delete "Article 1975" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

In line 1, delete "Article 1975, Revised Civil Statutes" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

92, 376a
492, 758, 109

TO Justice Wallace.

Texas Tech University

School of Law

April 30, 1984

Honorable Jack Pope, Chief Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: Conflicts and oversights in 1984 amendments to the Texas Rules of Civil Procedure

Dear Justice Pope:

In going over the 1984 amendments, I have discovered several conflicts and oversights, other than the ones I had related to Justice Spears earlier this year.

1. Rule 72. The first sentence changed the phrase "the adverse party or his attorney of record" to "all parties or their attorneys of record." Shouldn't the phrase read: "all adverse parties or their attorneys of record"? This would be consistent with the remaining language of Rule 72 and with other rules which normally refer to service on the "adverse," "opposite" or "opposing" party.

2. Rule 92. The second paragraph was added, but it refers to a "plea of privilege." Obviously, this should be changed to "motion to transfer venue under Rule 86."

Aside - the phrase "plea of privilege" had perhaps one sole virtue. When it was used everyone knew this was an objection to venue under Rule 86, rather than a motion for a discretionary change of venue under Rule 257. Unfortunately, a motion to change venue under Rule 257 may also properly be referred to as a motion to transfer venue. See Rules 86(1), 87(2)(c), (3)(c), (5), 258, 259. And see Article 1995(4)(c)(2).

3. Rule 165a(3). In the second sentence the word "is" should be changed to "are."

4. Rules 239a and 306a. Prior to the 1984 amendments, the language of Rule 306d (repealed), which dealt with notification of appealable orders generally, and Rule 239a, which deals with notification of default judgments (also an appealable order) were worded slightly differently, but in substance

were the same. Both rules provided: "Failure to comply with the provisions of this rule shall not affect the finality of the judgment or order."

New Rule 306a(4),(5), however, which superseded old Rule 306d, makes it possible for the finality of a judgment to be extended for up to ninety days. Rule 239a was not amended. In my opinion, this creates an anomoly in that, unless Rule 239a is to be ignored, it is possible to have the periods for a motion for new trial, perfecting an appeal, etc., to start running at a later date (if a party proves he did not receive notice of a judgment) for all appealable orders and judgments, except a default judgment. Unless this was so intended, Rule 239a should be amended to conform to Rule 306a(4),(5).

5. Rules 360(5), (8) and 363. New Rule 360(5) requires that, in addition to filing the petition for writ of error, a notice of appeal must be filed if a cost bond is not required. Rule 360(8) says, in effect, that in such circumstances the writ of error is perfected when the petition and a notice of appeal are filed. It had been my understanding, at least prior to the 1984 amendments, that where a cost bond was not required by law, an appellant in an appeal by writ of error to the court of appeals needed only to file the petition. Rule 363, which was not amended in 1984, supports this view. Thus the last sentence of Rule 363 conflicts with Rule 360(8).

Aside from this problem, the word "is" in the last line of Rule 360(8) should be changed to "are."

6. Rule 376a. Part (g) of the Supreme Court order relating to the preparation of the transcript needs to be amended. The last paragraph of part (g) should be deleted. It is obsolete in view of the 1984 repeal of Rule 390 and the 1981 and 1984 amendments of Rule 376. A party no longer needs the authority to apply to the clerk to have the transcript prepared and delivered to him, since Rule 376 makes it clear that the clerk has the duty to prepare and transmit the transcript to the court of appeals.

7. Rule 418. Amended Rule 414 incorporates all the provisions of Rule 418, as well as several other rules. These Rules (415-417) were repealed, but Rule 418 was not. Rule 418 should be repealed.

8. Rules 469(h) and 492. New Rule 469(h) requires the application for writ of error to state that a copy has been served on "each group of opposite parties or their counsel." Rule 492, however, requires that a copy of each instrument (including "applications") filed in the Supreme Court to be served on "the parties or their attorneys." Since two or more parties may belong to one group, only one copy would have to be served on them as a group under Rule 469(h), but under Rule 492, each party would have to be served with a copy. Are these two rules conflicting in their requirements or does Rule 492 apply to all filings in the Supreme Court except the application for writ of error?

9. Rules 758 and 109. Rule 109 was amended to delete the proviso (last sentence). Rule 758, which was not amended, states: "but the proviso of Rule 109, adapted to this situation, shall apply." Rule 758 needs to be amended to delete any reference to the now nonexistent proviso of Rule 109.

One final note: Section 8 of Article 2460a, the Small Claims Court Act, was not amended by the legislature along with the repeal of Article 2008, which

had allowed an interlocutory appeal from the trial court's ruling on a plea of privilege. Arguably, section 8 allows such an interlocutory appeal. On the other hand, the right to interlocutory appeal may be geared to or depend on a right in some other statute, such as now repealed Article 2008, since section 8 begins with the phrase "nothing in this Act prevents."

I hope my comments and suggestions have been helpful.

Respectfully yours,

Jeremy C. Wicker
Professor of Law

JCW:tm

in other respects shall conform to the rules laid down for typewritten transcripts.

(d) The caption of the transcript shall be in substantially the following form, to wit:

"The State of Texas,
County of _____

At a term of the _____ (County Court or _____ Judicial District Court) of _____ County, Texas, which began in said county on the _____ day of _____, 19___, and which terminated (or will terminate by operation of law) on the _____ day of _____, 19___, the Honorable _____ sitting as Judge of said court, the following proceedings were had, to wit:

A.B., Plaintiff,
v. No. _____
C.D., Defendant. } In the _____ Court of _____ County, Texas."

(e) There shall be an index on the first pages preceding the caption, giving the name and page of each proceeding, including the name and page of each instrument in writing and agreement, as it appears in the transcript. The index shall be double spaced. It shall not be alphabetical, but shall conform to the order in which the proceedings appear as transcribed.

(f) It shall conclude with a certificate under the seal of the court in substance as follows:

"The State of Texas,
County of _____ } I, _____

Clerk of the _____ Court, in and for _____ County, State of Texas, do hereby certify that the above and foregoing are true and correct copies of (all the proceedings or all the proceedings directed by counsel to be included in the transcript, as the case may be) had in the case of _____ v. _____, No. _____, as the same appear from the originals now on file and of record in this office.

Given under my hand and seal of said Court at office in the City of _____, on the _____ day of _____, 19___.

_____

Clerk _____ Court, _____
County, Texas.
By _____ Deputy."

(g) The front cover page of the transcript shall contain a statement showing the style and number of the suit, the court in which the proceeding is pending, the names and mailing addresses of the attorneys in the case, and it shall be labeled in bold type "TRANSCRIPT." The following form will be sufficient for that purpose:

"TRANSCRIPT

No. _____
District Court No. _____

_____
Appellant___
v.
_____
Appellee___

_____ _____

Transcript from the _____ District Court of _____ County, at _____, Texas.
Hon. _____, Judge Presiding.

Attorney___ for Appellant___:
_____ Address: _____
Attorney___ for Appellee___:
_____ Address: _____"

The Clerk shall deliver the transcript to the party, or his counsel, who has applied for it, and shall in all cases indorse upon it before it finally leaves his hands as follows, to wit:

"Applied for by P. S. on the _____ day of _____, A.D. 19___, and delivered to P. S. on the _____ day of _____, A.D. 19___," and shall sign his name officially thereto. The same indorsement shall be made on certificates for affirmance of the judgment.

(h) In the event of a flagrant violation of this rule in the preparation of a transcript, the appellate court may require the Clerk of the trial court to amend the same or to prepare a new transcript in proper form at his own expense.

Entered this the 20th day of January, A.D. 1944.

_____
Chief Justice.

_____
Associate Justice.

_____
Associate Justice.

Change in form by amendment effective January 1, 1981: Paragraph (b) is changed to provide that judgments shall show the date on which they were *signed*, rather than "rendered" or "pronounced." *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978). The first sentence of paragraph (c) is changed to permit duplication of pages by methods other than typing and printing.

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 COLORADO, SUITE 600 • P.O. BOX 12066 • AUSTIN, TEXAS 78711 • 512/475-2421

TO: Justice Wallace

FROM: C. Raymond Judice

DATE: December 4, 1984

RE: Certification of transcription
Supreme Court Order following Rule 377

On November 20, 1984 the Supreme Court promulgated amendments to the Standards and Rules for Certification of Certified Shorthand Reporters in conformity with Article 2324b, V.T.C.S.

These amendments provide, among other matters, that each shorthand reporter, when certifying to a transcription, indicate his or her certification number, date of expiration of certification, and business address and telephone number.

The Order following Rule 377 of the Rules of Civil Procedure, provides a similar certification form but it does not require the certification number, date of expiration of current certification and business address and phone number of the reporter certifying.

As it is unclear whether the Supreme Court Order of November 20, 1984 amended the Order following Rule 377 of the Rules of Civil Procedure as well as the Standards and Rules for Certification of Court Reporters, I felt that I should bring this to your attention.

If the November 20, 1984 Order had the effect of amending the Order following Rule 377 as well as the Court Reporter Standards, should this be communicated to West Publishing Company to ensure that the next printing of the Rules of Civil Procedure will include this amendment?

If the November 20, 1984 Order did not amend the Order following Rule 377, should this amendment be brought to the attention of the Advisory Committee for possible action to bring it into conformity with the action of the Supreme Court of November 20, 1984?

OCA:MEMWAL.21

ORDER OF THE COURT

IT IS ORDERED by the Supreme Court of Texas that the following changes, additions, and amendments to the Standards and Rules for Certification of Certified Shorthand Reporters as they were adopted and promulgated effective January 1, 1984, in conformity with Article 2324b, V.T.C.S., as amended by Senate Bill 565, 68th Legislature, Regular Session, shall be and read as follows:

Rule I., General Requirements and Definitions, is amended by adding Paragraphs I. and J. to read as follows:

I. Certification of transcriptions.

1. The transcription of any oral court proceeding, deposition or proceeding before a grand jury, referee or court commissioner, or any other document certified by a certified shorthand reporter for use in litigation in the courts of Texas, shall contain as a part of the certification thereof, the signature, address and telephone number of the certified shorthand reporter and his or her State certification number and the date of expiration of certification, substantially in the following form:

I, _____, a certified shorthand reporter of the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of

(insert description of material or document certified)

Certified to on this the _____ day of _____, 19___.

_____
(Signature of Reporter)

_____
(Typed or Printed Name of Reporter)

Certification Number of Reporter: _____

Date of Expiration of Current Certification: _____

Business Address: _____

_____

Telephone Number: _____

2. A certification of a transcript of a court proceeding by an official court reporter shall contain a certificate signed by the court reporter substantially in the following form:

"THE STATE OF TEXAS
COUNTY OF _____

I, ... , official court reporter in and for the . . . . . court of . . . . . County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the repsective parties.

WITNESS my hand this the . . . . day of . . . . . , 19 . . . .

. . . . . .
(Signature)
Official Court Reporter"

. . . . . .
(Typed or Printed Name of Reporter)

Certification Number of Reporter: . . . . . .

Date of Expiration of Current Certification: . . . . . .

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

3. A person not certified who performs the functions of a court reporter pursuant to Section 14 of Article 2324b, V.T.C.S., shall attach to and make a part of the certification of any deposition which requires certification, an affidavit that no certified shorthand reporter was available to take the deposition, which shall be sworn to by that person and the parties to the proceedings, or their attorneys present. The certification of a transcription of a court proceeding reported pursuant to section 14 of article 2324b, V.T.C.S., by a person not certified shall contain an affidavit sworn to by that person, the attorneys representing the parties in the court proceeding, and the judge presiding that no certified shorthand reporter was available to perform the duties of the court reporter.

(e) The statement of facts shall contain the certificate signed by the court reporter in substance as follows:

"THE STATE OF TEXAS }
COUNTY OF _____ }

I, _____, official court reporter in and for the _____ court of _____ County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the _____ day of _____, 19___.

_____
(Signature)
Official Court Reporter"

(f) As to substance, it shall be agreed to and signed by the attorneys for the parties, or shall be approved by the trial court, in substantially the following form, to-wit:

"ATTORNEYS' APPROVAL

We, the undersigned attorneys of record for the respective parties, do hereby agree that the foregoing pages constitute a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts, and other proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by the official court reporters.

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Plaintiff

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Defendant

COURT'S APPROVAL

The within and foregoing pages, including this page, having been examined by the court, (counsel for the parties having failed to agree) are found to be a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts and other proceedings, all of which occurred in open court or in chambers and were reported by the official court reporter.

496

Texas Tech University

School of Law

February 6, 1985

Wilkes Ltr 1-17-84

Honorable John L. Hill, Jr.
Chief Justice
The Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Apparent error in amendment to Rule 496, effective April 1, 1985

Dear Justice Hill:

In examining the new amendments to the Rules of Civil Procedure, I noticed an apparent error in the amendment to Rule 496. That rule, of course, prescribes the contents of briefs filed in response to an application for writ of error. The problem deals with the last sentence of the first paragraph, which provides:

> "Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 414(b), (c), (e), (f), (g), (h), (j), and (n)."

The reference to Rule 414 is erroneous. That rule governs the contents of the appellant's brief in the court of appeals. Instead, the reference should be to Rule 469, which prescribes the contents of the application for writ of error. The 1984 amendment of Rule 496 correctly referred to Rule 469, but erroneously referred to subdivisions "(j) and (n)." Those subdivisions do not exist in Rule 469, but do appear in Rule 414. The problem can be remedied by amending Rule 496 to provide:

> "Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 469(b), (c), (e), (f), (g), and (h)."

-continued-

I have recently authored a multi-volume treatise for West on Texas civil trial and appellate procedure which will be released early this summer. Enclosed is a copy of a footnote from the manuscript which deals with the problem in Rule 496 in somewhat more detail.

Thank you for considering my suggestion. I hope it proves to be of some help to the Court. Incidentally, I am delighted that you have expressed your concern and commitment to needed procedural reforms of our Texas court system. It is comforting to know that the leadership of the Court will continue in this regard in the fine tradition of Chief Justices such as Jack Pope.

Respectfully yours,

Jeremy C. Wicker

Jeremy C. Wicker
Professor of Law

encl.

1. Rule 496, however, expressly refers to Rule 414, Vernon's Ann.Rules Civ.Proc., which governs the contents of the appellant's brief in the court of appeals, rather than Rule 469, Vernon's Ann.Rules Civ.Proc., which prescribes the contents of the application for writ of error. This unfortunate result probably occurred due to two compounding errors. The 1984 amendment to Rule 496 correctly referred to Rule 469, but not only expreesly referred to subdivisions (b), (c), (e), (f), (g) and (h) of that rule, but also (j) and (n). Rule 469 does not contain these latter two subdivisions, but Rule 414 does. The Court amended Rule 496 again in 1985, realizing that the first paragraph contained a typographical error, but instead of deleting the reference to subdivisions (j) and (n), it changed the reference to "Rule 469" to "Rule 414." In defense of the Court's error, however, the mix-up is somewhat understandable in view of the fact that the pre-1984 version of Rule 496 contained a general requirement that briefs filed in the Supreme Court comply with the rules prescribed for briefs in the court of appeals. It is anticipated, or at least hoped, that Rule 496 will not cause any undue prejudice. Notice, howeve that Rule 414(j) allows briefs to be written, as well as typewrit and printed, whereas Rule 492 requires that briefs in the Supreme Court be either typewritten or printed. Also, while Rule 414(n) deals with amendments and supplements of briefs, Rule 481, Vernon's Ann.Rules Civ.Proc., covers the matter of amendments of briefs filed in the Supreme Court. And see §§865, 868.

Justice
Doggett
Duncan
Wallace
FYI

Texas Tech University

School of Law

January 17, 1984

Honorable Franklin S. Spears
Justice, The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: Error in Amended Rule 496

Dear Justice Spears:

I happened to notice today that newly amended Rule 496 refers to Rule 469(j) and (n), but there is no subdivision (j) or (n) under either the existing or amended version of Rule 469. My guess is that the Court intended the reference to be to Rule 414, rather than Rule 469.

Respectfully,

Jeremy C. Wicker

Jeremy C. Wicker
Professor of Law

JCW:tm

Above observation is correct. Rule 496 should be changed. Reference should be changed from Rule "469" to Rule "414".

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 26, 1985

Honorable Robert W. Calvert
McGinnis, Lochridge & Kilgore
1300 Capitol Center
919 Congress Ave.
Austin, Tx 78701

Dear Judge:

Chief Justice Hill has referred to me, as the liaison to the Supreme Court Advisory Committee and the Committee on the Administration of Justice, your memorandum to Mssrs. Kilgore and St. Clair, concerning Rule 499a.

I am forwarding a copy of your memo to the chairman of each of the above committees with the request that it be placed on the agenda for a future meeting of the committees.

Thank you for your continued interest in the Court.

Sincerely,

James P. Wallace
Justice

JPW:fw
cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
70th Fl., Allied Bank Plaza
Houston, TX 77002

M E M O R A N D U M

TO: Mr. Kilgore
Mr. St. Clair

FROM: Judge Calvert

SUBJECT: Direct Appeals

DATE: September 17, 1985

I seriously question the validity of the provision of Rule 499a, Direct Appeals, paragraph (b), which authorizes presentation in the supreme court by direct appeal of questions involving "the validity or invalidity of an administrative order issued by a state board or commission under a statute of this state."

The Rule-Making Act (Art. 1738a V.A.T.S., 1984 Texas Rules of Court, Desk Copy, page 3), enacted by the Legislature, effective May 15, 1939, conferred on the Supreme Court "the full rule-making power in the practice and procedure in civil actions." In the same act the Legislature expressly provided:

> Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

A constitutional amendment, adopted November 5, 1940, added section 3-b to Article 5 of the Constitution. The section reads:

> 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.

It will be noted that the quoted section confers carte blanche power on the Legislature to provide for direct appeals in cases in which injunctions are granted or denied on the grounds of the constitutionality or unconstitutionality of any statute or on the validity or invalidity of an administrative order issued by any state agency. Obviously, use of the disjunctive "or" authorized the Legislature to provide for such appeals in either of the situations or in both. In 1943 the Legislature provided for direct appeals in both situations. Art. 1738a, V.A.T.C.S. In the same statute the Legislature directed the supreme court "to prescribe the necessary rules of procedure to be followed in perfecting such an appeal."

The supreme court discharged its obligation by adopting Rule 499a, Direct Appeals, T.R.C.P, effective December 31, 1943. As adopted, the Rule provided a procedure for direct appeals in both of the situations addressed by Art. 5, §3-b, of the constitution and art. 1738a of the statutes. A minor amendment to the Rule was adopted December 5, 1983, effective April 1, 1984, but no change was made with respect to the two situations in which a direct appeal would be considered. In 1983, the 68th Legislature amended Art. 1738a by removing the provision for direct appeals in situations where injunctions are granted or denied "on the ground of the validity or invalidity of any administrative order issued by any State Board or Commission under any statute of this State."[1]

[1] The amendment of the statute was effective June 19, 1983, only five and one-half months before the amendment to the Rule was adopted and nine and one-half months before it became effective. It is thus probable that the Supreme Court was unaware when the amendment to the Rule became effective that its power to provide for direct appeals had been modified by the Legislature.

Inasmuch as an amendment to the constitution was prerequisite to the Legislature's authority to provide for direct appeals, it follows as a matter of course that the right is a substantive right, (as distinguished from "practice and procedure in civil actions,") which the Legislature has now expressly removed from the court's rule-making authority. Therefore, the provisions of Rule 499a which purport to deal with the second situation are no longer relevant, are invalid, and are excess baggage.