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TRCP 57 Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, ~~and~~ telephone number[, and, if available, telecopier number]. A party not represented by an attorney shall sign his pleadings, state his address, ~~and~~ telephone number[, and, if available, telecopier number].

[COMMENT TO 1990 CHANGE: To supply attorney telecopier information with other identifying information on pleadings.]

TRCP166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. (No change.)

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. (No change.)

b. Documents and Tangible Things. (No change.)

c. Land. (No change.)

d. Potential Parties and Witnesses. (No change.)

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a[n expert] witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the

mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a[n expert] witness at trial is required if the ¢x¤¢rt/$ /w¤rk /¤r¤d¤ct /f¤rm$ /a /b¤i /¢it¤n¢r /in wh¤l¢/¤r/in/¤art/¤f/t¤e/¤pinion$/¤f/an/¢x¤¢rt/wh¤/i$/t¤ b¢/¢all¢d/a$/a/wit¤n¢$$/ [consulting expert's opinion or impressions have been reviewed by a testifying expert.]

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial wh¢n/it/f¤rm$/a/b¤$i$/¢it¤n¢r/in/wh¤l¢/¤r/in/¤art/¤f/t¤e ¤pinion$/¤f/an/¢x¤¢rt/wh¤/i$/t¤/b¢/¢all¢d/a$/a/wit¤n¢$$/ [if the consulting expert's opinions or impressions have been reviewed by a testifying expert.]

(3) Determination of Status. (No change.)

(4) Reduction of Report to Tangible Form. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as a[n expert] witness have not been recorded and reduced to tangible form, the trial judge may order these matters reduced to tangible

form and produced within a reasonable time before the date of trial.

f. Indemnity, Insuring and Settlement Agreements. (No change.)

g. Statements. (No change.)

h. Medical Records; Medical Authorization. (No change.)

3. Exemptions. The following matters are protected from disclosure by privilege:

a. Work Product. (No change.)

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tangible things containing such information if the expert will not be called as a[n expert] witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify [as an expert] and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a[n expert] witness.

c. Witness Statements. The written statements of potential witnesses and parties, ~~if the statement was~~ [when] made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the

prosecution or defense of the claims made in [a part of] the pending litigation, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. [For purpose of this paragraph a photograph is not a statement.]

d. Party Communications. With the exception of communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, made subsequent to the occurrence or transaction upon which the suit is based, and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made in [a part of] the pending litigation. [This exemption does not include communications prepared by or for experts that are otherwise

discoverable.] For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. Any matter protected from disclosure by any other privilege.

Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempt from discovery by subparagraphs c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for hearing and determined by the court. Any party may at any reasonable time request a hearing on any objection or motion for protective order. The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion.] In ~~responding~~ [objecting] to an appropriate discovery request within the scope of paragraph 2, ~~directly addressed to the other party~~ a party ~~who seeks~~ [seeking] to exclude any matter from discovery on the basis of an exemption

or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and [at or prior to any hearing shall] produce [any] evidence [necessary to] supporting such claim [either] in the form of affidavits [served at least seven days before the hearing] or [by] live testimony. Protected at a hearing regarding by either the requesting or objecting party. When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection of the individual documents [an inspection and review of the particular discovery] before ruling on the objection. [After the date on which answers are to be served, objections are waived unless an

extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

5. Protective Orders. (No change.)

6. Duty to Supplement. A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good cause exists for permitting or requiring later supplementation.

a. A party is under a duty ⊄[r]easonably to supplement his response if he obtains information upon the basis of which:

(1) (No change.)

(2) (No change.)

b. (No change.)

c. (No change.)

[7. Discovery Motions. All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.]

[COMMENT TO 1990 CHANGE: To eliminate the contradiction between Rule 166b 2(e)(1) and (2) and corresponding Rule 166b 3(e), Rule 166b 2(e)(1) and (2) have been modified. As modified, Rule 166b 2(e)(1) and (2) now make discoverable the impressions and opinions of a consulting expert if a testifying expert has reviewed those opinions and material, regardless of whether or not the

opinions and material form a basis for the opinion of the testifying expert. The revisions keep the intent of Rule 166b 2(e)(1) and (2) and Rule 166b 3(e) consistent with regard to consulting experts. The amendments to Section 3 standardize language for the same meaning. New Section 7 was added to ensure that court time will not be taken to resolve discovery disputes unless the parties cannot resolve them without court intervention and provide that matters exempt under paragraph 3(c) are not made discoverable solely because the consultant may or is to be a fact witness only.The amendments to Section 4 expressly dispense with the necessity of doing anything more than serving objections to preserve discovery complaints in order to avoid unnecessary time and expense to parties and time of the courts, particularly where no party ever requests a hearing on the objection. The failure of any party to do more than merely object fully shall never constitute a waiver of any objection. The last sentence added to Section 4 was previously the second sentence of Rule 168(6) and was moved because it applies to all discovery objections.]

TRCP 120a. Special Appearance

1. (No change.)

2. (No change.)

[3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.]

3/ [4.] If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

[COMMENT TO 1990 CHANGE: To provide for proof by affidavit at special appearance hearings, with safeguards to responding parties. These amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction.]

TRCP 237a. Cases Remanded From Federal Court

When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. [No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.]

[COMMENT TO 1990 CHANGE: To preclude a default judgment is a case remanded from federal court if an answer was filed in federal court during removal.]

TRCP 299. Omitted Findings

~~Where~~ [When] findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a ~~presumption of~~ [ed] finding upon any ground of recovery or defense, no element of which has been ~~found by the trial court~~ [included in the findings of fact]; but ~~where~~ [when] one or more elements thereof have been found by the trial court, omitted unrequested elements, ~~where~~ [when] supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

[TRCP 299A. Findings of Fact To Be Separately Filed and Not Recited In A Judgment

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the Rule 297 and 298 findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.]

[COMMENT TO 1990 CHANGE: To cause trial courts to make findings of fact separate from the judgment and provide that the separate findings of fact are controlling on appeal.]

TRCP 308a. In Child Support Cases

In cases where the court has ordered periodical payments for the support of a child or children as provided in the statutes relating to divorce and it is claimed that such order has been disobeyed the person claiming that such disobedience has occurred shall make same known to the judge of the court ordering such payments. Such judge may thereupon appoint a member of the bar of that court to advise with and represent said claimant. It shall be the duty of said attorney if the attorney in good faith believes that said order has been contemptuously disobeyed to file with the clerk of said court a written statement verified by the affidavit of said claimant describing such claimed disobedience. Upon the filing of such statement or upon its own motion the court may issue a show cause order to the person alleged to have disobeyed such support order commanding that person to appear and show cause why they should not be held in contempt of court. Notice of such order shall be served on the respondent in such proceedings in the manner provided in Rule 21a not less than ten days prior to the hearing on such order to show cause. The hearing on such order may be held either in term time or in vacation. No further written pleadings shall be required. The court the parties and the attorneys may call and question witnesses to ascertain whether such support order has been disobeyed. Upon a finding of such disobedience the court may enforce its judgment by orders as in other cases of civil contempt.

/////Except with the consent of the court, no fee shall be charged by or paid to the attorney representing the claimant for any services. //If the court shall be of the opinion that an attorney's fee shall be assessed against the party in default and collected as costs,

[When the court has ordered child support or possession of or access to a child and it is claimed that the order has been violated, the person claiming that a violation has occurred shall make this known to the court. The court may appoint a member of the bar to investigate the claim to determine whether there is reason to believe that the court order has been violated, the attorney shall take the necessary action as provided under Chapter 14, Family Code. On a finding of a violation, the court may enforce its order as provided in Chapter 14, Family Code.

Except by order of the court, no fee shall be charged by or paid to the attorney representing the claimant. If the court determines that an attorney's fee should be paid, the fee shall be adjudged against the party who violated the court's order. The fee may be assessed as costs of court, or awarded by judgment, or both.]

[COMMENT TO 1990 CHANGE: This rule has been completely rewritten and designed to broaden its application to cover problems dealing with possession and access to a child as well as support.]

TRCP 749c. Appeal Perfected

The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed.

When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court~~, however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed and when one rental period's rent has been paid into the justice court registry~~. In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled~~ and if the case involves nonpayment of rent, one rental period's rent has been paid into the justice court registry~~.

[COMMENT TO 1990 CHANGE: To dispense with the appellant requirement of payment of any rent into the court registry.]

TRAP 9 Substitution of Parties

(a) Death of a Party in Civil Cases. (No change.)

(b) Death of Appellant in a Criminal Case. (No change.)

(c) Public Officers; Separation from Office. (No change.)

[(d) Substitution for Other Causes. If substitution of a successor to a party in the appellate court is necessary for any reason other than death or separation from public office, the appellate court may order such substitution upon motion of any party at any time or as the court may otherwise determine.]

[COMMENT TO 1990 CHANGE: To provide mechanism for substitution of appellate parties as may be necessary.]

TRAP 20. Amicus Briefs

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties,a nd shall show in the brief that copies have been furnished to all attorneys of record in the case. [In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

[COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs in civil cases to conform with Rules 74(h) and 136(e).]

TRAP 46. Bond for Costs on Appeal in Civil Cases

(a) Cost Bond. (No change.)

(b) Deposit. (No change.)

(c) Increase or Decrease in Amount. (No change.)

(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given ¢øµn$el for [each] appellant by mailing [serving] a copy thereof to ¢øµn$el /øf /r¢¢ørd [on all parties in the trial court together with notice of]ør/¢a¢h/party/øther/than/the/appellant/ør//if/a party/is/not/represented/by/¢øµn$el/ /to/the/party/at/his/last known/address//¢øµn$el/shall/note/on/¢a¢h/¢øpy/$¢ry¢d the date on which the appeal bond or certificate was filed. Failure to [so] serve a /¢øpy [all other parties] shall be ground for dismissal of the [appellant's] appeal or other appropriate action if [an] appellee is prejudiced by such failure.

(e) Payment of Court Reporters. (No change.)

(f) Amendment: New Appeal Bond or Deposit. (No change.)

[COMMENT TO 1990 CHANGE: To provide immediate notice to all parties in the trial court of any appeal by any other parties.]

TRAP 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds [:

(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim] that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

[(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that setting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and setting the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.]

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a ~~child~~ [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of

the ~~child~~ [minor], unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: To conform the rule to statute.]

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending to Enforcement of Judgment Pending Appeal. The trial court's order ~~pursuant to Rule 47~~ [setting security or staying enforcement of a judgment] is subject to review ~~by~~ [on] a motion to the ~~court of appeals~~ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~court of appeals~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~court of appeals~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

TRAP 51. The Transcript on Appeal

(a) Contents. (No change.)

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." The failure to designate matters will not be grounds for complaint on appeal if the designation specifying such matter is not timely filed. The party making the designation shall serve a copy of the designation on all other parties. [Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 54(a); however, t] The failure of the clerk to include designated matter will not be grounds for complaint on appeal if the designation specifying such matter is not timely filed.

(c) Duty of Clerk. (No change.)

(d) Original Exhibits. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely designation is a jurisdictional requisite for appeal.]

TRAP 52. Preservation of Appellate Complaints

(a) General Rule. (No change.)

(b) Informal Bills of Exception and Offers of Proof. (No change.)

(c) Formal Bills of Exception. (No change.)

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in paragraph (b) of Rule 324 of the Texas Rules of Civil Procedure. [A party desiring to complain on appeal in a non-jury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with subdivision (a) of this rule.]

[COMMENT TO 1990 CHANGE: To clarify appellate requisites from non-jury trials.]

TRAP 53. The Statement of Facts on Appeal

(a) Appellant's Request. The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. [Failure to timely request the statement of facts under this paragraph shall not prevent the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 5 4(a).]

(b) Other Requests. (No change.)

(c) Abbreviation of Statement. (No change.)

(d) Partial Statement. (No change.)

(e) Unnecessary Portions. (No change.)

(f) Certification by Court Reporter. (No change.)

(g) Reporter's Fees. (No change.)

(h) Form. (No change.)

(i) Narrative Statement. (No change.)

(j) Free Statement of Facts. (No change.)

(k) Duty of Appellant to File. (No change.)

(l) Duplicate Statement in Criminal Cases. (No change.)

(m) When No Statement of Facts Filed in Appeals of Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely request is a jurisdictional requisite for appeal.]

TRAP 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion. ~~which should not be published~~

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

~~(c)~~ [(c)] Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

~~(c)~~ [(d)] Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal

issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) [(e)] Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(f) (No change.)

(g) (No change.)

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, ~~when by order~~ an opinion previously unpublished shall forthwith be released [by the clerk of the court of appeals] for publication. ~~If the Supreme Court orders~~

[Upon the denial or dismissal of an application for writ of error[,] an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication, if the Supreme Court so orders.

(i) (No change.)

[COMMENT TO 1990 CHANGE: To require publication of a court of appeals opinion following grant or refusal of writ of error by the Supreme Court of Texas and textual corrective changes.]

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS, AND OPINIONS [IN THE COURT OF CRIMINAL APPEALS]

[COMMENT TO 1990 CHANGE: To correct caption.]

TRCP 21. [Filing and Serving Pleadings and] Motions

An [pleading, plea, motion, or] application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be ~~made~~ [filed with the clerk of the court] in writing, shall state the grounds therefor, shall set forth the relief or order sought, [and a true copy shall be served on all other parties,] and shall be ~~filed/and~~ noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon [all other] ~~the/adverse/party~~ [parties], not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

[The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.]

[After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.]

[COMMENT TO 1990 CHANGE: To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73, into a single rule.]

TRCP 21a. Notice [Methods of Service]

Every notice required by these rules, [and every application to the Court for an order,] other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy [thereof] of the notice or of the application to the party to be served, or his [the party's] duly authorized agent or his attorney of record, either in person or by [agent or by courier receipted delivery or by certified or] registered mail, to [the party's] his last known address, [or by telephonic document transfer to the party's current telecopier number,] or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail [or by telephonic document transfer], three days shall be added to the prescribed period. It [Notice] may be served by a party to the suit, or his [an] attorney of record, or by any other person competent to testify. [The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.] A written

statement certificate by [a party or] an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document [instrument] was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. When/the/rule/provided/for/notice/or/service/by/registered/mail,/such/notice/or/service/may/also/be/had/by/certified/mail.

[COMMENT TO 1990 CHANGE: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved service practices more current.]

TRCP 21b. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions

If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules 21 and 21a, the court may in its discretion, on notice and hearing order all or any part of such document stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the other parties the amount of reasonable costs and expenses including attorneys fees incurred as a result of the failure, or make such other order with respect to the failure as may be just pursuant to Rule 215.

[COMMENT TO 1990 CHANGE: Repealed provisions of Rule 72, to the extent same are to remain operative, are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties.]

TRCP ~~72~~ [21b]. [Sanctions for] Failure to ~~Furnish~~ [Serve or Deliver] Copy of Pleadings [and Motions] ~~to Adverse Party~~

If any party fails to ~~furnish~~ [serve on or deliver to] the ~~adverse party~~ [other parties] ~~with~~ a copy of any pleading, [plea, motion, or other application to the court for an order] in accordance with ~~the preceding rule~~ [Rule 21 and 21a], the court

may in its discretion, ϕn/ɱϕtlϕn/ [on notice and hearing] order all or any part of such pleading [document] stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the adverse/party [other parties] the amount of reasonable costs and expenses [including attorneys fees] incurred as a result of the failure, including/attorney/fees/ or make such other order with respect to the failure as may be just [pursuant to Rule 215].

[COMMENT TO 1990 CHANGE: Repealed provisions of Rule 72, to the extent same are to remain operative, are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties.]

TRCP 72 Filing/Pleadings;/Copy/Delivered/to/All/Parties/or //////////Attorneys [Repealed]

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 or 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 deposited 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 TO 1990 CHANGE: Repealed and surviving provisions consolidated to Rule 21.]

TRAP 73. Failure to Furnish Copy of Pleadings to Adverse Party

[Repealed]

If any party fails to furnish the adverse party with a copy of any pleading in accordance with the preceding rule, the court may in its discretion, on motion, order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the adverse party the amount of reasonable costs and expenses incurred as a result of the failure, including attorney fees, or make such other order with respect to the failure as may be just.

[COMMENT TO 1990 CHANGE: Repealed and surviving provisions moved to new Rule 21b.]

TRCP 60. Of Intervenor

Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party; and such intervenor shall, in accordance with Rule 7~~2~~ [21 and 21a], notify the opposite party or his attorney of the filing of such pleadings within five days from the filing of same.

[COMMENT TO 1990 CHANGE: To revise rule reference to Rules 21 and 21a intested of repealed Rule 72.]

TRAP

~~Rule~~ 15a. Grounds For Disqualification and Recusal of Appellate Judges

~~(1) Disqualification. Appellate judges shall disqualify themselves in all proceedings in which:~~

~~(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law (except in the context of a district or county attorneys office) served during such association as a lawyer concerning the matter; or~~

~~(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or~~

~~(c) either of the parties may be related to them by affinity or consanguinity within the third degree.~~

~~(2) Recusal. Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. In the event the court sitting en banc is evenly divided the motion to recuse shall be granted.~~

A judge of an appellate court shall disqualify himself in any proceeding in which judges must disqualify themselves under Texas Rule of Civil Procedure 18b, or in which he participated in the trial or decision of any issue in the court below.

(Adopted by Supreme Court order of July 15, 1987, eff. Jan. 1, 1988.)

COMMENT: This is a new rule which states the grounds for recusal of an appellate Judge or Justice.

COMMENT TO 1990 CHANGE:

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July 18, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 18b
Texas Rules of Civil Procedure
and
Proposed Changes to Rule 15a
Texas Rules of Appellate Procedure

Dear Mr. Beck:

Enclosed please find a copy of proposed changes to TRCP 18b and TRAP 15a proposed by Justice Nathan L. Hecht. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable David Peeples

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TRCP
~~Rule~~ 18b. Grounds For Disqualification and Recusal of Judges

~~(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:~~

~~(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or~~

~~(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or~~

~~(c) either of the parties may be related to them by affinity or consanguinity within the third degree.~~

~~(2) Recusal. Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.~~

(a) A judge shall disqualify himself in any proceeding in which:

(1) his impartiality might reasonably be questioned;

(2) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(3) he served as a lawyer in the matter in controversy while in private practice, or a lawyer with whom he previously practiced law served during such association as a lawyer

concerning the matter, or he or such lawyer has been a material witness concerning it;

(4) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while in government employment;

(5) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(6) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii)is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(b) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(c) In this rule:

(1) "proceeding" includes pretrial, trial, or other

stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii)the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(d) The parties to a proceeding may waive any ground for disqualification after it is fully disclosed on the record.

(e) If a judge does not discover that he is disqualified under subparagraphs (a)(5) or (a)(6)(iii) until after he has devoted substantial time to the matter, he is not required to disqualify himself if he or the person related to him divests himself of the interest that would otherwise require disqualification.

(Added by order of July 15, 1987, eff. Jan. 1, 1988.)

00052

Supreme Court Clerk's Office, see § 2 Comment.

Notes of Decisions

2\. Generally

Notwithstanding expiration of rehearing period, a federal appellate court has power to recall a mandate in appropriate instances. American Iron and Steel Institute v. Environmental Protection Agency, C.A.3, 1977, 560 F.2d 589, certiorari denied 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

Fact that Federal Communications Commission request that Court of Appeals recall its mandate affirming Commission's order awarding construction permit to television broadcaster was filed within the same term as the mandate was of no significance as to power of court to recall mandate; significance of the "term concept" was removed by 1948 amendment to the Judicial Code. Greater Boston Television Corp. v. F.C.C., 1971, 463 F.2d 268, 149 U.S.App.D.C. 322.

§ 453. Oaths of justices and judges

Notes of Decisions

1\. Duty of court

Federal courts cannot countenance deliberate violations of basic constitutional rights; to do so would violate judicial oath to uphold Constitution of United States. Adamson v. C.I.R., C.A.9, 1984, 745 F.2d 541.

§ 454. Practice of law by justices and judges

West's Federal Forms

Disqualification of judge due to bias or prejudice, see § 5152 Comment.

Notes of Decisions

2\. Generally

Military judge does not come within prohibition set forth in this section against practice of law by any justice or judge appointed under authority of United States. U.S. v. Rachels, CMA 1979, 6 M.J. 232.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduc[redacted] financial interests, and make a reasonable effort to inform himself about [redacted] personal [redacted]l int[redacted] of h[redacted]use [redacted]nor [redacted] res[redacted] his [redacted]hold. [redacted]

(d) For the purposes of this section the following words or phrases shall have the

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1007, 102 Stat. 4667.)

1988 Amendment. Subsec. (f). Pub.L. 100-702 added subsec. (f).

1986 Amendment. Pub.L. 99-554, Title I, § 144(g)(2), Oct. 27, 1986, 100 Stat. 3097, substituted "40" for "39" in item relating to the Independent Counsel.

1978 Amendment. Pub.L. 95-598 struck out references to referees in bankruptcy in the section catchline and in subsecs. (a) and (e).

1974 Amendment. Pub.L. 93-512 substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in section catchline, reorganized structure of provisions, and expanded applicability to include magistrates and referees in bankruptcy and grounds for which disqualification may be based, and added provisions relating to waiver of disqualification.

Effective Date of 1978 Amendment. Amendment by Pub.L. 95-598 effective Oct. 1, 1979, see [redacted] ction 40[redacted] Pub.L.[redacted] set ou[redacted]ote preceding section 101 of Title 11, Bankruptcy. ... during transition period, see note preceding section 151 of this title.

Effective Date of 1974 Amendment. Section 3 of Pub.L. 93-512 provided that: "This Act [amending this section] shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act."

Legislative History. For legislative history and purpose of Pub.L. 93-512, see 1974 U.S. Code Cong. and Adm. News, p. 6351. See, also, Pub.L. 95-598, 1978 U.S. Code Cong. and Adm. News, p. 5787; Pub.L. 100-702, 1988 U.S. Code Cong. and Adm. News, p. 5982.

Federal Practice and Procedure

Bases and procedures for disqualification of federal judges, see Wright, Miller & Cooper: Jurisdiction 2d § 3541 et seq.

Competency of witnesses, see W[redacted] Criminal [redacted]05. [redacted]

Procedure for disqualification at hearings, see Wright: Criminal 2d § 600.

Note 30

withstanding that following it might result in seeming inequity. Kovacs v. U. S., C.A.Cal.1960, 355 F.2d 319, certiorari denied 86 S.Ct. 1160, 384 U.S. 944, 16 L.Ed.2d 539.

Declarations of the United States Supreme Court were binding on federal district court and on Court of Appeals, and it was for the United States Supreme Court and not for federal district court or Court of Appeals to determine whether such declarations still held good. U. S. v. Dollar, C.A.Cal.1952, 196 F.2d 551.

Federal district court was required to follow decision of United States Supreme Court rather than decision of Court of Appeals, though latter was affirmed by equally divided United States Supreme Court. U. S. v. Gable, D.C.Conn.1963, 217 F.Supp. 82.

§ 47. Disqualification of trial judge to hear appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

June 25, 1948, c. 646, 62 Stat. 872.

Historical and Revision Notes

Reviser's Note. Based on (Title 28 U.S.C., 1940 ed., § 216, and District of Columbia Code, 1940 ed., § 11-205) Acts Feb. 9, 1893, c. 74, § 6, 27 Stat. 435; July 30, 1894, c. 172, § 2, 28 Stat. 161; Mar. 3, 1901, c. 854, § 225, 31 Stat. 1225; Mar. 3, 1911, c. 231, § 120, 36 Stat. 1132.

The provision in section 11-205 of the District of Columbia Code, 1940 ed., that a justice of the district court while on the bench of the Court of Appeals in the District of Columbia shall not sit in review of judgment, order, or decree rendered by him below, was consolidated with a similar provision of section 216 of Title 28 U.S.C., 1940 ed. The consolidation simplifies the language without change of substance.

References in said section 11-205 to the power to prescribe rules, requisites of record on appeal, forms of bills of exception, and procedure on appeal, were omitted as covered by Rules 73, 75, 76, of the Federal Rules of Civil Procedure and by Rule 51 of the Federal Rules of Criminal Procedure.

Said section 11-205 contained a provision that on a divided opinion by the Court of Appeals for the District of Columbia the decision of the lower court should stand affirmed. This was omitted as unnecessary as merely expressing a well-established rule of law.

Other provisions of said section 11-205 are incorporated in section 48 of this title.

The provision of section 216 of Title 28, U.S.C., 1940 ed., with respect to the competency of justices and judges to sit, was omitted as covered by section 43 of this title.

Specific reference in said section 216 to the Chief Justice of the United States was likewise omitted inasmuch as he sits as a circuit justice.

The provision of said section 216 with respect to assignment of district judges was omitted as covered by section 291 et seq. of this title.

Provision of said section 216 relating to presiding judge was omitted as covered by section 44 of this title. 80th Congress House Report No. 308.

Library References

Judges ⊂⊃10.

C.J.S. Judges § 73.

Notes of Decisions

Note 4

See, also, Notes of Decisions under sections 144 and 455 of this title.

1. Prior law

Act Mar. 3, 1911, c. 231, § 120, 36 Stat. 1132, is but a re-enactment of a prohibition found in the former Judiciary Act, Mar. 3, 1891, c. 527, 26 Stat. 827. William Cramp, etc., Ship, etc., Bldg. Co. v. International Curtis Marine Turbine Co., Pa. 1913, 33 S.Ct. 722, 228 U.S. 645, 57 L.Ed. 1003.

Early statutes provided that the chief justice and associate justices of the Supreme Court should be likewise judges of the then existing Circuit Courts and that it should be the duty of the chief justice and each justice to attend at least one term of the Circuit Court in each district of the circuit to which he was allotted during every period of two years. In re Neagle, Cal.1890, 10 S.Ct. 658, 135 U.S. 1, 34 L.Ed. 55.

By the provisions of Acts Sept. 24, 1789, c. 20, § 4, 1 Stat. 74, and Apr. 29, 1802, c. 31, § 5, 2 Stat. 158 re-enacted in the former section 611 of the Revised Statutes, upon the hearing in the Circuit Court of an appeal from a judgment of the District Court, the district judge who rendered the decision appealed from, although he might for the information of the Circuit Court assign his reasons for that decision, was prohibited from voting or taking part in the judgment of the Circuit Court, and that judgment was to be entered according to the opinion of the judge who was not so qualified. The provision of Act Mar. 2, 1867, c. 185, § 2, 14 Stat. 515 also incorporated in the same section of the Revised Statutes, which, in order to prevent failure or delay of justice permitted such a case, by consent of parties to be heard and disposed of by the district judge when alone holding the Circuit Court, had no application when another judge is present. And the provisions of Acts Apr. 29, 1802, c. 31, § 6, 2 Stat. 159 and June 1, 1872, c. 255, § 1, 17 Stat. 196, embodied in former sections 650, 652, 693, and 697, of the Revised Statutes, did not enlarge the authority of the district judge in this respect. U. S. v. Emholt, Wis.1882, 105 U.S. 414, 15 Otto. 414, 26 L.Ed. 1077.

2. Purpose

The manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the Circuit Court of Appeals to consider and pass upon. That the question may be easy of solution or that the parties may consent to the judge's participation in its decision can make no difference, for the sole criterion under the statute is, does the case in the Circuit Court of Appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below? Rexford v. Brunswick-Balke-Collender Co., N.C.1913, 33 S.Ct. 515, 228 U.S. 339, 57 L.Ed. 864.

The purpose is to make certain that the court shall be constituted of Judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance. Moran v. Dillingham, Tex.1899, 19 S.Ct. 620, 174 U.S. 153, 43 L.Ed. 930. See, also, U. S. v. Tod, C.C.A.N.Y.1921, 1 F.2d 216, reversed on other grounds 45 S.Ct. 227, 267 U.S. 571, 69 L.Ed. 793.

3. Generally

The term "a cause" as used in Act Mar. 3, 1891, c. 517, § 3, 26 Stat. 827 includes, in its usual and natural meaning, all questions that have arisen or may arise in it, and the provision by its language and its purpose is not restricted to the case of a judge sitting on a direct appeal from his own decree on a whole cause or a single question. Moran v. Dillingham, Tex.1899, 19 S.Ct. 620, 174 U.S. 153, 43 L.Ed. 930.

4. Prior cases and issues—Disqualification

A judge who hears and disposes of a case in the first instance is ineligible to sit in the Circuit Court of Appeals for the purpose of reviewing his action in the court below although he merely enters a pro forma decree for the purpose of enabling the case to be heard for the first time by the reviewing court acting pro hac vice as a court of first instance. William Cramp, etc., Ship, etc., Bldg. Co. v. International Curtis Marine Turbine Co., Pa.1913, 33 S.Ct. 722, 228 U.S. 645, 57 L.Ed. 1003.

A district judge who denied a motion to remand to the state court is disqualified to sit in the Circuit Court of Appeals on the hearing of an appeal from the final decree of the Circuit Court in such case. Rexford v. Brunswick-Balke-Collender Co., N.C.1913, 33 S.Ct. 515, 228 U.S. 339, 57 L.Ed. 864. See, also, William

Historical and Revision Notes

Reviser's Note. Based on (Title 28 U.S.C., 1940 ed., § 26) Act Mar. 3, 1911, ch. 231, § 22, 36 Stat. 1090, which was derived from R.S. §§ 602, 603.

The last clause of section 26 of Title 28 U.S.C., 1940 ed., prescribing the powers of a designated judge is now covered by section 296 of this title.

Minor changes were made in phraseology. 80th Congress House Report No. 308.

Library References

Judges ⇐S.

C.J.S. Judges § 29 et seq.

Notes of Decisions

1. Prior law

Act Mar. 3, 1911, c. 231, § 22, 36 Stat. 1090 in substance re-enacts the latter part of the Judiciary Act of 1789, § 6, to the effect that in case of a vacancy in the office of district judge all matters pending shall be continued, of course, until the next stated term after the appointment and qualification of his successor. McDowell v. U. S., S.C.1895, 16 S.Ct. 111, 159 U.S. 596, 40 L.Ed. 271.

2. Construction

R.S. § 602, being remedial, should be liberally construed so as to carry out its general purpose which is to so provide that the administration of justice shall not through a vacancy be defeated or unduly impeded. U. S. v. Murphy, D.C.Del.1897, 82 F. 893.

3. Purpose

The general purpose of R.S. § 602 "is that the administration of justice by a District Court shall not, through a vacancy in the office of judge, be defeated or unduly impeded; that causes, civil and criminal, shall, notwithstanding the vacancy, be preserved in their full force and vitality, to be effectively proceeded in when there is a judge authorized to discharge the functions of the court; that all acts and steps, calling for or serving as the basis of judicial action, which otherwise must or should earlier be done or taken in court in the progress of a cause, shall or may be done or taken therein after the termination of the vacancy." U. S. v. Murphy, D.C.Del.1897, 82 F. 893.

4. Definitions

"Vacancy," as used in Act Mar. 3, 1911, c. 231, § 22, 36 Stat. 1090, does not require a previous appointment by the President, said Act being applicable where by Act of Congress a district judge of one district is assigned to a newly created district in the same circuit. Bland v. Kennamer, C.C.A.Okl.1925, 6 F.2d 130.

A recognizance entered into by a defendant and his surety is "process" within the meaning of R.S. § 602. U. S. v. Murphy, D.C.Del.1897, 82 F. 893.

5. Generally

During a vacancy in the office of district judge for a district coextensive with a state, no other judge is authorized to sit therein, and all judicial action remains in abeyance until the vacancy is filled, or another judge is designated, pursuant to law, to exercise the judicial functions temporarily. U. S. v. Murphy, D.C.Del.1897, 82 F. 893.

6. Authority of assigned judge

Where, on the death of a District Judge to whom a case had been submitted on motions by both parties for directed verdict, the case was duly assigned to another judge, before whom it was reargued without objection, and the issues submitted to him for decision, his decision on the motions had the same force as that of the original judge would have had, including decision of whatever question of fact was involved. Thomas-Bonner Co. v. Hooven, Owens & Rentschler Co., C.C.A.Ohio 1922, 284 F. 386.

It is only when the office of district judge of one district is vacant that the judge of another district has au-

to discharge judicial duties in the former district, and a leave granted by the judge of another district to sue a receiver, the judge of the district being out of the state, is void. American Loan & Trust Co. v. East & West R. Co., C.C. Ga.1889, 40 F. 182.

7. Puerto Rico

Executive Order of President designating judge of Supreme Court of Puerto Rico to serve as acting judge in United States District Court for Puerto Rico was not void, where regular District Judge was absent. Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico 1944, 141 F.2d 939, certiorari denied 65 S.Ct. 856, 324 U.S. 859, 89 L.Ed. 1417, rehearing denied 65 S.Ct. 1019, 324 U.S. 891, 89 L.Ed. 1438. See, also, Petition of Capo, C.C.A. Puerto Rico 1942, 131 F.2d 531.

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

June 25, 1948, c. 646, 62 Stat. 898; May 24, 1949, c. 139, § 65, 63 Stat. 99.

Historical and Revision Notes

Reviser's Note. Based on (Title 28 U.S.C., 1940 ed., § 25) Act Mar. 3, 1911, c. 231, § 21, 36 Stat. 1090.

The provision that the same procedure shall be had when the presiding judge disqualifies himself was omitted as unnecessary. (See section 291 et seq. and section 455 of this title.)

Words, "at which the proceeding is to be heard," were added to clarify the meaning of words, "before the beginning of the term." (See U. S. v. Costea, D.C. Mich.1943, 52 F.Supp. 3.)

Changes were made in phraseology and arrangement. 80th Congress House Report No. 308.

1949 Amendment. Act May 24, 1949, substituted the limitation that "A party may file only one such affidavit in any case" for "A party may file only one such affidavit as to any judge."

Legislative History. For legislative history and purpose of Act May 24, 1949, see 1949 U.S.Code Cong.Service, p. 1248.

Library References

Judges 49, 51.

C.J.S. Judges §§ 82, 92 et seq.

Notes of Decisions

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July 18, 1989

Mr. David J. Beck
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Re: Proposed Changes to Rule 18b
Texas Rules of Civil Procedure
and
Proposed Changes to Rule 15a
Texas Rules of Appellate Procedure

Dear Mr. Beck:

Enclosed please find a copy of proposed changes to TRCP 18b and TRAP 15a proposed by Justice Nathan L. Hecht. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable David Peeples

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Rule 271 Charge ~~to~~ [of] the ~~jury~~ [Court]

NLT New Paragraph [1. At the conclusion of the introduction of evidence pursuant to Rule 265(b), the party who opened the evidence shall submit in writing to the court and the other parties that party's proposed jury questions, instructions, and definitions. Thereafter, at the conclusion of the introduction of its evidence pursuant to Rule 265(c), the adverse party shall submit in writing to the court and the other parties that party's proposed jury questions, instructions, and definitions. Thereafter at each conclusion of the introduction of evidence pursuant to Rule 265(e) by each intervenor, that intervenor shall submit its proposed jury questions, instructions, and definitions in writing to the court and the other parties. The court may order that any party's jury questions, instructions, and definitions must be submitted at any other time for the convenience of the court.]

Modified Former Rule 271 [2. In all jury cases,] ~~In~~ [u]nless expressly waived by the parties, [at the conclusion of the evidence,] the trial court shall prepare and ~~in writing~~ deliver a written charge to the ~~jury~~ [parties, signed by the court, and filed with the clerk, and the charge so filed shall be a part of the record of the case.]

Part of Former Rule 278 [3. The court shall submit the questions and instructions and definitions, raised by the written pleadings and the evidence. The

Part of Former Rule 277 court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The

Part of Former Rule 277

placing of the burden of proof may be accomplished by instruction rather than by inclusion in the question.

Part of Former Rule 277

4. Inferential rebuttal questions shall not be submitted in the charge.

Part of Former Rule 277

5. The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

Part of Former Rule 278

6. The court shall not submit other and various phases or different shades of the same question.

Part of Former Rule 277

7. In any cause in which the jury is required to apportion the loss among the parties, the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the parties found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the party injured. The court may predicate the damage question or questions upon affirmative findings of liability.

Part of Former Rule 278

8. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party.

Part of Former Rule 277

9. The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their

answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

Part of Former Rule 278

10. Nothing herein shall change the burden of proof from what it would have been under a general denial.]

[COMMENT TO 1990 CHANGE: The jury charge rules are entirely rearranged to follow better the order of proceedings in the trial court, to provide means for counsel to assist the court in preparing the charge, to place together the formal requisites of the charge, and to provide that the charge prepared by the court be signed and filed prior to objections. The court may modify its prepared charge as provided by Rule 272(5).]

Rule 272 ~~Requisites~~ [Objections to the Charge of the Court]

Moved to Rule 271 Para. 2

~~The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal, and when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.~~

Rewritten below in this Rule 272

Moved to Rule 273 Para. 3

Moved to Rule 273 Para. 4

Moved to Rule 273 Para. 3

Modified Former Rule 272

[1. The charge, prepared by the court and filed pursuant to Rule 271 shall be submitted to the respective parties or their attorneys for their inspection and the court shall allow them reasonable time in which to examine and present objections to the charge and to assign error pursuant to Rule 273 outside the presence of the jury.

Part of Former Rule 274

2. Each party may object to the charge. A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that clearly points out the portion of the charge to which complaint is made and is specific enough to support the conclusion that the trial court was fully aware of the ground of complaint and chose to overrule the objection.

McDonald v. New York Central Fire, 380 S.W.2d 545 (Tex. 1964)

Citizens v. Bowles, 663 S.W.2d 845 (Tex.App. 1983, writ dism'd)

Part of Former Rule 274

3. When the complaining party's objection or requested question, definition, or instruction is, obscured or concealed by voluminous unfounded objections, minute differentiations, or numerous unnecessary requests, such objection or request shall be a nullity.

Part of Former Rule 274

4. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

New Paragraph

5. The court may modify the charge of the court at any time before it is read to the jury or as provided in Rule 286.]

[COMMENT TO 1990 CHANGE: To provide procedures and requisites for objecting to the charge of the court.]

Rule 273 ~~Jury Submissions~~ [Preservation of Error In the Charge of the Court]

Repealed Rule 273

~~Each party may present to the court and request written questions, definitions, and instructions to be given to the jury, and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any questions, definitions, or instructions shall be made separately and apart from such party's objections to the court's charge.~~

New First Paragraph

[1. No failure by the court to submit a question, instruction, or definition, nor any defect therein, shall be a ground for reversal of a judgment unless the party complaining on appeal made a proper objection pursuant to Rule 272.

Part of Former Rule 272

2. The objections shall be presented to the court in writing or be dictated to the court reporter in the presence of the court and opposing counsel before the charge is read to the jury. All objections not so presented shall be considered waived. It shall be presumed, unless otherwise noted in the record, that any objections made by a party were presented at the proper time.

Part of Former Rule 272

3. The court shall announce its rulings on the objections before reading the charge to the jury and shall endorse the rulings on the objections or dictate same to the court reporter on the record in the presence of counsel.

Part of Former Rule 272

4. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a record for appeal of the rulings of the court on the objections.

New Paragraph

5. If, upon any objection, the trial court orders and provides reasonable time for the objecting party to submit a question, instruction, or definition in writing in substantially correct wording to cure the objection, the objecting party shall comply with the court's order, and only in that event shall a failure to submit a jury question, instruction, or definition in writing in substantially correct wording also be necessary to preserve an objection to the court's charge for appellate purposes. If the trial court does not make such order, failure of any party to submit a question, instruction, or definition in writing shall never be a waiver of any objection made in compliance with Rule 272. ~~to the court's charge.~~

DFI

New Paragraph

5. (Alternate) If, upon any objection, the trial court orders and provides reasonable time for the:

a. party objecting to an instruction or definition to submit an instruction or definition in writing in substantially correct wording to cure that party's objections; or

b. party with the burden of proof on a question to submit a question in writing in substantially correct wording to cure any party's objections;

such party shall comply with the court's order, and only in the event of such order shall a failure to submit a jury question, instruction, or definition in writing in substantially correct wording also be necessary for such party to preserve an objection to

~~the court's charge for appellate purposes. If the trial court does not make such order, failure to submit a question, instruction, or definition in writing shall never be a waiver of any objection to the court's charge.~~

New Paragraph

6. Compliance with Rule 271(1) is not a requisite for appeal of any objection to the court's charge, and failure to comply with Rule 271(1) shall never constitute waiver of any error in the court's charge or of any objection to the court's charge made pursuant to Rules 272 and 273.

New Paragraph

7. For purposes of appeal, objections shall be deemed overruled and requests shall be deemed refused if not ruled on by the court or cured by modification in the court's charge, and no waiver of any objection or request shall result solely from the absence of an express ruling in the record.]

[COMMENT TO 1990 CHANGE: To place in a single rule all requisites and predicates for appellate review of error in the charge of the court and to eliminate any necessity to request questions, instructions of definitions in writing for purposes of appeal except as required by new paragraph 5.]

Rule 274 Objections and Requests

Moved to Rule 272

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. When the complaining party's objection, or requested question, definition, or instruction is in the opinion of the appellate court, obscured by or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be unreviewable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

Substance in Rule 273

Moved to Rule 272

Moved to Rule 272

[COMMENT TO 1990 CHANGE: The provisions of Rule 274, to the extent they remain viable, have been relocated to Rules 272 and 273.]

Rule ~~275~~ [274] Charge [of the Court to be] Read [to the Jury] Before Argument

Former Rule 275

Before the argument is begun, the trial court shall read the [entire] charge to the jury in the precise words in which it ~~was written~~ [is completed], including all questions, definitions, and instructions ~~which the court may give~~.

[COMMENT TO 1990 CHANGE: Derived from former Rule 275]

Moved to Rule 274

~~Rule 275 Charge Read Before Argument~~

~~Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, definitions, and instructions which the court may give.~~

[COMMENT TO 1990 CHANGE: The substance of former Rule 275 has been renumbered Rule 274]

TRCP ~~279~~. [275. Grounds or Elements] Omi~~ssions~~[tted] From the Charge

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

[COMMENT TO 1990 CHANGE: Former Rule 279 has been renumbered Rule 275.]

Rule 276 Refusal or Modification [Repealed.]

Repealed

When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall indorse thereon "Refused," and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows:" (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

[COMMENT TO 1990 CHANGE: Rule 276 was repealed to eliminate the necessity for submitting written questions, instructions, or definitions as a predicate for perfecting appeal except as required by paragraph 5 of Rule 273.]

Rule 277 Submission to the Jury [Repealed.]

Moved to Rule 271 Para. 3

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Moved to Rule 271 Para. 4

Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

Moved to Rule 271 Para. 7

In any cause in which the jury is required to answer a question or questions inquiring what percentage, if any, of the negligence or causation, if any, that caused the injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may prepare the damage question or questions upon affirmative findings of liability.

Moved to Rule 271 Para. 5

The court may submit a question disjunctively when it is appropriate from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

Moved to Rule 271 Para. 9

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of their answers when it is proper and a part of an instruction or definition.

[COMMENT TO 1990 CHANGE: The provisions of former Rule 277 have to the extent they remain viable been relocated to Rule 271.]

Rule 278 Submission of Questions, Definitions, and Instructions

[Repealed]

Moved to Rule 271 Para. 3

The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party.

Moved to Rule 271 Para. 10

Nothing herein shall change the burden of proof from what it would have been under a general denial.

Moved to Rule 271 Para. 6

A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless it is submitted substantially correct wording, has been requested in writing and rendered by the party complaining of the judgment, provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party.

Repealed

Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and rendered by the party complaining of the judgment.

[COMMENT TO 1990 CHANGE: The provisions of former Rule 278, to the extent they remain viable, have been relocated to Rule 271.]

TRCP 279. Omissions From the Charge

[Repealed]

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict. Regardless of

J. Sims McDONALD, Petitioner,

v.

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, Respondent.

No. A-10025.

Supreme Court of Texas.

June 10, 1964.

Rehearing Denied July 15, 1964.

Action on insurance policy which covered loss of house if caused by wind or hurricane but not if caused by tidal wave, high water or overflow, whether wind driven or not. On a jury verdict the 130th District Court, Matagorda County, G. P. Hardy, Jr., J., entered judgment for the insured, and the insurer appealed. The Austin Court of Civil Appeals, Third Supreme Judicial District, Matagorda County, reversed, 374 S.W.2d 767. On further appeal the Supreme Court, Culver, J., held that testimony of a neighbor that he drove on a peninsula about one mile from plaintiffs' house and shortly after that the house was found destroyed was sufficient to sustain a jury finding that the house was destroyed by hurricane, and not by tidal wave.

Judgment of Court of Civil Appeals reversed; judgment of trial court affirmed.

1. Insurance ⇐429.1(9)

Testimony of neighbor that he drove on peninsula about one mile from plaintiffs' house and shortly after that plaintiffs' house was found destroyed was sufficient to sustain jury finding that house was destroyed by hurricane, and not by tidal wave, in action on insurance policy which covered wind but not wave.

2. Appeal and Error ⇐758(3)

Points that court erred in overruling defendant's motions for instructed verdict and judgment n. o. v. and in entering judgment on jury's verdict because there was insufficient evidence that damage was caused by wind and not by water were not applicable to granting of new trial after entry of judgment and, in court of civil appeals, raised only question of legal sufficiency of evidence or point of no evidence, and not that findings were against great weight and preponderance of credible evidence.

3. Trial ⇐366

Under rule that claim that evidence was insufficient to warrant submission of issue may be made for first time after verdict, objection to submission of special issue on grounds of no evidence and insufficient evidence to warrant submission and that submission was against great weight and preponderance of evidence raised only point of no evidence. Rules of Civil Procedure, rule 279.

4. Trial ⇐366

Defendant's objection to instruction "because such issue in its present form puts an improper and onerous burden on the defendant" was obscured by many formal, unfounded and trivial objections and was too general. Rules of Civil Procedure, rule 274.

Harris, Salyer & Huebner, Bay City, Hill, Brown, Kronzer, Abraham, Watkins & Steely, Al Taylor, Houston, for petitioner.

Bryan & Patton, Julietta Jarvis, Houston, for respondent.

CULVER, Justice.

Petitioner, McDonald, brought this action against New York Central Mutual Fire Insurance Company to recover for the destruction of his house located in Matagorda County under the terms of a policy of insurance issued by that company. The policy covered loss caused by wind and hurricane but excluded loss caused by tidal wave, high water or overflow, whether driven by wind or not.

The jury found that the winds of the hurricane directly and proximately caused the loss and damage; that the loss was not caused by tidal wave, high water or overflow whether driven by wind or not and that the loss did not result from the combined action of the wind, tidal wave, high water or overflow. Based on this verdict the trial court entered a judgment in favor of McDonald and against the Insurance Company. The Court of Civil Appeals reversed and rendered judgment that McDonald take nothing, holding that the jury's findings failed to be supported by the evidence. 374 S.W.2d 767. From a review of the record we reach a conclusion to the contrary.

Admittedly the house was totally destroyed at some time during the passage of Hurricane Carla through this area in September of 1961. It was one of the most destructive storms that has visited the Texas Coast so far as property loss is concerned. Mr. McDonald left his house on Saturday morning, September 9th, and when he returned on Wednesday, the 13th, the house was gone. The evidence bearing on the loss is circumstantial. The only testimony was given by Mr. and Mrs. Jensen who lived nearby and rode out the storm in a concrete building. The remainder of the evidence consisted of maps and official records and reports.

McDonald's house was located on Turtle Bay about 6 feet above water level at mean low tide and was supported on pilings approximately 4 feet above the ground. Turtle Bay, so-called, is a rather long, narrow inlet generally about a mile in width extending in a northeasterly direction from Tres Palacios Bay, a much larger body of water. Palacios Bay in turn forms a small and the upper part of Matagorda Bay, which is some 15 miles in width. Between Turtle Bay and Tres Palacios Bay there extends a long narrow peninsula almost the entire length of Turtle Bay. Mr. Jensen lived and grazed cattle on the land formerly the site of Camp Hulon west of the town of Palacios. McDonald's house was located on the west side of Turtle Bay directly across from Camp Hulon.

On Sunday, September 10th, Jensen and his wife made several trips down this peninsula to move his cattle back from the water's edge where they had drifted or were blown by the wind. On the morning of that day he went to the end of the long peninsula and found that the water level was 18 inches to two feet over mean low tide. At that time he could not see across the bay on account of the rain. In the afternoon he made two similar trips for the same purpose and found the conditions the same as they existed at the time of the first trip. In his opinion the wind was blowing from the northeast at the rate of 100 miles per hour. On the morning of the following day, Monday, September 11th, he drove his car out on the peninsula but could get no further than the narrowest part of the peninsula which was about a mile from the tip end. The elevation at that point is about the same as that across Turtle Bay where the insured property was located. At that time Jensen still could not see across the bay. According to him the wind velocity had increased to about 150 miles per hour. Between 3:00 and 4:00 o'clock that same afternoon he made another trip out on the peninsula. At that time the lull came and lasted for about 15 minutes. The rain ceased and he could see across Turtle Bay. McDonald's house was gone and all he saw were the high line poles along where the house had stood. After the lull the water began to rise rapidly and he and his wife hurried back to the safety of the concrete refrigeration building. Mrs. Jensen accompanied her husband on his last trip on Monday and also looked across the bay approximately a half mile to the location of the house and saw nothing standing but the poles.

Introduced in evidence were various official reports, charts and maps from the United States Weather Bureau and the United States Corps of Engineers. It seems to be undisputed that at all times before the eye or center of the storm reached

the Palacios area the wind was blowing from a northeasterly direction. After the eye passed inland, due to the counter-clockwise motion of these hurricanes, the wind was reversed and in the Palacios area blew in the opposite direction. The data introduced in evidence showed that the leading edge of the eye reached Port Lavaca, some 20 miles southwest of the Palacios area between 3 and 4 p. m. Monday, the 11th. In advance of the eye many stations along the Coast that morning reported the highest recorded wind velocity. A peak gust of 170 miles per hour was estimated at Port Lavaca. Gusts of 150 miles per hour were estimated at other nearby points. Sustained winds were reported at more than 115 miles per hour at Matagorda, which is about 15 miles east of Palacios.

The Insurance Company counters with a report from the Palacios Federal Aeronautics Authority station, which recorded that the wind was from the north and northeast on the 10th and that the highest wind observed on that day was up to 48 miles per hour. But the last observation was made at 5:58 p. m. on that day and the station was abandoned shortly thereafter. The report did show that from the beginning of that day the wind was more or less steadily increasing in velocity.

[1] So far as the high tides and wind-driven water are concerned the Weather Bureau at Galveston gives a report on the peak flooding at various points along the Texas Coast. The information was collected from all available sources but mostly was obtained from the Army Corps of Engineers. According to this report the peak tide at Port Lavaca was 16.6 feet above mean sea level. Of course to determine the depth of the water above ground at any point the ground elevation must be subtracted. At Port O'Connor the peak was 14½ and at Palacios 15.4. However, at these points the height of the tide was ascertained from an observation of the high-water mark. The report does not profess to determine when the peak was reached. Unquestionably, all of this area was flooded by hurricane-driven water, but we may reasonably infer from the evidence before us that the flooding of this area took place in the second phase of the hurricane after the center had reached the area and after the ensuing lull. Up until that time the wind was blowing from the northeast and was calculated to blow water from Turtle Bay toward the southwest and away from McDonald's house. There were no bodies of water northeast. The Insurance Company lays much stress on the statement made by Jensen that on the occasion of his last visit down the peninsula to round up his cattle early in the afternoon on Monday and before the lull, he watched big waves in the bay "easily 15 to 20 feet high". Certainly he was not talking about any waves in the narrow Turtle Bay, but out into Tres Palacios and Matagorda Bays. Had those waves been sweeping toward the peninsula and toward the property in question, it would seem that Jensen and his wife and automobile would have been swept away. The Company argues that waves always go toward the shore, but with a gale blowing from the northeast at the rate of 100 or more miles per hour, it would naturally be inferred that the water was being blown upon the shores around Port O'Connor and the Matagorda Peninsula. The point where Jensen was standing when the wind ceased blowing and the rain stopped, and he could see across Turtle Bay, was about the same elevation as the location of McDonald's house on the other side of Turtle Bay. In other words we believe the evidence to be conclusive that if on the day previous and at 4:00 o'clock on Monday afternoon the witness could have driven his car out on the peninsula to a point a little to the south of and about a mile from McDonald's house, there had been no flooding or wind-driven waters up to that time which could have destroyed the house. We hold, therefore, that the foregoing jury findings are supported by evidence.

[2] The insurer brings forward as a cross-point that, in the event we should agree that there is evidence to support the jury's findings that the house was destroyed by wind and not as a result of wind-driven water, the cause should be remanded to the district court for a new trial since a finding of no evidence by the Court of Civil Appeals includes necessarily a finding of insufficient evidence.[1] However, the insured does not raise in the Court of Civil Appeals the point of "insufficient evidence" to support the jury findings or the point that the findings are against "the great weight and preponderance" of the credible evidence. Its points are premised on the proposition that the Court erred in entering judgment on the jury's verdict and correspond to the grounds appearing in its amended motion for new trial. The points are in the following form:

> "The Court erred in overruling defendant's motions for instructed verdict and judgment n. o. v. and in entering judgment on the jury's verdict because there was insufficient evidence that the damage to plaintiff's beach house was covered by the policy sued upon in that there was insufficient evidence that the damage was caused by the wind and insufficient evidence that it was not caused by water or the concurring action of wind with rising water and wind driven water."

The points do not seek relief from the jury findings on the ground that they are not supported by sufficient evidence or that they are against the great weight of the evidence, but relate only to the type of judgment that the Court entered. They are not applicable to the granting of a new trial after the entry of a judgment. We therefore hold that the points in the Court of Civil Appeals above referred to only raised the legal sufficiency of the evidence or the point of no evidence. Houston Maritime Association v. South Atlantic & Gulf Coast District, I.L.A., Tex.Civ.App., 367 S.W.2d 705, no writ, 1962; Calvert, 38 Texas Law Review 361.

Further praying in the alternative that the cause be remanded, the insurer asserts that it specially pleaded the exclusion clause of the policy and therefore the burden of proving a loss from a hazard insured by the policy and not excepted by the exclusions should have been laid upon the plaintiff. Coyle v. Palatine, 222 S.W. 973 (Tex.Comm.App.1917); Shaver v. National Title & Abstract Co., 361 S.W.2d 867, (Tex.1962).

This has reference to the form of Special Issues 2 and 3, No. 2 reading as follows:

> "Do you find from a preponderance of the evidence that tidal wave, high water, overflow, whether driven by wind or not, * * * directly and properly caused damages to plaintiff's house on the premises in question on or about September 11, 1961?"

Number 3 followed the same form reading:

> "Do you find from a preponderance of the evidence that the loss and damage to the house of the plaintiff, J. Sims McDonald, was a direct and proximate result of the combined action of the wind of Hurricane Carla and tidal wave, high water or overflow, whether driven by wind or not?"

Rule 274 provides that the objecting party must point out distinctly the matter to which he objects and the grounds of his objections, and where the same are obscured or concealed by voluminous unfounded objections or minute differentiations, the objection shall be deemed to be waived. The matter will bear a somewhat extended discussion.

The first Special Issue read as follows:

> "Do you find from a preponderance of the evidence that the winds of Hurricane Carla, on or about September

1. Barker v. Coastal Builders, 153 Tex. 540, 271 S.W.2d 798.

11, 1961, directly and proximately caused loss and damage to the house on the property in question?"

To this issue the insurer objected on ten numbered grounds:

"(1) Because there is no evidence to warrant or support the submission of Special Issue No. 1;

"(2) Because there is insufficient evidence to warrant or support the submission of Special Issue No. 1;

"(3) Because the submission of Special Issue No. 1 is against the great weight and preponderance of probative evidence adduced in this case;

"(4) Because such issue in its present form consists of a judicial comment on the weight of the evidence;

"(5) Because such issue is assumptive and presumptive;

"(6) Because such issue amounts to a general charge in a special issue case;

"(7) Because such issue is an irrelevant and immaterial issue in this case;

"(8) Because such issue in its present form puts an improper and onerous burden on the Defendant;

"(9) Because the pleadings as relied on by the Plaintiff do not warrant or support the submission of such issue;

"(10) Because the said Plaintiff, not having borne the burden, no fact issue of any kind has been made to go to the Jury, and the Court is again moved to sustain Defendant's Motion for Instructed Verdict at the end of Plaintiff's case and at the end of the whole case."

[3] The first three objections raised only the point of no evidence. Rule 279 provides that a claim that the evidence was insufficient to warrant the submission of an issue may be made for the first time after the verdict. As they relate to the first special issue the last seven objections, so far as we can observe, had no validity whatever. It could not be contended in good faith that this issue was on the weight of the evidence; that it was assumptive or presumptive; that it amounted to a general charge; that it was irrelevant and immaterial; that it placed an improper burden on the defendant or that it was not supported by the pleadings.

[4] The same ten objections were leveled to Issues 2 and 3 as well as to Issues 4, 5 and 7 which inquired whether one McGlathery had filed a sworn proof of loss with the Insurance Company; whether McGlathery was acting as agent for McDonald and what was the actual cash value of the property in question. In each of these issues the burden of proof was properly placed upon the plaintiff. The objection raised by the insurer indiscriminately to all issues was "because such issue in its present form puts an improper and onerous burden on the defendant". Similar objections have been held by Courts of Civil Appeals to be too general to direct the trial court's attention to any error in the charge.[2] It certainly does not as clearly state the nature of the error as the insurer does in its brief filed here in the following language:

"The form of this issue as submitted places the burden of proof on the defendant, rather than on the plaintiff, and allows the jury to find, in effect, that the loss is covered by the policy if the evidence is equal."

If the objection had been presented to the Court in those words there could have been no doubt as to its meaning. But whether or not the objection as presented is too general to merit consideration, we nevertheless say that it is obscured by many

2. Texas-Mexico Railway Co. v. Bell, Tex.Civ.App.1937, 110 S.W.2d 199, no writ; Parker v. Jones, Tex.Civ.App.1939, 130 S.W.2d 1072, no writ; Karotkin Furniture Co. v. Decker, Tex.Civ.App.1930, 32 S.W.2d 703, affirmed 50 S.W.2d 795.

formal, unfounded and trivial objections. Rule 274.

The late Chief Justice Alexander, in speaking of the reason for the adoption of this rule, had this to say: "It is believed that an objection that is concealed in a mass of immaterial and untenable objections, is as effectively smothered and concealed as one that is counched in veiled and uncertain language." Evidently counsel presented to the trial court the same set of stock objections to each and all issues without any consideration of pertinence or valid relationship. The great majority of them had no legal application and admittedly pointed out no error. In our opinion it does not appear that as to Issues 2 and 3 the trial court was made fully cognizant of the complaint that the burden of proof was cast upon the defendant rather than upon the plaintiff but nevertheless deliberately chose to submit the issue in the form which placed the burden upon the defendant.

For the foregoing reasons the judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

CITY OF SWEETWATER et al., Petitioners,

v.

J. T. GERON, Respondent.

No. A-9709.

Supreme Court of Texas.

June 3, 1964.

Rehearing Denied July 15, 1964.

Former city policeman's action against city to compel reinstatement following removal because he had attained age specified in city ordinance as mandatory age for retirement. The 32nd District Court, Nolan County, Eldon B. Mahon, J., rendered judgment for defendants and plaintiff appealed. The Court of Civil Appeals, Eleventh Supreme Judicial District, 368 S.W.2d 151, reversed and entered judgment for plaintiff and defendants brought error. The Supreme Court, Hamilton, J., held that city ordinance providing for maximum age limit of 65 years for city employees was not repugnant to provisions of Firemen's and Policemen's Civil Service Act providing a system of removal for classified employees for disciplinary reasons.

Reversed.

1. Municipal Corporations ⇐65

When Legislature limits the broad powers granted to home rule cities by the Constitution, its intention to do so should appear with unmistakable clarity. Vernon's Ann.St.Const. art. 11, § 5.

2. Municipal Corporations ⇐218(1)

Provision in Firemen's and Policemen's Civil Service Act granting Civil Service Commission power to dismiss for disciplinary cause does not prevent city from legislating in other fields which may cause dismissal of employees. Vernon's Ann.Civ.St. art. 1269m, §§ 5, 16, 16a.

3. Municipal Corporations ⇐185(1), 198(2)

Provision of Firemen's and Policemen's Service Act which merely regulates and controls matter of demotions and dismissals does not grant city authority to make demotions and dismissals but recognizes that the provision regarding removal or suspension for cause is not exclusive as to cause for dismissal. Vernon's Ann.Civ. St. art. 1269m, §§ 5, 21.

4. Municipal Corporations ⇐592(1)

City ordinance providing for maximum age limit of 65 years for policemen and firemen was not repugnant to provisions of Firemen's and Policemen's Civil Service Act providing a system of removal of classified employees for disciplinary reasons.

Date

2/8/84

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CITIZENS STATE BANK OF DICKINSON, Texas and Citizens State Bank of Dickinson Texas, Independent Executor of the Fagans Dickson, Deceased, Appellants,

v.

L.R. BOWLES, Jr., Trustee, Appellee.

No. A14-82-295CV.

Court of Appeals of Texas, Houston (14th Dist.).

Sept. 29, 1983.

Rehearing Denied Nov. 23, 1983.

Purchaser brought action against executor-vendor, alleging breach of contract, fraud, and violation of Deceptive Trade Practices Act. The District Court, Galveston County, Ed. J. Harris, J., entered judgment on jury verdict for purchaser, and executor appealed. The Court of Appeals, Ellis, J., held that: (1) purchaser had authority, in capacity as trustee, to bring action on behalf of trust property; (2) judgment was properly rendered against vendor, individually, though original petition named it in its representative capacity as executor; (3) vendor was not entitled to judgment notwithstanding verdict; (4) evidence of probative force supported finding that vendor violated Deceptive Trade Practices Act; (5) objection to jury charge requesting determination of reasonable market value was not sufficient to preserve error; (6) fair market value of property was properly determined over course of several months in which alleged wrongful facts occurred; (7) vendor was not entitled to submission of its special issue which was not significantly distinct from that submitted; and (8) award of $350,000 in exemplary or additional damages was not excessive.

Affirmed.

1. Trusts ⇐257

While generally in suits involving trust property, both trustee and beneficiaries should be made parties, exception occurs where, by terms of trust, power to litigate concerning such property is expressly conferred upon trustee. Vernon's Ann.Texas Rules Civ.Proc., Rule 39.

2. Abatement and Revival ⇐27
Parties ⇐18

Vendor was not entitled to abatement and leave to add parties, where purchaser, who brought suit in capacity as trustee, was expressly authorized by trust agreement to prosecute any claims or lawsuits affecting trust property, so that trust beneficiaries were not required to be joined to accomplish just adjudication. Vernon's Ann.Texas Rules Civ.Proc., Rule 39.

3. Parties ⇐95(6)

General rule that defendant who has answered or appeared in case is charged with notice of subsequent amendments to plaintiff's petition without necessity of new citation applies to amended pleading complaining of present party in additional capacity.

4. Judgment ⇐244

Judgment rendered against bank, individually, was proper, where bank was named in original petition in its representative capacity as independent executor and bank did not claim that it was not before court at time petition was amended to name bank in its individual capacity or that it did not timely receive copies of amended pleadings pursuant to rule. Vernon's Ann.Texas Rules Civ.Proc., Rule 72.

5. Judgment ⇐199(3.5)

If there is any evidence of probative force upon which jury could have made findings upon which judgment is based, court does not err in overruling motion for judgment notwithstanding verdict.

6. Judgment ⇐199(3.2)

In ruling on motion for judgment notwithstanding verdict, court must review record in light most favorable to jury findings, considering only evidence and inferences which support them, and rejecting evidence and inferences contrary to finding.

7. Judgment ⇐199(3.5)

Executor-vendor was not entitled to judgment notwithstanding verdict, where evidence demonstrated that executor's vice-president and trust officer did not inform purchaser of third party's option to purchase regarding subject property at any time during negotiations for its sale, that purchase option was not filed of record at time earnest money contract was executed, and that executor represented that it had power to convey property in its entirety.

8. Consumer Protection ⇐32, 34

To support judgment based on violation of Deceptive Trade Practices and Consumer Protection Act, plaintiff must be consumer of "goods" and show that he has been adversely affected by any of false, misleading, or deceptive acts or practices declared unlawful in Act, such as representation that agreement confers or involves rights which it does not have. V.T.C.A., Bus. & C. §§ 17.41–17.63, 17.45, 17.46.

9. Consumer Protection ⇐8

In purchaser's action against executor-vendor, evidence that executor represented that agreement for purchase of real property conferred or involved rights it did not have supported finding that executor violated Deceptive Trade Practices and Consumer Protection Act. V.T.C.A., Bus. & C. §§ 17.41–17.63, 17.45, 17.46.

10. Appeal and Error ⇐1078(5)

Points of error which appellant did not brief with respect to overruling of its motion to disregard answers to special issues and objection to special issues were waived on appeal. Vernon's Ann.Texas Rules Civ. Proc., Rules 418, 418(e).

11. Trial ⇐279

Objection to charge does not meet requirements of rule that party point out distinctly matters to which he objects and grounds of his objection unless defect relied upon and grounds of objection are stated specifically enough to support conclusion that trial court was fully cognizant of ground of complaint and deliberately chose to overrule it. Vernon's Ann.Texas Rules Civ.Proc., Rule 274.

12. Appeal and Error ⇐231(9)

In purchaser's action against executor-vendor, vendor's objection to charge which asked jury to determine reasonable market value of property on grounds that it did not "present the legal requirement to determine a measure of damage," was not sufficient to preserve error. Vernon's Ann.Texas Rules Civ.Proc., Rule 274.

13. Consumer Protection ⇐40
Fraud ⇐59(1)
Vendor and Purchaser ⇐351(3)

In purchaser's action against executor-vendor alleging breach of contract, fraud, and violation of Deceptive Trade Practices Act, determination of fair market value of property over three-month period, rather than on specific date, was proper, as acts allegedly committed occurred during course of several months. V.T.C.A., Bus. & C. §§ 17.41–17.63.

14. Appeal and Error ⇐181

Objection which was not asserted in trial court was waived for purposes of appeal.

15. Trial ⇐351.5(4)

In purchaser's action against executor-vendor alleging breach of contract for sale of real property, refusal to submit special issue tendered by vendor was not error, in light of lack of significant distinction between issue which was submitted and that tendered.

16. Appeal and Error ⇐1062.2

Case will not be reversed where trial court has failed to submit other and various phases or different shades of same issue.

17. Appeal and Error ⇐1079

Where executor-vendor failed to present coherent argument to support claims that trial court erred in overruling his special exceptions to purchaser's petition and in allowing purchaser to present improper and inflammatory evidence, provided no applicable authority, and made little or no reference to record, vendor failed to comply with governing rule and thus

waived points for purposes of appeal. Vernon's Ann.Texas Rules Civ.Proc., Rule 418.

18. Appeal and Error ⇐1004.1(10)

Generally, in absence of affirmative showing of bias or prejudice, jury finding in exemplary or additional damages will not be disturbed based on ground of excessiveness if there is any probative evidence to sustain award.

19. Consumer Protection ⇐40

Jury finding of $350,000 in exemplary or additional damages for vendor's violation of Deceptive Trade Practices Act was based on probative evidence, and in absence of affirmative showing of bias or prejudice, was not excessive. V.T.C.A., Bus. & C. §§ 17.41–17.63, 17.45, 17.46.

Charles R. Hancock, Dickinson, for appellants.

Frederick J. Bradford, William T. Little, Otto D. Hewitt, III, McCleod, Alexander, Powel & Apffel, Galveston, for appellee.

Before J. CURTISS BROWN, C.J., and DRAUGHN and ELLIS, JJ.

OPINION

ELLIS, Justice.

This is an appeal from a judgment in favor of L.R. Bowles, Jr., Trustee (appellee). The original suit was filed against Citizens State Bank of Dickinson, Texas (appellant) in its capacity as Independent Executor of the Estate of Fagan Dickson, alleging breach of contract, fraud, and violation of the Texas Deceptive Trade Practices Act. Appellee subsequently amended his petition to include appellant bank in its individual capacity. After trial to a jury, the court entered judgment against appellant, both in its individual and representative capacities, for actual damages, additional damages, and attorney's fees based on the Deceptive Trade Practices Act. We affirm.

We summarize the facts for clarity. Upon the death of Fagan Dickson in 1977, Citizens State Bank of Dickinson, Texas assumed the duties of independent executor of Dickson's estate in accordance with his will. The estate included the "Fagan Dickson Ranch," a 359.5 acre tract of land located in Burnet County, near Marble Falls, Texas, which is the subject of this lawsuit. Prior to his death, Fagan Dickson was involved in litigation with his divorce attorneys concerning their legal fees. This matter was still pending when he died. In December of 1978, appellant bank, represented by Robbye Waldron, a vice president and trust officer, entered into a settlement agreement with Dickson's attorneys. The bank agreed to pay the attorneys $20,000 in cash and to convey to them an undivided one-hundred acre interest in the "Fagan Dickson Ranch." In addition, appellant bank and the attorneys executed a Sale and Partition Agreement, which provided that the attorneys would have a purchase option, or right of first refusal, to the entire 359.5 acre tract of land, if anyone made a bona fide offer in writing to pay $1,000 or more per acre for the entire tract. The agreement further provided that if the attorneys chose to exercise their right of first refusal, they would be obligated to complete the transaction on the same terms and conditions contained in the contract submitted by the prospective purchaser. The settlement agreement was filed of record in Travis County, Texas in January of 1979, but was never filed in Burnet County. The Sale and Partition Agreement was not recorded until December 28, 1979.

In August of 1979, appellant bank decided to sell the Dickson property, and contacted appellee, a Marble Falls resident, who had earlier expressed an interest in acquiring the land. After conferring by phone with Mr. Waldron, appellee and his attorney prepared and submitted an earnest money contract. This document was subsequently redrafted to reflect certain changes requested by appellant bank. The contract was signed by Waldron and sent to appellee for his signature. Appellee signed the contract on October 19, 1979, and returned it to Waldron, along with a $20,000 deposit. While the earnest money contract contained

no reference to the outstanding interest held by Dickson's divorce attorneys, nor to any right of first refusal, appellee admitted that Waldron had informed him of the attorneys' outstanding interest. However, he testified that Waldron had assured him that the owners of the outstanding interest would join with appellant bank in conveying the property, and that only one earnest money contract was needed, with appellant bank designated as the seller.

After the earnest money contract was executed, Waldron informed Dickson's attorneys, who then notified him by letter that they intended to exercise their option. On November 21, 1979, Waldron wrote the attorneys, agreeing to execute the necessary documents to sell them the "Fagan Dickson Ranch." Waldron also wrote appellee the same day to tell him the property was to be sold to other parties as of December 30, 1979. After appellee received Waldron's letter, he retained counsel in the Galveston area, and a hearing was scheduled for December 28, 1979, to consider appellee's petition for specific performance and injunctive relief. Upon the advice of appellant bank's attorney, Waldron flew to San Antonio on December 27, 1979, and proceeded to close the sale with Dickson's attorneys between 11:30 p.m. and 12:00 a.m. that evening. Waldron and the attorneys then drove to Marble Falls early on December 28, 1979, and recorded the deed. Since this transaction was completed prior to the hearing set for December 28, the matter to be heard was rendered moot. Appellee proceeded with the prosecution of this lawsuit.

In answer to special issues, the jury found that Waldron did not notify Bowles of the purchase option agreement prior to the execution of the earnest money contract; that Waldron did not notify appellee that the earnest money contract would not be effective until approved by Dickson's attorneys; that Waldron represented to appellee that the earnest money contract conferred rights or obligations which it did not have; that Waldron's representations were a producing cause of the damage to appellee; that Waldron knowingly made these representations; that the market value of the property during the period October through December was $1,800; that Waldron misrepresented material facts to appellee with the intent of inducing him to execute the contract; and that appellee relied to his detriment on the false representations.

In points of error one and two, appellant contends the trial court erred in overruling its plea in abatement and motion for leave to add parties. Appellant claims that while appellee brought suit in his capacity as a trustee in accordance with a trust agreement executed in August of 1979, the trial court abused its discretion in failing to require the joinder of the trust beneficiaries to accomplish "just adjudication" pursuant to TEX.R.CIV.P. 39. We disagree.

[1, 2] While it is a general rule that in suits involving trust property, both the trustee and the beneficiaries should be made parties, this rule is subject to many exceptions, as where, by the terms of the trust, the power to litigate concerning such property is expressly conferred upon the trustee. *Smith v. Wayman,* 148 Tex. 318, 224 S.W.2d 211 (1949); *Slay v. Burnett Trust,* 143 Tex. 621, 187 S.W.2d 377 (1945). The trust agreement in the instant case expressly sets out appellee's power to prosecute any claims or lawsuits affecting the disputed property. We, therefore, overrule points of error one and two.

In point of error three, appellant contends the trial court erred in rendering judgment against appellant bank, individually, because it was not served, nor did it file an answer, in such capacity. We find no merit in this contention. Appellee filed suit on December 29, 1979, naming appellant bank in its representative capacity as an independent executor. On June 18, 1980, appellee filed an amended petition, also naming the bank in its individual capacity. Appellant makes no claim that he was not before the court at the time the petition was amended, or that he did not timely receive copies of the amended pleadings pursuant to TEX.R.CIV.P. 72.

[3, 4] Generally, a defendant who has answered or appeared in a case is charged with notice of subsequent amendments to the plaintiff's petition without the necessity of new citation. *Sanders v. Fit-All Pricing Corporation,* 417 S.W.2d 886 (Tex.Civ.App.—Texarkana 1967, no writ); *Landrum v. Robertson,* 195 S.W.2d 170 (Tex.Civ.App.—San Antonio 1946, writ ref'd n.r.e.). We find this rule applicable to an amended pleading complaining of a present party in an additional capacity. *See Pryor v. Krause,* 168 S.W. 498 (Tex.Civ.App.—El Paso 1914, writ ref'd). We overrule point of error three.

[5–7] In points of error four and five, appellant asserts the trial court erred in overruling his motion for judgment notwithstanding the verdict. Clearly, the court did not err in such regard if there is any evidence of probative force upon which the jury could have made the findings upon which the judgment is based. *Douglass v. Panama, Inc.,* 504 S.W.2d 776 (Tex.1974). The court must review the record in the light most favorable to the jury findings, considering only the evidence and inferences which support them, and rejecting the evidence and inferences contrary to the findings. *Williams v. Bennett,* 610 S.W.2d 144 (Tex.1980); *Dodd v. Texas Farm Products Co.,* 576 S.W.2d 812 (Tex.1979). Applying these rules, we find the trial court correctly overruled appellant's motion. The evidence shows that Waldron, appellant bank's vice president and trust officer, did not inform appellee of a purchase option regarding the "Fagan Dickson Ranch" at any time during negotiations for the sale of the land. The Sales and Partition Agreement containing the purchase option was not filed of record at the time the earnest money contract was executed. While he did tell appellee that other parties held a 100 acre interest in the "Fagan Dickson Ranch," he represented to appellee that appellant bank had the power to convey the property in its entirety. When appellee inquired if *two* earnest money contracts would be necessary, Waldron told him to prepare only one, indicating appellant bank as "Seller." The earnest money contract contained no terms which conditioned its effectiveness on any joinder by other parties or by another party's right of first refusal. In support of the jury findings regarding the price per acre, appellee's expert witness testified that the value of the land during the period in issue was $2,500 per acre. Appellant's expert witness testified that the land was worth $900 per acre. The jury apparently determined $1,800 to be a fair figure between the high and low valuations.

[8, 9] In order to support a judgment based on a violation of the Deceptive Trade Practices and Consumer Protection Act, TEX.BUS. & COM.CODE ANN. § 17.41–.63 (Vernon Supp.1982–1983), plaintiff must be a consumer of goods, as defined in Section 17.45, and must show he has been adversely affected by any of the false, misleading, or deceptive acts or practices declared unlawful in Section 17.46. Among these acts and practices is a representation that an agreement confers or involves rights which it does not have. A consumer, as defined, includes an individual who seeks or acquires by purchase or lease, any goods or services. The definition of goods includes real property purchased for use. In the instant case, appellee is a consumer who sought to purchase goods for use. The evidence shows that the seller represented the purchase agreement conferred or involved rights it did not have. We hold that there clearly was evidence of probative force in support of the jury findings set out above, and the court properly entered judgment based on the Deceptive Trade Practices Act. *See Anderson v. Havins,* 595 S.W.2d 147 (Tex.Civ.App.—Amarillo 1980, no writ). We overrule appellant's points of error four and five.

[10] In points of error six through nine, appellant contends the trial court erred in overruling its motion to disregard the answers to special issues and its objection to Special Issue Nos. 6 and 8. We will not address the merits of these claims. Appellant has not complied with TEX.R.CIV.P. 418. Rule 418(e) states, in part:

> A brief of the argument shall present separately or grouped the points relied upon for reversal. The argument shall include (i) a fair, condensed statement of the facts pertinent to such points, with references to the pages in the record where the same may be found; and (ii) such discussion of the facts and authorities relied upon as may be requisite to maintain the point at issue.

Appellant has grouped points four through nine together for discussion. However, it has failed to provide support for points six through nine with a clear statement of the facts, and a discussion of those facts with applicable authority. It is well settled in this state that points not properly briefed are waived. *Arndt v. National Supply Co.*, 650 S.W.2d 547 (Tex.App.—Houston [14th Dist.] 1983, writ filed); *Mossler v. Texas Commerce Bank*, 640 S.W.2d 702 (Tex.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Arrechea v. Arrechea*, 609 S.W.2d 852 (Tex.Civ.App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

[11, 12] In point of error ten, appellant claims the trial court erred in overruling its objection to Special Issue No. 6 which asked the jury to determine "the reasonable market value of the land in question between October and December, 1979." Appellant contends the court erred in failing to use the phrase, "reasonable *cash* market value." We cannot support this contention. In objecting to a charge, a party must point out distinctly the matter to which he objects and the grounds of his objection. TEX.R. CIV.P. 274. An objection does not meet the requirements of this rule unless the defect relied upon and the grounds of the objection are stated specifically enough to support the conclusion that the trial court was fully cognizant of the ground of complaint and deliberately chose to overrule it. *Davis v. Campbell*, 572 S.W.2d 660 (Tex.1978); *Mowery v. Fantastic Homes, Inc.*, 568 S.W.2d 171 (Tex.Civ.App.—Dallas 1978, writ ref'd n.r.e.). Appellant objected to the term "market value" because it did not "present the legal requirement to determine a measure of damage." This objection was not sufficient to preserve error. We overrule point of error ten.

[13] In point of error eleven, appellant contends the trial court erred in overruling its objection to Special Issue No. 6 wherein it complained that the fair market value of the property should be determined as of December 27, 1979, rather than during the period October through December, 1979. Appellant argues that appellee alleged a breach of contract on December 27, and that such date is the only date upon which market value could be determined. We disagree. Appellee sought to recover damages from appellant based on fraud, violation of the Deceptive Trade Practices Act, and breach of contract. The acts allegedly committed by appellant occurred during the months October through December of 1979. Appellant cites no authority, nor do we know of any, which requires a party to specify a date upon which fair market value must be determined, when the alleged wrongful acts occurred during the course of several months. We overrule point of error eleven.

[14] In point of error twelve, appellant has raised an objection which it did not assert in the trial court. Therefore, the objection is waived. *See Stewart v. Fitts*, 604 S.W.2d 371 (Tex.Civ.App.—El Paso 1980, writ ref'd n.r.e.); *Campbell v. Davis*, 563 S.W.2d 675 (Tex.Civ.App.—Tyler), *rev'd on other grounds*, 572 S.W.2d 660 (Tex. 1978).

[15, 16] In point of error thirteen, appellant contends the trial court erred in refusing to submit Special Issue 2a. We disagree.

> Appellant tendered the following issue: Do you find from a preponderance of the evidence that Robbye R. Waldron gave notice to L.R. Bowles, Jr. prior to the execution of the Earnest Money Contract dated October 19, 1979 that title to all the property could not be conveyed by the Bank under the terms of the Earnest Money Contract of October 19, 1979 without the joinder of the San Antonio attorneys in a deed of conveyance?

The court refused to submit this issue. However, it submitted the following issue tendered by appellee:

> Do you find from a preponderance of the evidence that Robbye R. Waldron gave notice to L.R. Bowles, Jr. prior to the execution of the Earnest Money Contract dated October 19, 1979 that although such contract was executed by Robbye R. Waldron, said contract would not be effective until executed, or otherwise approved of by the San Antonio attorneys?

We find no significant distinction between the issue submitted by the court and that tendered by appellant. A case will not be reversed where the trial court has failed to submit other and various phases or different shades of the same issue. *Prudential Ins. Co. of America v. Tate,* 162 Tex. 369, 347 S.W.2d 556 (1961).

[17] In points of error fourteen, fifteen, and seventeen, appellant contends the trial court erred in overruling his special exceptions (No. 1 and, in part, No. 2) to appellee's petition, and in allowing appellee to present improper and inflammatory evidence. However, appellant has again failed to present any coherent argument to support such claims, has provided us with no applicable authority, and has made little or no reference to the record. By omitting these matters, appellant has not complied with TEX.R.CIV.P. 418, and has waived his points of error. *Arndt v. National Supply Co., supra; Arrechea v. Arrechea, supra.*

[18, 19] In points of error sixteen and eighteen, appellant argues the trial court erred in overruling his motion for new trial, or, in the alternative, in failing to direct a remittitur, because (1) the jury finding of $350,000 in exemplary or additional damages was so large as to show bias, prejudice, and passion on the part of the jury, and (2) the amount was so excessive as to shock the conscience of the court. We find no merit in these contentions. As a general rule, in the absence of an affirmative showing of bias or prejudice, this court will not disturb a jury finding based on the ground of excessiveness if there is any probative evidence to sustain the award. *T.J. Allen Distributing Co. v. Leatherwood,* 648 S.W.2d 773 (Tex.App.—Beaumont 1983, writ ref'd n.r.e.); *Texas Construction Service Co. of Austin, Inc. v. Allen,* 635 S.W.2d 810 (Tex. Civ.App.—Corpus Christi 1979, writ ref'd n.r.e.); *Browning v. Paiz,* 586 S.W.2d 670 (Tex.Civ.App.—Corpus Christi 1979, writ ref'd n.r.e.). Applying the applicable standard, we have carefully reviewed the record, and we do not find that appellee's damages are excessive. These points are overruled.

The judgment of the trial court is affirmed.

Charles W. HOTT, Appellant,

v.

PEARCY/CHRISTON, INC., Appellee.

No. 05-82-00183-CV.

Court of Appeals of Texas, Dallas.

Nov. 4, 1983.

Rehearing Denied Nov. 23, 1983.

Purchaser brought action against vendor for specific performance of land sales contract. The 116th District Court, Dallas County, James F. McCarthy, J., entered judgment in favor of vendor and purchaser appealed. The Court of Appeals, Storey, J., held that: (1) vendor could properly revoke option before payment of independent consideration and exercise of option by purchaser; (2) option had never been made irrevocable by payment of consideration; (3) trial court disposed of all claims; and (4) there was no showing of estoppel by contract or equitable estoppel or of fraud.

Affirmed.

Sparling, J., dissented and filed an opinion.

RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS AND INSTRUCTIONS

[1. General] The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment, provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment, unless a substantially correct

definition/of/instruction/has/been/requested/in/writing/and/tendered/by/the party/complaining/of/the/judgment.

[2. Matters Relied upon by a Party. If a question, including an element thereof or instruction or definition pertaining thereto, is omitted from the charge or is included in the charge defectively, such omission or defect shall not be a ground for reversal of a judgment unless its submission in substantially correct wording has been requested in writing and tendered by the party relying upon it. The trial court's endorsement as required by Rule 276 will preserve any error related thereto and no further objection will be necessary.

[3. Matters Not Relied upon by a Party. If a question, including an element thereof or instruction or definition pertaining thereto, not relied upon by a party, is omitted from the charge or is included in the charge defectively, such omission or defect shall not be a ground for reversal of a judgment unless an objection thereto has been made by such party.

4. Matters Not Relied upon by Either Party. An instruction or definition which is not included in the charge or is included defectively which is not relied upon by either party shall not be deemed a ground for reversal unless its submission in substantially correct wording has been requested in writing and tendered by the party complaining of the judgment. The trial court's endorsement as required by Rule 276 will preserve any error related thereto and no further objection will be necessary.]

4543.001

UTB HJH
copy LHS
✓ 7-16-89
83

Texas Tech University

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

July 6, 1989

Mr. Luther H. Soules III
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Tex. R. Civ. P. 278

Dear Luke:

Time constraints have precluded me from discussing the change to the above rule with Justice Hecht, Buddy, and Tom.

I have taken the liberty of drafting a change which incorporates the thoughts expressed at our last meeting. Please include it in our agenda for next Saturday.

Copies are being provided to those listed below who are in no way responsbile for its contents.

Sincerely,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt
Enclosures

cc: Gilbert I. Lowe
Tom L. Ragland
Justice Nathan L. Hecht

HELD OVER FROM MAY 26-27 Meeting

Rule 278. Submission of Questions, Definitions, and Instructions

The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless it is submission in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment, provided, however, that such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

[To complain of and seek reversal of a judgment because of the court's:

a. failure to submit a question, the party relying on the question must request and tender it in writing in substantially correct form, while the party not relying on the question must either request and tender the question in writing in substantially correct form or object to the court's failure to include it in the charge;

b. submission of a defective question, the party relying on the question must request and tender in writing in substantially correct form, while the party not relying on the question must either request and tender the question in writing in substantially correct form or objection to the court's defective submission;

c. failure to submit a definition or instruction, the party must request and tender the definition or instruction in writing in substantially correct form;

d. submission of a defective or improper definition or instruction, the party must either request and tender the definition or instruction in writing in substantially correct form or object to the court's defective submission.]

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SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

June 5, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 278

Dear Hadley:

Enclosed herewith please find a copy of a letter sent to me by Gilbert I. Low regarding proposed changes to Rule 278. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stan Pemberton
Honorable Nathan L. Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
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6/5 — HJH COAJ SCAC Sub C SCAC Agenda SBD

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STANLEY PLETTMAN
JAMES W. HAMBRIGHT
GILBERT I. LOW
BENNY H. HUGHES, JR.
J. HOKE PEACOCK II
LAWRENCE L. GERMER
JOHN CREIGHTON III
JAMES H. CHESNUTT II
J. B. WHITTENBURG
PAUL W. GERTZ
GARY NEALE REGER
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SCOT G. DOLLINGER
LINDA S. LEMMONS

B. D. ORGAIN, OF COUNSEL

WILL E. ORGAIN (1882-1965)
MAJOR T. BELL (1897-1969)

May 30, 1989

Mr. Luther H. Soules III
Attorney at Law
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-2230

Dear Luke:

I'm sorry that I had to leave at noon on Saturday. However, for the Memorial Day Weekend, I had longstanding plans.

Judge Hecht spoke for some simpler method of determining when a party needs to object and when a party needs to submit a request in writing in proper form. This is somewhat complicated for two reasons. First, certain instructions and definitions may be relied upon by both parties. Secondly, some defects could be considered an omission and some omissions could be considered a defect. Further, a party usually prepares only the instructions, definitions, and questions upon which his suit or defense depends. Therefore, with this in mind, I don't feel it would be unreasonable to have a rule something similar to the following:

When any element of a party's cause of action or defense, upon which that party has the burden of proof, properly includes a question, an instruction or a definition, and said question, instruction or definition is either omitted, or is improper, defective or incomplete, said party must submit to the court in proper written form such question, instruction or definition prior to jury argument. Thereafter, no objection is necessary in order to preserve any error pertaining thereto.

When any element of a cause of action or defense, upon which a party does not have the burden of proof, properly includes a question, instruction or definition, and said question, instruction or definition is either omitted or is improper, defective or incomplete, said party who does not have the burden of proof thereon, may preserve error by objecting thereto as required by these rules. No tender of a properly written question, instruction or definition is necessary for said party without the burden of proof thereon.

Under the above, or some version thereof, a party ordinarily would already have a proper written question, definition or instruction before submission of the case because he would prepare the things upon which he has the burden of proof. I don't submit this as a polished version but something of this nature may suffice.

Sincerely,

Gilbert I. Low

GIL:cc

cc: Justice Nathan Hecht
Chief Justice Thomas Phillips

8-7-89

TO: Luke Soules

FROM: Hadley Edgar

RE: Rules 216-314 Subcommittee - SCAC and Session Law Changes

Luke, as a result of the procedure to remove two ureteral stones a week ago today, I was not released from the hospital until Friday. I do not see the doctor again until Thursday, but based upon the way I feel today. I seriously doubt that I could take an intensive, all day meeting on Saturday of this week. While I will make every effort to contact you by telephone and further explain some of the following comments, I'm faxing this to you today so that it can be included by Holly in our agenda packet:

1. T.R.C.P. 296 - W. Michael Murray's memo you sent me on July 27 points up a problem that currently may arise. However, if the Court approves our recent recommendation regarding T.R.C.P. 296, Murray's concerns will be eliminated. Therefore, I believe no action is necessary.

2. T.R.C.P. 271-79 - First, let me congratulate you on the proposed reorganization of these rules. Even if none of the proposed changes which you have included are adopted, the reorganization should be. You read these over the phone to me, but I did not have a chance to review them in writing until after surgery. In accordance with your request, I make the following comments:

a. T.R.C.P. 271 (1) - If compliance with this provision is not a basis for reversal (T.R.C.P. 273 (6), then isn't the use of the word "shall" misleading? After the first clause in the second sentence, why not insert "... the trial court should request that the adverse party submit in writing to the court, etc...?" The last sentence empowers the court to order proposed charges. What is the penalty for refusal? Contempt? Somehow, in view of 273(6), this is troublesome and I'm not convinced this is the way to proceed. I'm not up on the principles of contempt as I should be, but is contempt proper if its basis cannot form a ground for reversible error?

b. T.R.C.P. 271(7) - We have discussed this before, but I want to raise it again. Here, we tell the court to compare "negligence and/or causation", yet the "tort reform" compares "responsibility". Until this issue is presented and the Court resolves this as a matter of substantive law, aren't we being presumptuous in eliminating "responsibility" as a proper basis for comparison?

c. T.R.C.P. 271(4) - In the view of some persons that inferential rebuttals should be eliminated from the charge in <u>any</u> form whatsoever and their use of this language as their authority, I would suggest that since the purpose of this change in 1973 was only to eliminate them in the form of questions and <u>not</u> instructions, that it be rephrased as follows: "Inferential rebuttal matters shall not be submitted in the form of questions, but as instructions only.

d. T.R.C.P. 273(5, alternate) - For reasons which we discussed over the phone when you read this proposal to me, I much prefer the alternate to the original version because you have eliminated a serious flaw. However, with respect to subparagraph "a" concerning instructions and definitions, let us assume that the Plaintiff has the burden of establishing a "fiduciary relationship" and does not submit a proposed definition. Your version (alternate) would require the defendant who objects to the failure to include the definition to submit one in substantially correct form in writing to preserve error. This is contrary to existing law and, in my opinion, would be unfair. Why should a party not requiring an affirmative answer to a question be required to tender a proper definition to submit properly an opponent's theory of recover or defense in order to complain on appeal? The existing law is much fairer and should be retained.

The penultimate sentence in this paragraph ends with the phrase "for appellate purposes". What does it add except to suggest to the reader that you might be able to preserve an objection for some other purpose? I would end the sentence after the word "charge."

I hope that I have not been too confusing and am sorry that I will not be able to attend the meeting. However, I'll try to call you and fully explain myself between now and then.

You've done a great job on this area.

Hadley

P.S. Almost forgot. While reviewing Vol. 6 of Vernon's Session Law Service (the latest one) over the week-end, I ran across the following legislative acts which appear to conflict with T.R.C.P. They should be reviewed and considered at this upcoming meeting:

1. Ch. 419 (H.B. 1597) requires 12 person juries in Montgomery County Courts at Law 1 and 2, which conflicts with T.R.C.P. 229, 231, 232, 233 and 234.

2. Ch. 369 (S.B. 307) prescribes the form of citation in family law cases which differs from T.R.C.P. 99b.

FAX 512/224-7073

8-7-89

TO: LUKE SOULES

FROM: HADLEY EDGAR

RE: RULES 216 - 314 SUBCOMMITTEE - SCAC AND SESSION LAW CHANGES

Luke, as a result of the procedure to remove two ~~internal~~ ureteral stones a week ago today, I was not released from the hospital until Friday. I do not see the doctor again until Thursday, but based upon the way I feel today, I seriously doubt that I could take an intensive, all day meeting on Saturday of this week. While I will make every effort to contact you by telephone and further explain some of the following comments, I'm FAXING this to you today so that it can be included by Holley in our agenda packet:

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with your request, I make the following comments:

a. T.R.C.P. 271 1. - If compliance with this provision is not a basis for reversal (T.R.C.P. 273 6.), then isn't the use of the word "shall" misleading? After the first clause in the second sentence, why not insert "... the trial court should request that the adverse party submit in writing to the court, etc. . . . ?" The last sentence empowers the court to order proposed charges. What is the penalty for refusal? Contempt? Somehow, in view of 273 6., this is troublesome and I'm not convinced this is the way to proceed. I'm not up on the principles of contempt as I should be, but is contempt proper if its basis cannot form a ground of reversable error?

b. T.R.C.P. 271 7. - We have discussed this before, but I want to raise it again. Here, we tell the court to compare "negligence and/or causation", yet the "tort reform" compares "responsibility." Until this issue is presented and the court resolves this as a matter of substantive law, aren't we being presumptuous in eliminating "responsibility" as a proper basis for comparison?

c. T.R.C.P. 271 4. - In the view of some persons that inferential rebuttals should be eliminated from the charge in any form whatsoever and their use of this language is their authority. I would suggest that, since the purpose of this change in 1973 was only to eliminate them

in the form of questions and not instructions, that it be rephrased as follows: "Substantial substantial matters shall not be submitted in the form of questions, but as instructions only."

d.T.R.C.P. 273 5. (alternate) - For reasons which we discussed over the phone when you read this proposal to me, I much prefer the alternate to the original version because you have ~~eliminated~~ eliminated a serious flaw. However, with respect to sub-paragraph "a." concerning instructions and definitions, let us assume that the π has the burden of ~~establishing~~ establishing a "fiduciary relationship" and does not submit a proposed definition. Your version [alternate] would require the Δ who objects to the failure to include the definition to submit one in substantially correct form in writing to preserve error. This is contrary to existing law and, in my opinion, would be unfair. Why should a party not requiring an affirmative answer to a question be required to ~~submit~~ tender a proper definition to submit properly an opponent's theory of recovery or defense in order to complain on appeal? The existing law is much fairer and should be retained.

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Hayley

P.S.

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1. Ch. 419 (H.B. 1597) requires 12 person juries in Montgomery county courts at Law 1 and 2, which conflicts with T.R.C.P. 229, 231, 232, 233, and 234.

2. Ch. 369 (S.B. 307) prescribes the form of citation in family law cases which differs from T.R.C.P. 99 b.

TRAP 40. Ordinary Appeal -- How Perfected

(a) Appeals in Civil Cases.

[(1) (A) In the Court of Appeals. Any party to the trial court's final judgment may perfect an appeal to the court of appeals in the manner provided by these rules. After any party to the trial court's final judgment has perfected an appeal to the court of appeals in the manner provided by these rules, other than a limited appeal pursuant to Rule 40(a)(4), no other party to the trial court's final judgment shall be required to separately perfect an appeal in order to perfect assignment of error to the appellate court and invoke its jurisdiction over the error assigned by such other party. Prior to the time when a party to the trial court's final judgment has perfected an appeal, other than a limited appeal perfected pursuant to Rule 40(a)(4), any other party must perfect its own appeals until same party perfects an appeal not limited pursuant to Rule 40(a)(4). After any party has perfected an appeal, other than pursuant to Rule 40(a)(4), then any other party to the trial court's final judgment may raise points, counter-points, cross-points, and reply points pursuant to the requirements of Rules 74 and 100 regarding briefs and motions for rehearing in the court of appeals.

(B) In the Supreme Court. Any party to the trial court's final judgment affected by the judgment of the court of appeals may seek an application for writ of error from the Supreme Court in the manner provided by these rules. Once any

party has made application to the Supreme Court for a writ of error in the manner provided by these rules, any other party to the trial court's final judgment affected by the judgment of the court of appeals may raise points, counter-points, cross-points, and reply points in the Supreme Court pursuant to the requirements of Rules 100, 130-31, 136, and 190 regarding motions for rehearing in the court of appeals and in the Supreme Court and applications and briefs in the Supreme Court.]

([1][2]) When Security is Required. (No change.)

([2][3]) When Security is Not Required. (No change.)

([3][4]) When Party is Unable to Give Security. (No change.)

([4][5]) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective as to any party unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party [all other parties to the trial court's final judgment] within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

([5][6]) Judgment Not Suspended by Appeal. (No change.)

(b) Appeals in Criminal Cases.

(1) (No change.)

(2) Effect of Appeal in Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE:

HELD OVER FROM MAY 26-27 Meeting

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FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

May 15, 1989

Re: Committee on Administration of Justice

Mr. Luther H. Soules III
Soules & Wallace
800 Milam Building
San Antonio, Texas 78705-2230

Dear Luke:

I enclose my proposed revision of Bill Dorsaneo's drafted amendment to Texas Rule of Appellate Procedure 40(a)(4):

> "(c) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4)(A), any appellee who has been aggrieved by the judgment can seek a more favorable judgment against any party to the appeal by cross-point as an appellee in the courts of appeals without perfecting a separate appeal. To seek a more favorable judgment against one who is not a party to the appeal, however, an appellee must perfect a separate appeal."

The intent of my proposal is to let a party know it may be involved in an appeal no later than 90 days after the judgment is signed. The danger is that a party against whom the appellant has no complaint may close its file and not worry about what the record contains, only to find that a co-appellee has raised cross-points against it many months later.

Very truly yours,

Roger Townsend

Roger Townsend

RT/sp

00103

How about a Rule that in Cross-Appeals the parties be designated as in Trial Court?

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

APPELLATE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 40.

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 40.

(4) Notice of Limitation of Appeal. And Perfection of Appeal By Other Parties.

(A) No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant any party unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party all parties to the suit within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

(B) If the scope of an appeal is limited in accordance with this Rule 40(a)(4), any other party may cross-appeal any other portion or portions of the judgment by timely perfecting a separate appeal.

(C) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4), the entire judgment is subject to appellate review. Once an unlimited appeal has been perfected by any party, any other party who has been aggrieved by the judgment may seek a more favorable judgment in the courts of appeal by crosspoint as an appellee without perfecting a separate appeal.

004.04

(6A)

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Rule 74(e) of the Rules of Appellate Procedure contemplates that any party aggrieved by a judgment may present cross-points as an appellee, even if it has not perfected an appeal, except when the judgment is severable and the appeal has been limited by the appellant to a severable portion. Recent courts of appeals decisions have expansively interpreted the exception to deny jurisdiction of appellees' cross-points even in two-party cases. The mechanism for limiting appeals provided by Rule 40(a)(4) is proving inadequate to abrogate the effect of those decisions.

Uncertainty over when a cross-point requires an independent appeal will result in precautionary perfection of appeals by appellees, rendering the intent behind 74(e), to simplify the procedural burden placed on appellees and to reduce duplicatio at the appellate level, a nullity. The proposed amendments will clarify the requirements.

Respectfully submitted,

_____

Name

_____

_____

Address

Date _____ 198____

TRAP 74. Requisites of Briefs

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct ~~Supreme/Judicial/D~~ [d]istrict. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State".

(a) Names of All Parties [to the Trial Court's Final Judgment]. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed at the beginning of the appellant's [opening] brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case [and so the clerk of the court of appeals may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the court of appeals].

(b) Table of Contents and Index of Authorities. (No change.)

(c) Preliminary Statement. (No change.)

(d) Points of Error. (No change.)

(e) Brief of Appellee. The [opening] brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable; and in civil cases, if the appellee desires to complan of any ruling or action of the trial court, his [opening or supplemental opening] brief in regard to such

matters shall follow substantially the form of the brief for appellant.

(f) Argument. (No change.)

(g) Prayer for Relief. (No change.)

(h) Length of Briefs. Except as specified by local rule of the court of appeals [permitting additional pages], ~~appellate~~ [a] brief~~s~~ in [a] civil case~~s~~ shall not exceed 50 pages, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. [The total pages of briefing by a party, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statues, rules, regulations, etc., filed in the court of appeals shall not exceed 100 pages.] The court may, upon motion [and order], permit a longer brief [or more total pages]. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

(i) Number of Copies. (No change.)

(j) Briefs Typewritten or Printed. (No change.)

(k) Appellant's Filing Date. Appellant shall file his [opening] brief within thirty days after the filing of the transcript and statement of facts, if any, except that in accelerated appeals and habeas corpus appeals appellant shall file his brief within the time prescribed by Rule 42 or Rule 44.

(l) Failure of Appellant to File Brief.

(1) Civil Cases. [When appellant has failed to file his brief as provided in this rule, the appellee may, prior to the call of the case, file his brief, which the court may in its discretion regard as a correct presentation of the case, and upon which it may, in its discretion, affirm the judgment of the court below without examining the record.] In ¢ivil//¢ae [the alternative, when the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless reasonable explanation is shown for such failure and that appellee has not suffered material injury thereby. The court may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.

(2) Criminal Cases. (No change.)

(m) [Briefs.] Appellee/s/Filing/Date$///Appellee/shall/file his/brief/within/twenty-five/days/after/the/filing/of/appellant/s brief/ //In /civil /ca$e$/ /when /appellant /has /failed /to /file /his brief /as /provided /in /this /rule/ /the /appellee /may/ /prior /to /the call /of /the /ca$e/ /file /his /brief/ /which /the /court /may /in /its discretion/regard/as/a/correct/presentation/of/the/ca$e//and/upon which/it/may//in/its/discretion//affirm/the/judgment/of/the court below/without/examining/the/record/

[(1) Opening Briefs. Opening briefs may assign error to the appellate court and reply to assignments of error of other parties. Any party to the trial court's final judgment may file an opening brief raising points, counter-points, cross-points, and reply points within thirty days of the date the appellant's brief

was filed. Thereafter, any other party to the trial court's final judgment may file an opening brief raising points, counter-points, cross-points, and reply points within thirty days of the date any last opening or supplemental opening brief was filed by any other party to the trial court's final judgment.

(2) Supplemental Opening Briefs. Supplemental opening briefs may assign error to the appellate court when such briefs are authorized to be filed. After a party has filed an opening brief, that party may, at any time prior to judgment in the appellate court, file a supplemental opening brief raising new or additional points, counterpoints, or cross-points only upon motion with notice to all parties to the trial court's final judgment and pursuant to an order of the appellate court. In the event the appellate court permits a party to file a supplemental opening brief raising points, counter-points, or cross-points in addition to those raised by that party's opening brief, all other parties to the trial court's final judgment may, without leave of court, each file an opening or supplemental opening brief raising points, counter-points, cross-points, and reply points within thirty days of the date any last opening or supplemental opening brief was filed by any other party to the trial court's final judgment.

(3) Reply Briefs. Whether or not a party files an opening or supplemental opening brief, the party may file a reply brief in reply to assignment of error by other parties where such reply is not contained in the party's opening brief.

(4) Post-Submission Briefs. Any party who has filed an opening brief may file a post-submission brief presenting additional argument and authorities limited to any point, counter-point, cross-point, or reply point raised in any party's opening or supplemental opening brief following submission of the case.]

(n) Modifications of Filing Time. (No change.)

(o) Amendment or Supplementation. (No change.)

(p) Briefing Rules to be Construed Liberally. (No change.)

[(q) Service of Briefs. All briefs filed in the appellate court shall at the same time be served on all parties to the trial court's final judgment.]

COMMENT TO 1990 CHANGE:

TRAP 91. Copy of Opinion and Judgment to [Interested Parties, and Other Courts]

On the date an opinion of an appellate court is handed down, the clerk of the appellate court [shall] mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to [the State and each of the defendants in a criminal case and to each of the parties to the trial court's final judgment in a civil case] a copy of the opinion [handed down] by the appellate court and a copy of the judgment rendered by [the] appellate court as entered in the minutes. [Delivery on a party having counsel indicated of record shall be made on counsel.] The clerk of the trial court shall [the copy of the opinion] among the papers of the cause in such court. When there is more than one attorney [for a party], the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals.

COMMENT ON 1990 CHANGE:

TRAP 100. Motion and Second Motion for Rehearing

(a) Motion for Rehearing. Any party [to the trial court's final judgment affected by the judgment of the court of appeals and] desiring a rehearing of any matter determined by a court of appeals or any panel thereof must, within fifteen days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified. [It is not a requisite to filing a motion for rehearing that a party affected by the judgment have previously filed a brief or otherwise appeared in the appeal.]

(b) Reply. (No change.)

(c) Decision on Motion. (No change.)

(d) ~~Second~~ [Further] Motion for Rehearing. If on rehearing the court of appeals or any panel thereof modifies its judgment, or vacates its judgment and renders a new judgment, or hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may [be filed by]~~if~~ a[ny]party [to the trial court's final judgment who is affected by the court of appeals' judgment on rehearing, and who] desires to complain of the action taken, ~~be filed~~ within fifteen days after such action occurs. However, in civil cases, a further motion for rehearing shall not be required or necessary as a predicate for a point in the application for writ of error if the asserted point of error was overruled by the court of appeals in a prior motion for rehearing. [It is not a requisite to filing a

further motion for rehearing that a party affected by the judgment on rehearing have previously filed a brief or otherwise appeared in the appeal.]

(e) Amendments. (No change.)

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel ~~within fifteen days after submission~~ [the period of the court's plenary jurisdiction[with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) by written order issues within said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(g) Extensions of Time. (No change.)

[COMMENT TO 1990 CHANGE: To provide that en banc review may be conducted at any time within the period of plenary jurisdiction of a court of appeals.]

TRAP 130. Filing of Application in Court of Appeals.

(a) Method of Review. (No change.)

(b) [Number of Copies;] Time and Place of Filing. [Twelve copies of] T[t]he application shall be filed with the Clerk of the Court of Appeals within thirty days after the overruling of the last timely motion for rehearing filed by any party [to the trial court's final judgment]. [An application filed prior to the filing of a motion for rehearing by a party shall not preclude a party, including the party filing the application, from filing a motion for rehearing, or the court of appeals from overruling such motion. An application filed prior to the overruling of the last timely filed motion for rehearing filed by any party shall be deemed to have been filed on the date of but subsequent to the overruling of such motion.]

(c) Successive Applications. If any party files an application within the time specified for any other party to file such an application but failed to do so shall have the date of filing any preceding application in which it] [Successive applications are not required from any party to the trial court's final judgment who is affected by the judgment of the court of appeals. Any party to the trial court's final judgment who is affected by the judgment of the court of appeals may raise points, counter-points, cross-points, and reply points for review by the Supreme Court by complying with Rule 40(a)(1)(B). Once any party has filed an application in the

manner provided by these rules, no other party to the trial court's final judgment who is affected by the final judgment of the court of appeals shall be required to file an application in accordance with these rules in order to perfect assignment of error and invoke the jurisdiction of the court over error assigned by such other party. However, all parties who desire to participate in the appeal in the Supreme Court must comply with all applicable requirements of Rules 100, 190, and 136 regarding motions for rehearing in the court of appeals and in the Supreme Court and briefs in the Supreme Court.]

(d) Extension of Time. (No change.)

COMMENT TO 1990 CHANGE:

TRAP 131. Requisites of Applications

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) Names of All Parties. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case [and so the clerk of the court may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the Supreme Court].

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(h) (No change.)

(i) (No change.)

(j) (No change.)

COMMENT TO 1990 CHANGE:

d:/scac/trap131.doc

TRAP 132. Filing and Docketing Application in Supreme Court

(a) (No change.

(b) Expenses. (No change.)

(e) Duty of the Clerk of the Supreme Court. The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify ~~the attorneys of record~~ [each party to the trial court's final judgment, as listed on the first page of the application,] by letter of the filing of the application in the Supreme Court. [Notification to parties having counsel indicated of record shall be made to counsel.]

COMMENT TO 1990 CHANGE:

TRAP 136. Briefs of Respondents and Others

(a) Time and Place of Filing [Briefs]. Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error in the Supreme Court unless additional time is granted.

[(1) Opening Briefs. Opening briefs may assign error to the Supreme Court and reply to assignment of error by other parties. Any party to the trial court's judgment that is affected by the court of appeals' judgment may file an opening brief raising points, counter-points, cross-points, and reply points within thirty days of the date the application for writ of error is filed. Thereafter, any other party to the trial court's judgment may file an opening brief raising points, counter-points, cross-points, and reply points within thirty days of the date of any last opening brief was filed by any other party to the trial court's final judgment.

(2) Supplemental Opening Briefs. Supplemental opening briefs may assign error to the Supreme Court when such briefs are authorized to be filed. After a party has filed an opening brief, that party may at any time prior to judgment in the Supreme Court file a supplemental opening brief raising new or additional points, counter-points or cross-points only upon motion and notice to all parties in the trial court's final judgment and pursuant to an order of the Supreme Court. In the event the Supreme Court permits a party to file a supplemental

opening brief raising points, counter-points, or cross-points, in addition to those raised by that party's opening brief, all other parties to the trial court's final judgment may, without leave of court, each file an opening or supplemental opening brief raising points, counter-points, cross-points, and reply points within thirty days of the date of any last opening brief was filed by any other party to the trial court's final judgment.

(3) Reply Briefs. Whether or not a party files an opening or supplemental opening brief, the party may file a reply brief in reply to assignment of error by other parties where such reply is not contained in the party's opening brief.

(4) Post-Submission Briefs. Any party who has filed an opening brief may file a post-submission brief presenting additional argument and authorities limited to any point, counter-point, cross-point, or reply point raised in any party's opening or supplemental opening brief following submission of the case.]

(b) Form. (No change.)

(c) Objections to Jurisdiction. (No change.)

(d) Reply and Cross-Points. Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross-points that respondent has preserved and that establish respondent's rights.

(e[d]) Length of Briefs. *A brief in response to the application* [No brief filed in the Supreme Court] shall

~~not~~ exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. [The total pages of briefing by a party, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. shall not exceed 100 pages.] The court may, upon motion and order, permit a longer brief [or more total pages].

(~~f~~[e]) Reliance on Prior Brief. (No change.)

(~~g~~[f]) Amendment. (No change.)

[(g) Service of Briefs. Any application filed in the court of appeals and all briefs filed in the Supreme Court shall at the same time be served on all parties to the trial court's final judgment.]

COMMENT TO 1990 CHANGE:

TRAP 190. Motion for Rehearing

[(a) Who May File. Any party to the trial court's final judgment affected by the judgmnt of the Supreme Court may file a motion for rehearing in the Supreme Court. It is not a requisite to filing a motion for rehearing that a party affected by the judgment have previously filed a brief or otherwise appeared in the Supreme Court of a court of appeals.]

(¢[b]) Time for Filing. (No change.)

(¢[c]) Contents and Service. The points relied upon for the rehearing shall be distinctly specified in the motion. The motion shall state the name and address of the attorneys of record for the parties [to the trial court's final judgment], and if there is no attorney of record, the name and address of the party [to the trial court's final judgment]. The party filing such motion shall ¢¢ll¡¥¢r/¢r/n¢ll/¥¢ [serve on] each party [to the trial court's final judgment], or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so ƒ¡¡r¡¡¡$¡¢d [served].

(¢[d]) Notice of the Motion. Upon the filing of the motion, the clerk shall notify the attorneys of record or other parties [to the trial court's final judgment] by mail of the filing.

(¢[e]) Answer and Decision. The parties [to the trial court's final judgment] shall have five days after notice in which to file a¡¡/¢¡¡$¥¢r [response] to the motion. Upon the filing of an answer or the expiration of the five-day period, the

motion shall be deemed submitted to the court and ready for disposition. The court may limit the time in which a motion for rehearing or an/~~answer~~ [response] may be filed, and may act upon any motion at any time after it is filed. The court for good cause may deny leave to file a motion for rehearing. The court will not ~~entertain~~ [consider] a second motion for rehearing.

[(f) Extensions of Time. An extension of time may be granted for late filing in the Supreme Court of a motion for rehearing, if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing the motion.]

[COMMENT ON 1990 CHANGE: To conform with Rule 54(c) providing for extensions of time in the courts of appeals.]

TRCP 4. Computation

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time beings to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. [Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three day period in Rule 21a, extending other periods by three days when service is made by registered or certified mail.]

[COMMENT TO 1990 CHANGE: Amended to omit counting Saturdays, Sundays, and legal holidays in all periods of less than five days except in the three day extension provision of Rule 21a.

Rule 10. Withdrawal of Counsel

~~Withdrawal of an attorney may be effected (a) upon motion showing good cause and under such conditions imposed by the Court, or (b) upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, and State Bar of Texas identification number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only. If the attorney in charge withdraws and other counsel remain or become substituted, another counsel must be designated of record, with notice to all other parties in accordance with Rule 21a, as attorney in charge.~~

An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as counsel for the party, the motion shall state: the name, address, telephone number, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as counsel for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; and that the party bas been notified in writing of all pending settings and deadlines. A copy of such notice to the party shall be attached to the motion. If

the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge and has not already notified the party. The court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and other counsel remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

(Amended by order of July 15, 1987, eff. Jan. 1, 1988.)

Source: Texas Rule 46 (for District and County Courts), unchanged.

COMMENT TO 1988 CHANGE: The amendment repeals the present rule and makes provision for withdrawal of counsel, setting forth the requirements for withdrawal and withdrawal with substitution of counsel. The amendment also carries forward the requirements of amended Rule 8 regarding designation of attorney in charge.

COMMENT TO 1990 CHANGE: The amendment repeals the present rule and clarifies the requirements for withdrawal.

TRCP 10. Withdrawal of Counsel

Withdrawal of an attorney may be effected (a) upon motion showing good cause and under such conditions imposed by the Court; or (b) upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, [telecopier number, if any,] and State Bar of Texas identification number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only. If the attorney in charge withdraws and other counsel remain or become substituted, another counsel must be designated of record, with notice to all other parties in accordance with Rule 21a, as attorney in charge.

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July 18, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 10

Dear Mr. Branson:

Enclosed please find a copy of requested change to TRCP 10 proposed by Justice Nathan L. Hecht. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan L. Hecht
Honorable David Peeples

00127

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TEXAS BOARD OF LEGAL SPECIALIZATION
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‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

...than thirty days after the judgment was ...d pursuant to Rule 329 of the Texas Rules of ...procedure, when process has been served by ...ation, the periods provided by subparagraph ...shall be computed as if the judgment were ...on the date of filing the motion.

...**Notice of Judgment of Appellate Court.** ...the court of appeals renders judgment or ...nts or overrules a motion for rehearing, the ... shall immediately give notice to the parties or ... attorneys of record of the disposition made of ...use or of the motion, as the case may be. The ...e shall be given by first-class mail and be so ...ed as to be returnable to the clerk in case of ...elivery.

... **No Notice of Judgment of Appellate Court.** ...withstanding any provision of these rules con... the time for filing a motion for extension of ...period for filing a motion for rehearing, applica... for writ of error, or petition for discretionary ...view, an extension of such period may be granted ... the appellate court in which a motion for exten... would properly be filed on sworn motion show... that neither the party desiring to file such ...tion for rehearing, application for writ of error, ...petition for discretionary review nor his attorney ...d notice or actual knowledge of the judgment or ...der from which such period began to run before ...e last day of such period and stating the earliest ...ate either the party or his attorney received such ...otice or actual knowledge. Such a motion for ...extension shall be filed within fifteen days of the ...ate either the party or his attorney first had such ...otice or actual knowledge, but in no event more ...han ninety days after the beginning of such period. When such a motion is granted, the period in question shall begin to run on the date of granting the motion.

Rule 6. Communications With the Appellate Court

Correspondence or other communications relative to any matter before the court must be conducted with the clerk and shall not be addressed to or conducted with any of the justices or judges or other members of the court's staff.

Rule 7. Substitution of Counsel

Counsel shall be permitted to withdraw or other counsel may be substituted upon such terms and conditions as may be deemed appropriate by the appellate court. The motion for leave to withdraw as counsel shall be accompanied by either a showing that a copy of the motion has been furnished to the party with a notice advising the party of any ensuing deadlines and settings of the cause or written acceptance of employment by new counsel indicated.

Rule 8. Agreements of Counsel

All agreements of parties or their counsel relating either to the merits or conduct of the case in the court or in reference to a waiver of any of the requirements prescribed by the rules, looking to the proper preparation of an appeal or writ of error or submission, shall be in writing, signed by the parties or their counsel, and filed with the transcript or be contained in it, and, to the extent that such agreement may vary the regular order of proceeding, shall be subject to such orders of the appellate court as may be necessary to secure a proper presentation of the case.

Rule 9. Substitution of Parties

(a) Death of a Party in Civil Cases. If any party to the record in a cause dies after rendition of judgment in the trial court, and before such cause has been finally disposed of on appeal, such cause shall not abate by such death, but the appeal may be perfected and the court of appeals or the Supreme Court, if it has granted or thereafter grants a writ therein, shall proceed to adjudicate such cause and render judgment therein as if all parties thereto were living, and such judgment shall have the same force and effect as if rendered in the lifetime of all parties thereto. If appellant dies after judgment, and before the expiration of the time for perfecting appeal, sixty days after the date of such death shall be allowed in which to perfect appeal and file the record, and all bonds or other papers may be made in the names of the original parties the same as if all the parties thereto were living.

(b) Death of Appellant in a Criminal Case. If the appellant in a criminal case dies after an appeal is perfected but before the mandate of the appellate court is issued, the appeal shall be permanently abated.

(c) Public Officers; Separation from Office.

(1) When a suit in mandamus, prohibition, or injunction is brought against a person holding a public office, in his official capacity, and after final trial and judgment in the trial court, and appeal has been taken, if such person should vacate such office, the suit shall not abate, but his successor may be made a party thereto by a motion showing such facts.

(2) Unless waived, the clerk shall give the successor ten days notice of such motion, whereupon the court shall hear and determine same, and its

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July 18, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 10 and TRAP 7

Dear Mr. Branson:

I forwarded to you under separate cover a proposed change to TRCP 10 submitted by Justice Nathan L. Hecht. Please consider any changes which need to be made to TRAP 7 as well. Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan L. Hecht
Honorable David Peeples

00129

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TRCP 63. Amendments [and Responsive Pleadings]

Parties may amend their pleadings, [respond to pleadings on file of other parties,] file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any ~~amendment~~ [pleadings, responses, or pleas,] offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such ~~amendment~~ [filing] will operate as a surprise of the opposite party.

[COMMENT TO 1990 CHANGE: To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.]

7/8
Proposed by Luke Soules

HJH - SCAC Subc Agenda

TRCP 166. Pre-Trial [Conference] Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All [pending] dilatory pleas[,] and motions[,] and exceptions relating to a suit pending;

(b) The necessity or desirability of amendments to the pleadings;

[(c) Requiring written statements of the parties' contentions;]

(d) [Contested issues of fact and] The simplification of the issues;

(e) The possibility of obtaining admissions [stipulations] of fact and of documents which will avoid unnecessary proof;

(f) [f] The limitation of the number of expert [The identification of legal matters to be ruled on or decided by the court];

[(g) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(h) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone

number, and the subject of the testimony and opinions that will be proferred by each expert witness;

(i) Agreed applicable propositions of law and contested issues of law;

(j) Proposed jury charge questions, instructions, and defintions for a jury case or proposed findings of fact and conclusions of law for a non-jury case;

(k) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(l) Written trial objections to the opposite party's exhibits, stating the basis for each objection;

~~(f)~~ [m] The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury.

[(n) The Settlement of the case. To aid such consideration, the court may encourage settlement.]

~~(g)~~ (o) Such other matters as may aid in the disposition of the action. The court shall make an order that recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions[,] ~~or~~ agreements of counsel[, or rulings of the court]; and such order when ~~entered~~ [rendered] shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court

in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

[COMMENT TO 1990 CHANGE: To add new paragraphs to broaden the scope of the rule and to express the ability of the trial courts at pretrial hearings to encourage settlement.]

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July 24, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 166
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a redlined version of TRCP 166. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable David Peeples

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July 13, 1989

HJH, SCAC Subc (Rec'd 8/2) Agenda

Thomas R. Phillips, Chief Justice
Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Judge Phillips:

In reviewing our Texas Rules of Civil Procedure I do not see where it is stated or defined that "officers" taking a deposition must be independent, etc.

I know that in order to be certified that they have to follow certain guide lines which were recently implemented on January 1, 1989.

It has recently come to my attention that a number of entities are contracting with court reporters for the furnishing of court reporting services on a continual basis. I, therefore, feel that the Supreme Court Advisory Committee and the Supreme Court need to address this question in conjunction with their rule making authority.

Though I have no instance in which this practice has interfered with the official court reporters impartiality, I can predict with a defendant to do all their work if the court reporter is under contract, that court reporters may be more concerned about losing their contract than in being equally impartial to both the attorneys for the plaintiffs and the defendants.

I would appreciate the consideration of this potential problem by the rule making committee and would offer in connection therewith the attached excerpt from the National Shorthand Reporter of March, 1989 and the code of ethics from National Shorthand Reporters.

Thank you for your attention in this matter.

Very truly yours,

R. GARY STEPHENS

3wp:rule.ltr

cc:

Mr. Mike Perrin
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Mr. James B. Sales
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1301 McKinney
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Mr. Luther H. Soules
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800 Milam Building
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Are Reporting Contracts With Insurance Companies Ethical?

[The following is an excerpt from the Showcase Seminar presentation given at the NSRA convention this past July. This seminar consisted of a series of pro/con presentations regarding various reporting issues. These issues were discussed in the spirit of pursuing the convention's theme, "Dare To Change." Speakers were not limited to their personal views on the subject at hand, but were to espouse one of the viewpoints under consideration. After an introduction by President-Elect Block, each of the two speakers was limited to a three-minute presentation.]

MARTIN BLOCK: Are contracts with insurance companies ethical? Are they in conformity with the certificate placed at the conclusion of a deposition by the reporter? What impact does contracting with insurance companies have on our professional image? Does insurance company contracting adversely affect the attitude of the reporter assigned to cover a deposition at less than the going rate?

BERNIE GOLDSTEIN: My name is Bernie Goldstein, West Palm Beach, Florida.

Is it ethical to contract with insurance companies to provide reporting services? In recent years that question has been the subject of much debate.

"Ethical" is defined by Webster as "conforming to the standards of conduct of a given profession or group." The Code of Professional Conduct of the National Shorthand Reporters Association—and I like our name—states in part that the shorthand reporter shall be fair and impartial toward each participant in all aspects of reported proceedings. By signing the certificate at the conclusion of a deposition or any reported matter, the reporter is certifying compliance with our Code of Professional Conduct.

As members of NSRA, we all subscribe to that code, and therefore it is of little consequence to the reporter if the matter being reported was secured under a contract with an insurance company. It is the reporter's duty to be fair and impartial.

The attitude of the reporter is not affected in any way because a fair and ethical principal will be paying the reporter the going rate. Does the lower rate charged to insurance company counsel result in increased charges to other counsel present? Again, the ethical and prudent principal will not increase charges to other counsel to compensate for the lower rate charged to insurance company counsel because it is just not good business practice.

Among the many reasons for a principal to enter into these contracts is an increased volume of business and the ability to expand its client base by having the opportunity to impress other counsel with the quality of their service.

The insurance industry is a huge consumer of products generated by the legal system and, as such, is constantly striving to purchase its products in a cost-effective manner. In our free enterprise system, insurance companies have the right to run their businesses at the least possible cost, and reporting companies have the right to enter into agreements which benefit their businesses.

For the most part, insurance companies realize the importance of our product and do not attempt to impose the services of a particular reporting company on counsel. When they do, ethical counsel will resist such an attempt. On the other hand, our professional image is greatly enhanced by our willingness to submit bids and enter into negotiations that conclude with a contract that is fair and equitable to all parties.

The question is: ethics or entrepreneur? The answer is: Ethical entrepreneurs and ethical reporters subscribing to our Code of Professional Conduct will elevate our professional image to its highest peak.

JAMES WOITALLA: Good morning. Jim Woitalla from Minneapolis. Welcome to our fair city.

I think we presume much when we presume everyone will behave in an ethical manner. I think we really do. In fact, unless you publish your rates, itemize every bill your firm issues, there is no guarantee of ethical conduct.

In my opinion, contracting with an insurance company vis-a-vis an exclusive contract does nothing but appeal to the greed and the avarice of principal firms or, rather, large firms whose principals concerned with nothing except continued expansion at the expense of squeezing out smaller firms, eliminating the competition at its weakest point by simple unethical conduct.

While one presumes that the quality of the product will remain consistent with other products produced without the benefit of contracting, we know that reporters will generally perform as well as they are paid. If reporters are not paid an equal amount on a per base for producing a transcript, corners will be cut. Quality will be lost.

There is a cumulative effect to that. The cumulative effect is that the bar and the bench will perceive the squabbling among court reporters to make a buck, and like Larry, Darrell and Darrell say, "Anything for a buck."

Do we want to lose our appearance of impartiality? Do we want to lose the integrity of our profession? Do we want to lose the perception of us as being untamperable? Those are actual questions. That's what we should be considering whenever we are approached by an insurance company asking for a discount, asking for a free ride.

More often than not the argument is advanced, "Well, if we don't, somebody else will." You have to decide where to draw the line, and where you draw the line is you treat everyone in the same manner: zero contracts. You leave the market as is. The product speaks for itself, and if your product doesn't speak loud enough for you, you should be looking at your product.

[Audience members were asked to applaud the view they favored, and these responses were measured on an "applause meter." The higher the number between zero and 100, the louder the response. Mr. Goldstein's position received a reading of 55, and Mr. Woitalla's a reading of 100.

Do you have a view on this another, reporting issue? Send Food For Thought submissions to Roger Nober, NSR Editor, 1324 W. Fullerton Street, Chicago, Illinois 60614.]

PREAMBLE

The Committee on Professional Responsibility (COPR) is the successor to the Committee on Ethics. In 1979, the Committee on Professional Responsibility presented its recommendations to the convention in the form of the Code of Professional Responsibility, Enforcement and Disciplinary Procedures, and Professional Practice Objectives, which were adopted by the convention.

The President charged the 1985 committee to review the experiences with the code during the time it was in effect and to evaluate its various sections. Following that charge, the committee studied the history of the code from its inception and came to the conclusion that, though sound in principle, it should be revised for brevity and clarity. In addition, the committee established Mediation Procedures for the membership in an effort to resolve amicably matters in dispute arising out of the Code of Professional Conduct, and changed the title of the Enforcement and Disciplinary Procedures to Complaint Procedures.

As a result, the committee has promulgated the mandatory Code of Professional Conduct defining the ethical relationship the public, the bench, and the bar have a right to expect from the reporter. They set out the conduct of the reporter when dealing with the user of reporting services and acquaint the user, as well as the reporter, with guidelines established for professional behavior. The Standards of Professional Practice, on the other hand, are goals toward which every reporter should strive. Reporters are urged to comply with the standards, which do not exhaust the moral and ethical considerations with which the reporter should conform but provide the framework for the practice of reporting.

Not every situation a reporter may encounter can be foreseen, but fundamental ethical principles are always present. By complying with the Code of Professional Conduct and Standards of Professional Practice, reporters maintain their profession at the highest level.

CODE OF PROFESSIONAL CONDUCT

The Shorthand Reporter Shall:

1. Be fair and impartial toward each participant in all aspects of reported proceedings.

2. Be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest. If a conflict or a potential conflict arises, the reporter shall disclose that conflict or potential conflict.

3. Guard against not only the fact but the appearance of impropriety.

4. Preserve the confidentiality and ensure the security of information, oral or written, entrusted to the reporter by any of the parties in a proceeding.

5. Be truthful and accurate when making public statements or when advertising the reporter's qualifications or the services provided.

6. Refrain, as an official reporter, from freelance reporting activities that interfere with official duties and obligations.

7. Determine fees independently, except when established by statute or court order, entering into no agreements with other reporters on the fees to any user.

8. Maintain the integrity of the reporting profession.

STANDARDS OF PROFESSIONAL PRACTICE

The Shorthand Reporter Should:

A. Accept only those assignments when the reporter's level of competence will result in the preparation of an accurate transcript. The reporter should remove himself from an assignment when he believes his abilities are inadequate, recommending or assigning another reporter only if such reporter has the competence required for such assignment.

B. Prepare the record in accordance with the transcript-preparation guidelines established by statute or court order, NSRA, or local custom and usage.

C. Notify the parties engaging the reporter if a substitute reporter, equally qualified, will be assigned to report the proceedings.

D. Preserve the shorthand notes in accordance with statute or court order, or for a period of no less than two years.

E. Meet promised delivery dates, or make timely delivery of transcripts when no date is specified.

F. Strive to become and remain proficient in his professional skills.

G. Keep abreast of current literature and developments, and participate in continuing-education programs.

H. Assist in improving the reporting profession by participating in national, state, and local association activities that advance the quality and standards of the reporting profession.

I. Cooperate with the bench and bar for the improvement of the administration of justice.

J. Cooperate with qualified assistance organizations providing legal services to the indigent. Members of the shorthand-reporting profession's commitment to the principle that reporting services should be available. Such participation should be in accordance with the basic tenets of the profession: impartiality, competence, and integrity.

MEDIATION PROCEDURES

As a further service to its members, the National Shorthand Reporters Association has established a mediation procedure to facilitate the resolution of disputes arising from the alleged violation of the Association's Code of Professional Conduct by any of its members. The mediation process will be conducted by the Association's Committee on Professional Responsibility (COPR). This procedure is an alternative to filing a formal complaint.

The purpose of mediation is to bring the disputing parties together in order to attempt to reach a resolution satisfactory to each of the parties. The mediator may suggest ways of resolving the dispute, but cannot impose a settlement on the parties.

All parties to the dispute must agree to participate in the mediation process before it can begin. Because it is voluntary, any party can withdraw from it at any time. The initiating party, however, will have to wait between the formal complaint procedure and the mediation process. If a mediation process is agreed to by all the parties, the parties cannot pursue the formal complaint procedure at a later time unless the party complained of refuses to participate substantially in the mediation process.

00139

Mediation Rules

1. Applicability

The mediation process can be used for disputes concerning the alleged violation of any of the provisions of the Association's Code of Professional Conduct by a member or members of the Association. It is not available to resolve disputes arising from business

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July 18, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 206
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copy of a letter I received from R. Gary Stephens. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable David Peeples

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TRCP 206. Certification by Officer; Exhibits; Copies; Notice of Delivery

1. Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:

(i) (No change.)

(ii) (No change.)

(iii) (No change.)

(iv) (No change.)

(v) (No change.)

(vi) (No change.)

(vii) that the original deposition transcript, or a copy thereof in event the original was not returned to the officer, together with copies of all exhibits, ~~was/delivered~~ ~~or/mailed/in/a/postpaid/properly/addressed/wrapper/certified~~ ~~filed/with/reporter/received/to~~ [is in the possession and custody of] the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial;

(viii) (No change.)

2. Delivery. (No change.)

3. Exhibits. (No change.)

4. (No change.)

5. Copies. (No change.)

6. Notice of Delivery. (No change.)

TRCP 248. Jury Cases

When a jury has been demanded, questions of law, motions, exceptions to pleadings, ~~etc.~~ [and other unresolved pending matters], shall, as far as practicable, be heard and determined by the court before ~~the day designated for~~ the trial [commences], and jurors shall be summoned to appear on the day so designated.

[COMMENT TO 1990 CHANGE: To provide a mechanism, in both bench trials prior to the start of evidence and jury trials prior to jury selection, and in both individual and central docket courts, to seek and obtain rulings on matters of law, evdience, and procedure affecting the trial.]

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JAMES P. WALLACE ‡

July 24, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 248

Dear Hadley:

Enclosed herewith please find a redlined version of TRCP 248. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan L. Hecht
Honorable David Peeples

00143

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7/27

HJH —
R 296 TRDP Sep C
8/2 Agenda.

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ATTORNEYS AT LAW

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Austin, Texas 78768-2006
(512) 469-9603

July 24, 1989

Mr. Luther H. Soules
Soules, Wallace
175 East Houston
San Antonio, Texas 78205

Dear Mr. Soules:

Enclosed please find Mr. Murray's memorandum on date conflicts arising from the appeal of a judgment of a case tried to the court.

Sincerely,

Carla D. Marshall
Legal Assistant to
W. Michael Murray

CDM:hs
Enclosure

MEMORANDUM

To: Luther H. Soules

RE: Date conflicts arising from the appeal of a judgment of a case tried to the court.

---

1. After judgment is rendered in a case tried to the court, and upon request, the trial court is required to file its findings of fact and conclusions of law within thirty days after the judgment is signed (Rule 297, T.R.C.P.). However, if the judge fails to file its findings and conclusions within the thirty day period, the requesting attorney must, within five days of the last day to file the findings and conclusions, present to the judge a reminder that the findings and conclusions have not been filed (Rule 297, T.R.C.P.). The judge then has an additional five days after the reminder to issue the findings and conclusions (Rule 297, T.R.C.P.). (What happens if the judge fails to file the findings and conclusions within this extension period is not clear, but is not relevant to this problem.)

2. The Cost Bond on appeal is also due thirty days after the judgment is signed, if no motion for a new trial is filed (Rule 41(a)(1) T.R.A.P.). This rule is jurisdictional; however, the time for filing the cost bond may be extended an additional fifteen days upon filing the bond and a motion is filed in the appellate court reasonable explaining the need for the extension. (Rule 41(a)(2), T.R.A.P.)

3. A motion for a new trial must also be filed within thirty days after the judgment is signed (Rule 329b(a), T.R.C.P.) and must be amended within the same thirty day period (Rule 329b(b), T.R.C.P.). The motion must be clear and avoid generalities and must specifically address the ruling of the court complained of (Rules 321 and 322, T.R.C.P.).

4. All of this means that the trial court can delay filing its findings and conclusions until after the cost bond and motion for a new trial are due, with no adverse consequences.

5. None of this would normally be a problem, since there is no longer a requirement to file a motion for a new trial as a prerequisite to an appeal and failure to file a motion for a new trial, in a case tried to the court,

does not waive any points to be relied on, on appeal (Rule 324, T.R.C.P.). One could, normally, either file a motion for a new trial alleging that some ruling on a procedural or evidentiary point was erroneous and "buy time" to perfect the appeal until after the trial court issues its findings and conclusions or simply file the cost bond and perfect the appeal prior to receiving the trial court's reasons for issuing its judgment.

6. The problem, though, arises when these rules are read in the light of Rule 13, T.R.C.P., which reads, in relevant part,

> The signature of attorneys or parties constitute a certificate by them that they have read the pleadings, motion, or other paper; that to the best of their knowledge, information and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

Sanctions under this rule are mandatory.

7. The problem arises, as it did in the case that I was involved in, when the trial court does not issue its findings and conclusions until after the thirty day period has run. To file a motion for a new trial simply to "buy time" before one has reviewed the findings and conclusions, runs too close to "bad faith", and would be difficult, at best, to sustain the burden of "reasonable inquiry." The same problem occurs if one files a cost bond to perfect the appeal. I truly am at a loss to determine how one meets the requirement of "reasonable inquiry" and lack of "bad faith" if one is faced with a judgment that recites only that one party is entitled to judgment against the other party or, as occurred in my case, a basic "take nothing" judgment was rendered, without any reasons therefore.

8. My solution, when faced with this dilemma, was to wait until after the trial court had issued its findings and conclusions, file the cost bond, and file a motion for extension of time to file the cost bond within the fifteen day grace period, alleging as the grounds for the motion that as counsel I had not been able to adequately

make the reasonable inquiry to determine if an appeal was justified without the findings and conclusions.

9. The Supreme Court, in the Garcia v. Kastner Farms, Inc. opinion, handed down a week or so ago, held that what I had done constituted a "mistake of law," inferring that such a mistake constituted negligence on my part, but that such a mistake constituted a reasonable explanation, and that the extension should have been granted and remanded the case. I should add that the opinion does not address the Rule 13 problem nor state what the procedure was that I should have followed.

10. Of course, a finding of attorney negligence by the Supreme Court, would open up the attorney to a liability claim by the client.

11. SOLUTION: My recommended solution then is to make a motion for a new trial and the filing of a cost bond due after the trial court is required to file its findings and conclusions. The easiest way would be to make the motion for a new trial and cost bond due to be filed seventy-five days after the judgment is signed. My rationale for this is that the judge initially has thirty days to file its findings and conclusions. If the court does not do so, the party requesting has an additional five days to give the court notice of the failure to file the findings and conclusions. The trial court then has an additional five days to file its initial findings and conclusions. If either party desires that the court issue additional findings, that party has five days from the date of the issuance of the initial findings and conclusions to request additional findings and conclusions and the court has five days to respond to that request. The total of this time is fifty days from the date of judgment. This would make the motion for a new trial and/or the cost bond due twenty-five days after all action on the findings and conclusions should have expired. The other solution is to make the motion for a new trial and the cost bond due twenty-five (or thirty) days after the trial court's issuance of its final findings and conclusions. I do not believe that twenty-five or thirty days is an inordinately long delay and would certainly make a motion for a new trial more meaningful than the present timetable allows.

12. One other matter in this area that presents a definite and substantial pitfall is the requirement,

> If the trial judge shall fail so to file them [findings and conclusions], the party so demanding, **in order to complain of the failure**, shall, in writing, within five days after such date, call the omission to the attention of the judge ... (Rule 297, T.R.C.P.)

This requires that the reminder must be presented to the judge, personally, otherwise the appellant waives the findings and conclusions and all presumptions in favor of the judgment are sustained, effectively precluding an meaningful appeal. Filing the reminder with the clerk of court is not enough (Zaruba v. Zaruba, 498 S.W.2d 695, 697-698 (Tex. Civ. App. - Corpus Christi 1973, dis.)). In the case that I was involved in, the judge rides circuit in South Texas. Therefore, to present this to the judge required that I first locate him and then take a full day to go to the courthouse he was holding court in (Sinton) and wait until he was on a break to present the reminder. An onerous burden, at best. The cost to the client to present this "reminder" to the judge was also considerable. I am not sure what would have happened if the judge had been on vacation or ill or simply not around. I guess that the client would have lost his appeal. I somehow feel that this rule is an anomaly and that a party should not be put at risk to lose his right to appeal on so tenuous a ground as failing to personally remind a trial judge of his duties to issue findings and conclusions within five days of when he was supposed to have done issued them.

13. Rule 297, T.R.C.P., is especially onerous given the normal practice in Texas courts, which is that counsel for the prevailing party normally prepares the findings and conclusions for the judge. The prevailing party is unreasonably and unfairly benefitted if his counsel is able to delay preparing the findings and conclusions for the judge's signature past the requisite deadlines. A fairer system then would seem to be that after the initial thirty days has expired, the burden shifts to the party attempting to sustain the judgment, to obtain findings and conclusions. This could be accomplished in one of several ways but the easiest method would be to amend the rule to allow either party to bring the failure to file findings and conclusions after thirty days to the attention of the trial court, but eliminate, by rule, the

presumption in favor of the judgment if no findings and conclusions have been filed. This would simply mean that without findings and conclusions, the judgment must stand or fall on the record, without any appellate presumption as to its validity.

I regret that the time constraints and my normal practice have not allowed me to do a more extensive and formal legal memorandum on this subject; however, I have given you the benefit of my analysis of the problems and my proposed solutions. If you have any questions or need additional information please feel free to give me a call.

W. Michael Murray

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WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

July 27, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296

Dear Hadley:

Enclosed herewith please find a copy of a letter from W. Michael Murray regarding TRCP 296. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan L. Hecht
Honorable David Peeples

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CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
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Rule 329. Motion for New Trial on Judgment Following Citation by Publication

In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years such after judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases.

(b) Execution of such judgment shall not be suspended unless the party applying therefor shall give a good and sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Appellate Rule 47 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale.

"(d) If an interest in property has been leased under the judgment, before the process was suspended, the defendant shall not be allowed to rescind the lease, but shall have judgment against the plaintiff for the proceeds resulting from the lease of such interest."

(e) If the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7).

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August 31, 1988

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 329

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Skipper Lay regarding Rule 329. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Mr. Skipper Lay

Copy to HJH
Orig to file
8-15-88
ljh

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HJH
SCAC Supp C
+ Agenda

August 16, 1988

Mr. Robert W. Fuller
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Attorneys at Law
Suite 300
United Bank Building
500 West Illinois
Midland, TX 79701

RE: Proposed "Fuller-Cummings" Amendments to Statute and Texas Rules of Civil Procedure

Dear Bob:

Thank you for your submittal of July 28, 1988, a copy of which was sent to me. We have now placed your proposed amendment to the Texas Civil Practice & Remedies Code §64.091 with the State Bar, hopefully for inclusion in the State Bar legislation package.

As I understand your submittal, you actually submitted a proposed revision to the Texas Civil Practice & Remedies Code, and also to Rule 329 of the Texas Rules of Civil Procedure. The scope of the Oil, Gas & Mineral Law Section's work this year involved statutory revisions and revisions or amendments to rules for consistency with the statutes. As we read your proposed addition to Rule 329, it has no connection with your submission for revision of the Texas Civil Practice & Remedies Code.

Therefore we return to you the materials you submitted concerning Rule 329, and the proposed addition. We encourage you to submit this proposed revision directly to the Supreme Court Advisory Committee. A copy of the listing of committee membership (valid at least through June 1, 1988) is enclosed with this letter.

In addition, I am sending some slightly different wording to your Rules amendment than you previously submitted. Accordingly, you may do with them as you see fit.

Thank you again for your submittal of the statutory revision materials.

Sincerely yours,

LAY & COFFEY, P.C.

By: Skipper Lay
Skipper Lay

SL/fdw
Enclosure
cc: Mr. Jan E. Rehler
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THE SUPREME COURT ADVISORY COMMITTEE

Purpose: To advise the Supreme Court on proposed changes in the Texas Rules of Civil Procedure.

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Continued on next page

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Rule 329c Motions to Set Aside Default Judgments

Rule 329b and the following rule shall be the exclusive rules applicable to motions for new trial designed to effect the setting aside of a default judgment:

(a) The motion must be supported by affidavit testimony alleging facts within the personal knowledge of the affiant reflecting that the default was not intentional or the result of conscious indifference; that the movant has a meritorious defense to the action; and that setting aside the default will not prejudice the nonmovant except by depriving him of the default judgment;

(b) The trial court can require a hearing on the motion for new trial on any just terms consistent with this rule and Rule 329b; and the trial court must hold a hearing on the motion for new trial if requested by the movant or the nonmovant, but the mere holding of a hearing shall have no effect on the evidentiary value of affidavits filed prior to the hearing;

(c) The movant's affidavit testimony may be controverted by affidavits (which, for the purposes of this rule, constitute evidence if filed prior to the hearing) reflecting personal knowledge of relevant facts or by other evidence of facts which would be admissible at trial under the Rules of Evidence, but the filing of opposing affidavits shall not be a prerequisite to the introduction of evidence at the hearing;

00157

(d) If the movant's affidavit testimony is not controverted by any facts proved prior to or during the hearing, if any, or prior to the ruling on the motion for new trial if no hearing is held, and the testimony otherwise is sufficient to satisfy the requirements of subsection (a) of this rule, the trial court must grant the motion and set aside the default judgment on such terms as it deems just; and

(e) If the movant's affidavit testimony is controverted in the manner and at the time(s) permitted in this rule, the trial court must find the facts and render a decision consistent with those findings and the requirements of subsection (a) of this rule.

LH&S
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January 6, 1987

1-15-88
Holly
P339b Title Secs
xc Jackson

Ms. Holly Halfacre
State Bar of Texas
800 Milam Building
Austin, Texas 78705

Dear Ms. Halfacre:

Enclosed is a copy of an article which will be published in the Baylor Law Review next month with the title "Default Judgments: Procedure(s) for Alleging or Controverting Facts on the Conscious Indifference Issue." The article concerns a proposed new rule of civil procedure which, for your convenience, I have copied and placed at the front of the article. I would appreciate it if you would submit the rule and the article to the State Bar's Advisory Committee on the Rules of Procedure for their consideration.

Thank you for your cooperation in this matter.

Very truly yours,

Aaron L. Jackson

ALJ:tes

Enclosures

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January 18, 1988

Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
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RE: Rule 329b

Dear Harry:

Enclosed herewith please find a copy of a letter I received from Aaron L. Jackson regarding Rule 329b. Please review this matter and be prepared to speak on same at our next committee meeting. I am including same on our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Mr. Aaron L. Jackson
Justice James P. Wallace

In any case involving an appeal from a default judgment, appellate courts slavishly cite the three-pronged test from Craddock v. Sunshine Bus Lines, Inc.,[1] as "the guiding rule or principle which trial courts are to follow in determining whether to grant a motion for new trial."[2] According to that test, a default judgment should be set aside if (1) failure of the defendant to answer before judgment was not intentional or the result of conscious indifference; (2) the motion for new trial sets up a meritorious defense to the plaintiff's cause(s) of action; and (3) setting aside the default judgment will not cause delay or otherwise prejudice the plaintiff.[3]

Despite the unanimity on the substance of the Craddock test, however, reported appellate court decisions reflect different beliefs about the procedure(s) the advocate must use in various contexts to comply with the test or to demonstrate the movant's noncompliance with it. In particular, no consensus seems to exist among appellate courts concerning the proper procedure for controverting facts alleged by the defaulting party in an attempt to show that the default was not intentional or the result of conscious indifference.

According to their published opinions, appellate courts would not agree on the answers to the following questions: Must the nonmovant file opposing affidavits as a prerequisite for introducing live testimony or other evidence at an evidentiary hearing on the motion for new trial?[4] If the movant submits uncontroverted affidavits to show the default was not intentional or the result of conscious indifference, are those affidavits sufficient to defeat the default judgment even if the trial court

holds a hearing on the motion for new trial?[5] If the movant submits affidavits which meet all the requirements of the Craddock test, are those affidavits sufficient to defeat the default judgment even if they are controverted?[6]

In an attempt to describe for the practitioner the proper procedure for showing or disputing that the failure to answer was intentional or the result of conscious indifference, this article offers two things:

1. An analysis of case law before and after the Supreme Court's watershed decision in Strackbein v. Prewitt;[7] and
2. A new rule of civil procedure designed to elucidate in detail the proper procedures for defending and opposing default judgments before the trial court.

Strackbein

In Strackbein v. Prewitt, supra, the Supreme Court reversed a default judgment upheld by the San Antonio Court of Appeals. The trial court refused to set the judgment aside after a hearing in which the defaulting party presented oral argument on his motion for new trial. Neither the movant nor the nonmovant made a record of the hearing;[8] so, when the case came to the appellate courts, the record contained only the uncontroverted affidavits of the movant. Accordingly, the Supreme Court held:

> Where factual allegations in a movant's affidavit are not controverted, a conscious indifference question must be determined in the same manner as a claim of meritorious defense. It is sufficient that the movant's motion and affidavit set forth facts which, if true, would negate intentional or consciously indifferent conduct.[9]

The Supreme Court does not say in this passage (or anywhere else in the opinion) that the nonmovant must controvert the movant's affidavits by filing controverting affidavits as opposed to other types of controverting evidence. Both the Supreme Court opinion in Strackbein, and the Supreme Court file in the case, indicate that the nonmovant had made no attempt of any kind to controvert the movant's affidavits.[10]

In such a context, it is easy to accept the following broad language which appears at the very end of the Strackbein opinion:

> Finally, Strackbein contends that if the trial court conducts a hearing on a defaulting defendant's motion for new trial, the appellate court should not substitute its discretion for that of the trial court. The issue is not one of which court's discretion shall prevail. Rather, it is a matter of the appellate court reviewing the acts of the trial court to determine if a mistake of law was made. The law in the instant case is set out in Craddock. That law requires the trial court to test the motion for new trial and the accompanying affidavits against the requirements of Craddock. If the motion and affidavits meet these requirements, a new trial should be granted. In this case those requirements have been met.[11]

Taken alone outside the context of the particular facts in Strackbein, however, this language can support such a broad reading of Strackbein that neither an evidentiary hearing nor controverting affidavits can defeat a motion supported by affidavit testimony indicating an absence of conscious indifference. See, Southland Paint v. Thousand Oaks Racket Club.[12]

After Strackbein: Southland

In Southland, the movant requested a hearing on the motion for new trial. Because Strackbein did not require the hearing simply because the nonmovant had filed conclusory affidavits

opposing the movants, and the opposing affidavits contained no facts about the events leading up to the default, the hearing need not have been requested for evidentiary reasons. Instead, the hearing simply could have given Southland an oral opportunity to persuade Judge Rivera to set aside the default judgment if the written motion for new trial had not persuaded him on its own.

A record on the proceedings in the hearing was presented to the appellate court. The record reflects that the nonmovant presented live testimony. The movant argued this testimony did not controvert the affidavit testimony supporting the motion for new trial because the testimony did not come from someone with personal knowledge of facts leading to the default, and because the evidence was in the form of an opinion grounded upon an erroneous definition of conscious indifference. The San Antonio court's majority opinion in Southland does not explicitly reject or accept the movant's argument in this regard. Instead, the court, citing Strackbein, simply broadly held that the movant's affidavits met the Craddock test and, therefore, the default had to be reversed.

Neither the majority nor the dissenting opinion in Southland addresses the effect of the nonmovant's affidavits or testimony. According to the weight of authority, the nonmovant's affidavits and testimony may have been irrelevant because neither controverted the facts leading up to the default, as alleged in the movant's affidavits. Because the San Antonio court does not make this clear in its opinion in Southland, however, the opinion could be read to support an argument that, once the movant files affidavit testimony which, if true, meets the Craddock test,

controverting evidence of any kind, even on the conscious indifference issue, is irrelevant, and the trial court must grant the motion for new trial.

In dissent in Southland, Chief Justice Cadena also did not mention the issue of controverting evidence. Instead, the Chief Justice opined that because the movant presented no testimony at the hearing, it had failed to discharge the burden it was required to bear to get the default set aside.[13] This dissent reflects a broad reading of Reedy Co., Inc. v. Garnsey,[14] according to which the movant's affidavits automatically become insufficient (become nonevidence) to support a motion for new trial upon request by the nonmovant for a hearing on the motion.

On May 13, 1987, the Supreme Court ruled that the San Antonio court had committed no reversible error in Southland. In so doing, the Supreme Court left standing the San Antonio's court broad language interpreting Strackbein, according to which controverting evidence of any kind is irrelevant as long as the movant files an affidavit which meets the requirements of Craddock.[15]

After Strackbein: Barber

In Peoples Sav. and Loan Ass'n v. Barber,[16] the San Antonio court offered another interpretation of Strackbein which may create problems for the practitioner. The procedural history of Barber provides a good introduction to the problems. The movant requested a hearing on the motion for new trial and called its own affiants live to supplement their affidavit testimony. The nonmovant filed a reply to the motion for new trial, but did not offer and could not have offered affidavits to controvert the

factual allegations of the movant's affiants. The nonmovant's inability in this regard may not have been significant at the time because the movant's affidavits seemed fatally deficient on the meritorious defense issue[17] (as pointed out in the reply to the motion for new trial).[18] At the time, Strackbein did not appear to require the filing of counter-affidavits before the nonmovant could take advantage of any controverting testimony elicited during cross-examination of the affiants at the hearing.

At the hearing, the nonmovant did elicit from the affiants testimony which contradicted their affidavit testimony. For example, as one of the excuses for the default, one of the movant's witnesses testified that, in a telephone conversation designed to notify him that the movant had been served with citation, he mistakenly thought he was being told only about a letter that had been previously sent by Mr. Barber.[19] This testimony impeached the witness' affidavit in which he admitted under oath that, on the ocassion in question, he was actually advised that the movant had been served with court papers concerning Mr. Barber's suit.[20]

During cross-examination, the trial court also asked questions of the impeached witness, questions which the witness avoided. The trial court denied the motion for new trial, and the movant appealed.

The San Antonio court, in an opinion by Justice Chapa, took a broad view of Strackbein and reversed the default judgment. The court held:

> Barber filed no controverting affidavits to the motion for new trial . . . . Since Barber filed no controverting affidavits, the trial court could only look to the record

before him at that time which included the motion for new trial and the attached affidavits . . . .[21]

* * *

Barber asserts that we should consider the evidence adduced at the evidentiary hearing [of which the court had a record] on the motion for new trial in reviewing the trial court's denial of the motion . . . . The Supreme Court, faced with the same contention [sic], held:

> Finally, Strackbein contends that if the trial court conducts a hearing on a defaulting defendant's motion for new trial the appellate court should not substitute its discretion for that of the trial court. The issue is not one of which court's discretion shall prevail. Rather, it is a matter of the appellate court reviewing the acts of the trial court to determine if a mistake of law was made. The law of the instant case is set out in Craddock. That law requires the trial court to test the motion for new trial and the accompanying affidavits against the requirements of Craddock. If the motion and affidavits meet those requirements, a new trial should be granted.[22]

(Emphasis added.)

The San Antonio court's holding in Barber creates at least the following problems for the practitioner in this area:

1. For the first time it seems to require that the nonmovant file controverting affidavits as a prerequisite for the introduction of other controverting evidence;
2. If for whatever reason, controverting or opposing affidavits are not available to the nonmovant, cross-examination testimony of the movant's affiants themselves cannot be considered by the trial court on the conscious indifference issue; and
3. If controverting or opposing affidavits are not available to the nonmovant, he has no way to defend the

default against an artfully worded, but false movant's affidavit.

Under most circumstances, as was true in Barber, the allegations made in the supporting affidavits as to intent or conscious indifference are wholly within the knowledge of the affiant(s) and concern facts which cannot be known personally to the nonmovant. For example, in Barber, to explain the default, the movant relied solely upon evidence of a telephone conversation during which a misunderstanding allegedly arose that resulted in the default. The only witnesses to this alleged telephone conversation were the two participants in it, and they were the only affiants offered in support of the motion for new trial.[23]

In the Barber situation, which experience has shown to be typical, the nonmovant can test the movants' proof only by cross-examining the affiant(s) regarding the truth or falsity of the facts alleged in affidavit testimony. According to the San Antonio court's holding in Barber, a nonmovant is effectively deprived of his right to cross-examine the movant's affiants in the vast majority of default judgment cases. In those cases, the nonmovant is left completely to the mercy of the affiants' conscience or lack thereof.

Of course, in the motion for rehearing and in the application for writ of error in Barber, the nonmovant argued that the live cross-examination testimony from the affiants themselves did controvert their affidavits; that the court did have before it a record of the controverting evidence; that the appellate courts in Strackbein did not have such a record; that the nonmovant had offered no controverting evidence of any kind in Strackbein;[24]

that, accordingly, Strackbein was not in point; and that the absence of controverting affidavits was irrelevant. At least three members of the Supreme Court agreed with these arguments when they granted the application for writ of error on October 7, 1987. Because the application was later withdrawn by agreement as a result of the settlement, however, the Supreme Court did not have a chance to address intermediate appellate court interpretations of the opinion in Strackbein.

If the Supreme Court had addressed the issues in Barber, it could have defended the following rules:

1. The nonmovant must controvert the movant's affidavits on the issue of conscious indifference; otherwise, they are taken as true;[25]
2. The nonmovant can controvert the movant's affidavits on the conscious indifference issue either by filing affidavits, or by adducing testimony live at a hearing as long as either contradicts the facts alleged by the movant's affidavits on the conscious indifference issue;[26]
3. The controverting evidence, if any, must be incorporated in the record presented to the appellate court; otherwise, the appellate courts will accept the movant's affidavits as true.[27]
4. An "evidentiary" hearing has no effect on the movant's affidavits if no evidence is presented at the hearing to controvert the facts alleged in the affidavits on the conscious indifference issue;[28]

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5. If the movant's affidavits are controverted, the trial court must find facts, which findings will not be disturbed on appeal if supported by some evidence;[29] and

6. If the movant's affidavits are not controverted, the motion for new trial must be granted if no reasonable interpretation of the affidavits would suggest the default was intentional or the result of conscious indifference.[30]

These rules avoid the problematic holdings and statements in Barber and Southland. For example, contrary to the ruling in Barber, it seems self-evident that, without requiring prerequisites, the trial court should be able to consider admissions by the affiants themselves, admissions made during cross-examination at a hearing on the motion for new trial. Before Barber, no Texas court had established prerequisites for cross-examination of witnesses called by the other side,[31] and it would seem extremely unjust if affidavit testimony need be taken as true in the teeth of the affiant's live admission or testimony during cross-examination indicating the affidavit testimony was not actually true. Likewise, contrary to the apparent ruling by the majority in Southland, it seems unjust to accept artfully worded affidavits on the conscious indifference issue if evidence is offered (at least by the time of the hearing on the motion for new trial) to controvert the affidavits. Finally, it seems unjust to exalt form over substance as does the dissent in Southland in opining that a mere request for a hearing automatically negates the force of the movant's affidavits.

According to the views expressed in Barber and Southland, the key issue seems to be form and not substance. According to the Supreme Court's views, however, as reflected in the Strackbein opinion read as a whole, the key issue seems to be the absence or presence of controverting facts of any kind on the issue of conscious indifference, whether these facts are in the movant's affidavits themselves and reflect internal inconsistencies; or whether the facts alleged in the movant's affidavits are inconsistent with facts alleged in opposing affidavits; or whether facts alleged in the movant's affidavits are inconsistent with facts established other than by affidavit, for instance, during live testimony at the evidentiary hearing. The facts developed as of the time of the hearing should control.

There should be and usually is a "symmetry" in the risks of any given action in litigation. For example, if an advocate calls a witness to prove a favorable fact, X, the witness may admit Y, which is unfavorable. Likewise, if the advocate's opponent calls a witness to prove Y, which favors the opponent, the witness may prove X, which disfavors the opponent.

Similarly, if the advocate does not call a witness to prove X, the factfinder may consider other evidence to be too weak to support the advocate's position on X. Likewise, if the opponent fails himself to call the advocate's witness adversely, the factfinder may find other evidence to be strong enough to support the advocate's position.

The views expressed by the San Antonio court in Southland and Barber alter the natural symmetry of risks with respect to witnesses called or not called in connection with an attempt to

effect the setting aside of a default judgment. The majority view in Southland, for instance, if read literally, eliminates entirely the risk in a movant's decision not to call witnesses live to prove the absence of conscious indifference. This is true because, according to the Southland majority's view, the movant's witness(es)' affidavit testimony must be taken as true and, as long as the affidavit is artfully worded, the trial court must grant the motion for new trial.

Likewise, the dissent in Southland, if read literally, eliminates entirely the risk in the nonmovant's decision not to call or to depose the movant's witness(es) on the conscious indifference issue. This is true because, according to the Southland dissent's view, the nonmovant, simply by requesting a hearing, can force the movant to call his witness(es) live to prove the absence of conscious indifference.

Similarly, the majority opinion in Barber, if read literally, eliminates entirely the risk in the movant's decision affirmatively to call witnesses live at the hearing to prove the absence of conscious indifference. This is true because, as long as the nonmovant files no controverting affidavits, nothing the movant's witnesses say can be used against the movant.

An argument that the views in Southland and Barber destroy "symmetry of risks" in litigation is, at bottom, an argument that the views are unfair. The following rule is proposed as a reasonably fair guideline for defending and opposing default judgments. It is respectfully commended for consideration by the State Bar Advisory Committee on the Rules of Civil Procedure.

Rule 329c Motions to Set Aside Default Judgments

Rule 329b and the following rule shall be the exclusive rules applicable to motions for new trial designed to effect the setting aside of a default judgment:

(a) The motion must be supported by affidavit testimony alleging facts within the personal knowledge of the affiant reflecting that the default was not intentional or the result of conscious indifference; that the movant has a meritorious defense to the action; and that setting aside the default will not prejudice the nonmovant except by depriving him of the default judgment;

(b) The trial court can require a hearing on the motion for new trial on any just terms consistent with this rule and Rule 329b; and the trial court must hold a hearing on the motion for new trial if requested by the movant or the nonmovant, but the mere holding of a hearing shall have no effect on the evidentiary value of affidavits filed prior to the hearing;

(c) The movant's affidavit testimony may be controverted by affidavits (which, for the purposes of this rule, constitute evidence if filed prior to the hearing) reflecting personal knowledge of relevant facts or by other evidence of facts which would be admissible at trial under the Rules of Evidence, but the filing of opposing affidavits shall not be a prerequisite to the introduction of evidence at the hearing;

(d) If the movant's affidavit testimony is not controverted by any facts proved prior to or during the hearing, if any, or prior to the ruling on the motion for new trial if no hearing is held, and the testimony otherwise is sufficient to satisfy the requirements of subsection (a) of this rule, the trial court must grant the motion and set aside the default judgment on such terms as it deems just; and

(e) If the movant's affidavit testimony is controverted in the manner and at the time(s) permitted in this rule, the trial court must find the facts and render a decision consistent with those findings and the requirements of subsection (a) of this rule.

ENDNOTES

1. 134 Tex. 388, 133 S.W.2d 124 (1939).

2. Strackbein v. Prewitt, 671 S.W.2d 37 (Tex. 1984).

3. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124.

4. Yes--People's Savings & Loan Assoc. v. Barber, 733 S.W.2d 679 (Tex. App.--San Antonio 1987, writ dism'd by agr.);

No--Royal Zenith Corp. v. Martinez, 695 S.W.2d 327 (Tex. App.--Waco 1985, no writ); Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.)

5. Yes--Strackbein v. Prewitt, 671 S.W.2d 37; Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.);

No--Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.)

6. Yes--Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.);

No--Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); Royal Zenith Corp. v. Martinez, 695 S.W.2d 327 (Tex. App.--Waco 1985, no writ).

7. Strackbein v. Prewitt, 671 S.W.2d 37; Order in Cause No. 82-CI-0794, signed October 1, 1982 (Strackbein v. Prewitt).

8. Strackbein v. Prewitt, 671 S.W.2d 37, 39.

9. Id. at 38-9.

10. The fact that the Strackbein case did not involve an evidentiary hearing, or at least no record of such was made, is documented in the transcript and pleadings found in the Supreme Court's file in Strackbein. The trial court's Order denying the Motion for New Trial states:

> The Court having considered the pleadings, affidavits and arguments of counsel, is of the opinion that the Motion for New Trial should be denied. Order in Cause No. 82-CI-0794, signed October 1, 1982 (Supreme Court File No. C-2883).

Also, the movant in Strackbein described the procedural history of that case:

> Mr. Strackbein [non-movant] did not file or offer any affidavits to controvert Mr. Prewitt's motion nor did he present any evidence at the hearing on the Motion for New Trial. Respondent's Answer to Application for Writ of Error, Statement of Facts, p. 5 (Supreme Court File No. C-2883).

(Emphasis added).

Furthermore, no record was made of the hearing on the Motion for New Trial in Strackbein. 671 S.W.2d at 38.

11. Strackbein v. Prewitt, 671 S.W.2d 37, 39.

12. 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.)

13. Id. at 811.

14. 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.), cited erroneously by Chief Justice Cadena as a decision of the Texas Supreme Court. 724 S.W.2d at 811. In Reedy, the movants filed a supporting affidavit on the conscious indifference issue, and the nonmovant presented controverting testimony at the evidentiary hearing on the Motion for New Trial. In its opinion,

the Dallas Court of Civil Appeals said nothing that would lead the reader to believe the nonmovant had filed opposing affidavits as a prerequisite for introducing the live testimony. The court did hold that the movants' affidavit on the conscious indifference issue was not evidence once controverted by the live testimony. 608 S.W.2d at 757. This seems to be unarguable based upon the weight of authority. However, the language in the Reedy opinion seems to go farther than a mere holding that, once controverted by live testimony or otherwise, a supporting affidavit is not evidence on the conscious indifference issue. At the very end of the opinion appears the following language:

> We hold that when a hearing is held on a motion to set aside a default judgment, . . . the movant has the burden of proving by a preponderance of the evidence that his failure to answer was not intentional or due to conscious indifference, but rather was due to mischance or mistake.

(Emphasis in original.)

Id. This language is not limited to a situation in which controverting evidence of some kind is presented at the hearing on the Motion for New Trial. Consequently, in Southland, the Chief Justice opined that merely because a hearing had been held on Southland's Motion for New Trial, Southland's affidavits on the conscious indifference issue lost their evidentiary value. 724 S.W.2d at 811. If this was a holding in Reedy, the Supreme Court in Strackbein seemed to repudiate it. There the Supreme Court held that the movant's affidavits on the conscious indifference issue constituted evidence even in the face of a hearing held in that case on the Motion for New Trial. 671 S.W.2d at 39. No controverting evidence was presented at the hearing in Strackbein.

15. Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.)

16. 733 S.W.2d 679.

17. It is well-established that the rule of Craddock does not require proof of a meritorious defense but rather a new trial should be granted if the motion for new trial "sets up a meritorious defense." Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex.

1966). No controverting evidence of any kind may be considered on the meritorious defense issue. Guaranty Bank v. Thompson, 632 S.W.2d 338, 340 (Tex. 1982).

18. Barber's Reply To People's Motion For New Trial, Barber v. People's Savings & Loan Assoc. and People's Mortgage Co., No. 86-CI-01820A (1986). Barber's Reply To People's Motion For New Trial asserted that the motion for new trial was fatally deficient because the motion failed to allege facts which, if true, would constitute a meritorious defense to the causes of action alleged. In particular, Barber's reply alleged that the motion for new trial contained mere conclusory allegations and other legal conclusions, which did not sufficiently set up a meritorious defense as required by the Supreme Court's decision in Ivy v. Carrell, 407 S.W.2d 212 (Tex. 1966).

19. Cause No. 04-86-00315-CV, Peoples Savings & Loan Assoc. and Peoples Mortgage Co. v. Barber, Byron (Tex. App.--San Antonio), Statement of Facts for April 30, 1986, P. 62, L. 17-25.

20. Id., Transcript at 18.

21. The language in the Barber opinion appears to track very

closely the language used in the Strackbein opinion, substituting the names from the Barber case where the names from the Strackbein case had been used previously.

22. People's Savings & Loan Assoc. v. Barber, 733 S.W.2d 679, 681.

23. Cause No. 04-86-00315-CV, Peoples Savings & Loan Assoc. and Peoples Mortgage Co. v. Barber, Byron (Tex. App.--San Antonio), Transcript, at 13-20.

24. Order in Cause No. 82-CI-0794, signed October 1, 1982 (Supreme Court File No. C-2883); Respondent's Answer To Application For Writ Of Error, Statement of Facts, p. 5 (Supreme Court File No. C-2883); Strackbein v. Prewitt, 671 S.W.2d 37.

25. Strackbein v. Prewitt, 671 S.W.2d 37; Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.)

26. Royal Zenith Corp. v. Martinez, 695 S.W.2d 327; Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755.

27. Strackbein v. Prewitt, 671 S.W.2d 37.

28. Implied in Strackbein v. Prewitt, id.

29. Royal Zenith Corp. v. Martinez, 695 S.W.2d 327; Strackbein v. Prewitt, 671 S.W.2d 37.

30. Strackbein v. Prewitt, 671 S.W.2d 37; Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16.

31. Cases recognizing the fundamental right to cross-examination are legion. As a former Chief Justice of the San Antonio Court put it in 1952, "ordinarily parties are entitled to cross-examine witnesses and test their opportunity to know what they profess to know. . . ." City of Corpus Christi v. McCarver, 253 S.W.2d 456, 459 (Tex. Civ. App.--San Antonio 1952, no writ). A party's right to cross-examine witnesses would be meaningless if the trial court could not consider the admissible testimony produced by the cross-examination.

RULE 534. ISSUANCE AND FORM OF CITATION

a. Issuance. When a claim or demand is lodged with a justice for suit, the clerk, when requested, he shall forthwith issue a ~~forthwith~~ citations and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition if any is filed. ~~for the defendant or defendants. The citation shall require the defendant to appear and answer plaintiff's suit at or before 10:00 o'clock a.m. on the Monday next after the expiration of ten days from the date of service thereof, and shall state the place of holding the Court.~~ It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. Upon request, separate or additional citations shall be issued by the clerk.

b. Form. The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition if any is filed, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of ten days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of ten days after you were served this citation and petition, a default judgment may be taken against you."

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

~~RULE 536. SPECIAL PROCESS SERVER~~

~~The justice, in case of an emergency, may depute any person of good character to serve any process; and the person so deputed shall for such purpose have all the authority of a sheriff or constable, but in every case the justice shall indorse on the process a statement in writing, signed by him officially, to the effect that he has deputed such person to serve such process. Such person shall also take and subscribe an affidavit, to be indorsed on or attached to the process, to the effect that he will do the best of his ability execute the same according to law and these rules.~~

535. WHO MAY SERVE AND METHOD OF SERVICE

(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

(b) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by this rule by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto if any is filed.

(c) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place or abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonbly effective to give the defendant notice of the suit.

536. DUTY OF OFFICER OR PERSON RECEIVING AND RETURN OF CITATION

The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The reutrn of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 536, the return by the officer or authorized person must also contain the return receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failue to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 536, proof of service shall be made in the manner ordered by the court.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 536, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

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TEXAS BOARD OF LEGAL SPECIALIZATION

FILE NO.:

August 9, 1989

FEDERAL EXPRESS

Honorable Luther H. Soules, III
Chairman, Supreme Court Advisory Committee
SOULES & WALLACE
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-2230

RE: Standing Subcommittee on Rules 523-591 TRCP.

Dear Luke:

This material pertains to the request for revision of the rules for issuance, service and return of citation in justice courts (Rules 533-536) to conform them to the provisions of Rule 97-107 as amended, their counterpart rules for District and County courts. Following our meeting of July 15 I did not return to the office until this week due to an extended absence for business purposes and vacation. In my absence I hand wrote a letter, mailed it in and asked my staff to type and forward it to each member of this subcommittee. Given the logistical difficulty of the process I reviewed the letter upon returning to the office and with the exception of a few garbled phrases the letter appears to have gone out and reflected the request made of the subcommittee by the SCAC. However upon return I did not have any substantive proposals from the members of the subcommittee and it was not feasible to schedule a meeting prior to the SCAC August 12 meeting. I also know a number of our members are away on vacation or otherwise. In order that this work does not lapse I have taken the liberty of drafting some modifications of these rules which are enclosed with this letter, and I pass them on to you with the clarification that this should not be construed as the work of the subcommittee nor expressing any preferences or opinions of members of the subcommittee on this issue, but merely to put something before the Committee for discussion at Saturday's meeting.

In formulating this product, I take the liberty of making certain presumptions. (1) That there is a desire to have the rules of citation in justice court proceedings be consistent

with, to the extent possible, the rules for citation in county and district courts. (2) That the procedures in district and county courts are workable in justice courts. (3) That the legislature has established an official clerk's office for the justice courts which will be able to function similarly to the district clerk and county clerk (which I have been informed of and have not had an opportunity to confirm). (4) That the Supreme Court desires to have this material before it for consideration along with all the other rules to be considered for the forthcoming pronouncement of rule adoptions and modifications. If either presumption fails, then my work is off base and needs to be redone or tabled.

My situation is further complicated by the fact that yesterday there was a death in my family and I understand arrangements for a Saturday funeral are being considered and in the event that it does occur this Saturday I will not be present at the meeting. Therefore I will discuss these matters more extensively by this letter than perhaps ordinarily I would do, since it appears I may not be able to be present Saturday to go into a more lengthy explanation at the meeting. What I hope to do in this letter is explain what I have attempted to do in the drafts and I do so with my usual precautionary statement that in no way am I expressing a personal preference for how it should be stated or done and certainly I take no pride in authorship and request that the Committee take full liberty (as I am sure it will) to deal with these matters Saturday.

Please refer to the rules for citation in district and county courts Rules 99, 103, 105, 106 and 107 and juxtapose them to the rules for citation in justice courts, 534, 536, and collaterally 533 and 535. I start with former justice court rule 534 (I could not tell exactly the purpose or reason for 533 but did not deal with it although it appears that 533 could be eliminated presuming the other rule changes are made to pick up any provisions in 533 as I believe has occurred with these proposed changes). However you do not have anything in your materials on rule 533 and I pass these comments on merely as advisory.

Rule 534 as existed has been modified by the proposed draft to conform to the extent appropriate or possible to Rule 99. Instead of the twenty day provision for filing an answer I kept the ten day provision in justice courts with the presumption that the ten day time period must have had some meaning and the justice courts may want to retain the ten day provision. Also I had to bear in mind that the justice court rules allow for oral pleading (Rule 525) and in fact appears to mandate such. I

believe the preference would be to go to written pleadings but since the oral pleadings provision is there I did not propose to remove it yet that does have some impact on the citation rule. I have attempted to pick that up by language referencing the petition "if any is filed" which you will see in several places in the rule.

It appeared that rule 536 as modified should really be Rule 535 (and I will discuss the existing Rule 535 later).

Rule 536 (new 535) as modified attempts to combine Rules 103 and 107. There is no particular reason for combining the two rules except to cut down on the number of new justice court rules and attempt to consolidate rules where possible.

New Rule 536 attempts to combine Rules 105 and 107, again merely for the purpose of limiting the number of new rules in the justice court rules.

Coming back to existing Rule 535 which I am proposing to eliminate, it appears that the rule is out of place and potentially either conflicts with or supplements existing Rule 537 having to do with appearance day and filing an answer. To the extent that any provision in Rule 535 needs to be preserved I would suggest it be placed in Rule 537, yet I cannot determine the benefit of 535 and therefore I have not drafted a rule to amend 537, and I would recommend deleting existing Rule 535 or alternatively placing the rule under 537 as an amendment thereto.

Finally, I remind us that the ninety day provision in Rule 534 has already been eliminated by previous action of the Committee this year and it does not appear in the new proposed Rule 534 enclosed, yet we need to track down the old/new 534 in the event these modifications are adopted in order that we do not have two conflicting new proposals for Rule 534. The reason for the previous new proposed rule was the only mission previously presented to this subcommittee was the question of eliminating the ninety day provision and not the complete redrafting of the rule which has now occurred.

I hope that these comments and this work will be helpful to the Committee in the Saturday meeting and in the event I am unable to attend because of the funeral I express my regret in not being with you to work on these rules and hope to see you the next time.

Yours sincerely,

Anthony J. Sadberry

AJS/stb

cc: Justice Nathan L. Hecht, Supreme Court of Texas
(w/enclosure)

Members of Standing Subcommittee on Rules 523-591 TRCP
(w/enclosures

May 25, 1989

Mr. Luther H. Soules, III
Soules and Wallace
Republic of Texas Plaza, Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I find no provision in the appellate rules for substitution of parties except Rule 9. That rule does not cover the situation, quite common in these hard times, in which a new entity (like the FDIC or the FSLIC) succeeds to the interest of a party on appeal. Perhaps an amendment to Rule 9 should be considered at the May meeting of the Advisory Committee.

Texas Rule of Civil Procedure 749c requires a pauper appellant in a forcible detainer case involving non-payment of rent to deposit one rental period's rent into the court registry to perfect the appeal. This deposit is not in the nature of a supersedeas, which is provided for in Rule 749b. A pending case challenges the constitutionality of Rule 749c. *Walker v. Blue Water Garden Apartments*, C-7798. This may be another problem we want to discuss.

Finally, a local justice of the peace recently complained of inconsistencies in the requirements for service of citation under Rules 99-107 and 533-536 of the Texas Rules of Civil Procedure. He suggested that the latter rules were simply overlooked when changes in the former rules were made.

As always, the Court is grateful to you for your dedicated assistance in developing our Rules.

Sincerely,

/Nathan L. Hecht

Nathan L. Hecht
Justice

HELD OVER FROM MAY 26-27 Meeting

Rule 82. Judgment on Affirmance or Rendition in a Civil Case

When a court of appeals affirms the judgment or decree of the court below, or proceeds to modify the judgment and to render such judgment or decree against the appellant as should have been rendered by the court below, it shall render judgment against the appellant and the sureties on his supersedeas bond, if any, for the performance of said judgment or decree, and shall make such disposition of the costs as the court shall deem proper, rendering judgment against the appellant and the sureties on his appeal or supersedeas bond, if any, for such costs as are taxed against him.

[NEW RULE]

Rule 82a

When a court of appeals reverses the judgment or decree of the court below, or proceeds to modify the judgment and to render such judgment or decree in favor of the appellant as should have been rendered by the court below, it shall render judgment in favor of the appellant for the performance of said judgment or decree, and shall make such disposition of the costs as the court shall deem proper, rendering judgment against the appellee and ordering the clerk of the court of appeals ~~shall~~ to notify the district clerk to abstract and enforce the judgment of the court of appeals as in other cases.

[NEW RULE]

Rule 82a. Modification of Security or Recordation of Judgment on Alteration of Judgment In a Civil Case.

(a) When the judgment of the court of appeals alters the judgment of the court below, upon fifteen days after the rendition of such judgment if no motion for rehearing is timely filed or upon the overruling of all timely filed motions for rehearing, any party to the appeal may file a certified copy of the judgment of the court of appeals with the clerk of the court below. The filing of such judgment will alter the existing judgment in the cause during the pendency of the appeal effective ten days following such filing. The filing of such judgment is a proper basis for exercise of the trial court's continuing jurisdiction under Rule 47(k) of these Rules.

(b) Following filing of the judgment of the court of appeals according to Paragraph (a) of this Rule, the trial court shall within ten days after motion by any party specify the form of an instrument for recordation under Chapter 52 of the Property Code to reflect the alteration of the judgment. The trial court may direct the signature of any party or the attorney of any party on such an instrument as necessary to comply with Section 52.005 of the Property Code. The trial court may impose any sanctions provided by Rule 215-2b of the Texas Rules of Civil Procedure for the failure of the parties to agree in good faith to the form of the instrument.

(c) The trial court's order or failure to act within the time period provided in Paragraph (b) of this Rule is subject to review by a motion to the court of appeals. Such motions shall be heard at the earliest practical time. The appellate court may at any time issue such temporary orders within the scope of Paragraph (b) of this Rule as it finds necessary to preserve the rights of the parties.

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July 31, 1989

Direct Dial Number
(214) 939-5421

Luther Soules, Esq.
Soules, Reed & Butts
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

I am enclosing a draft of a proposed Rule 82a of the Texas Rules of Appellate Procedure. This draft is intended to address the question of whether a defendant/appellant who obtains a reversal and rendition at the court of appeals level should be able to obtain the release of his supersedeas bond promptly before a mandate is issued. This was the question that, as I understand it, I was asked to look into at the last Texas Supreme Court Advisory Committee meeting. This draft is also intended to address the question of whether a plaintiff/appellant who obtains a reversal and rendition of a judgment n.o.v. should be able to abstract this new judgment against the defendant promptly or to enforce that judgment. In other words, this is intended to be a comprehensive rule to address the questions that were brought before the committee at the last meeting.

Also enclosed is a short report explaining the reasoning behind this draft Rule 82a.

Respectfully,

R. Doak Bishop

RDB/ls:143
Enclosure

M E M O R A N D U M

To: Members of Supreme Court Advisory Committee
From: R. Doak Bishop
Date: July 31, 1989
Re: Proposed Draft Rule 82a, Texas Rules of Appellate Procedure

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At the meeting of the Committee on July 15, 1989, we discussed a proposed draft Rule 82a to deal with potential problems of insufficient security for a prevailing plaintiff-appellant that can arise after the Court of Appeals has modified the judgment of the trial court and before the ultimate resolution of the appeal. I was asked to revise the draft in response to a concern of Harry Tindall regarding a prevailing defendant-appellant. In order to provide a proposed rule that is neutral for both plaintiffs and defendants, and also consistent with the existing procedural devices relating to trial court judgments, I have proposed an alternate draft. This memorandum will discuss, first, the nature of the problem that we are addressing, and second, the text of the proposed rule.

I. NATURE OF THE PROBLEM

When a final judgment is entered in the trial court, existing procedural rules provide a variety of steps that can be taken to secure the plaintiffs' ultimate rights in the judgment while also protecting the rights of the defendant to obtain appellate review of the judgment before satisfying the judgment. These existing procedures include abstracting the judgment under Chapter 52 of the Property Code and obtaining writs of execution and turnover orders, unless the judgment is superseded under Rules 47 and 49 of the Texas Rules of Appellate Procedure.

The problem arises from the fact that a trial court judgment may be effectively altered by the judgment of the Court of Appeals, but the steps taken at the trial court level to protect both parties' rights relating to the original judgment may be irrevocable pending the ultimate resolution of the appeal through the Texas or United States Supreme Court. It would seem fair and equitable that the judgment as revised by the Court of Appeals deserves the same procedural "respect" as the initial judgment of the trial court.

The problem could arise in two equally likely paradigm scenarios. First, a plaintiff-appellant who received a take nothing judgment at trial might have judgment rendered in his or her favor on appeal; that prevailing plaintiff-appellant should be entitled to abstract the revised judgment and execute on it unless it is properly superseded. Second, a defendant-appellant who lost a substantial judgment at trial

might have judgment rendered in his or her favor on appeal; that prevailing defendant-appellant should be entitled to the release of any abstracts of judgment and to the release of any supersedeas bond that was posted.

The general approach of the proposed rule is not to provide the Court of Appeals with procedural mechanisms to take the required steps to respond to all of the possible variations on the two scenarios described. Rather, the proposed rule provides the district court and the parties with an opportunity to make further use of existing post-judgment procedures in the district court in light of the revisions to the judgment by the Court of Appeals. I believe that there are two advantages to this approach: (1) it ensures consistency with existing post-judgment procedures, and (2) it provides for handling these issues in the first instance in the trial court, rather than the Court of Appeals, while preserving appellate review for those hopefully-rare instances in which it is required.

II. PROPOSED DRAFT RULE 82a

Paragraph (a). Paragraph (a) of the proposed rule provides the basic mechanism for making the revised judgment of the Court of Appeals the "effective" judgment during the pendency of the appeal by permitting filing a certified copy of the judgment with the district court after time for rehearing has expired or after timely motions for rehearing have been overruled. The intent of this paragraph is that by making the revised judgment the "effective" judgment in the district court, the district court would then have at its disposal all of the existing post-judgment procedures to protect the parties' interests.

In particular, a plaintiff with a favorable judgment in the district court is entitled to abstract the judgment and obtain writs of execution and turnover orders unless the judgment is properly superseded. By making the judgment as revised by the court of appeals the "effective" judgment, those rights would attach to the revised judgment, rather than the original trial court judgment. Conversely, once the revised judgment was filed, a plaintiff would be at risk attempting to abstract or execute on the original judgment (alterations to existing abstracts are addressed in paragraphs (b) and (c) of the proposed rule).

The last sentence of paragraph (a) makes clear that the filing of the appellate court judgment invokes the district court's existing authority under Rule 47(k) to revisit the appropriate supersedeas bond amount to reflect changed circumstances during the pendency of the appeal. Under the authority of Rule 47(k), the district court would presumably adjust the level of security upward to reflect an appellate judgment in favor of plaintiff and downward to reflect an

appellate judgment in favor of defendant. Appellate review of such determinations is already provided under Rule 49 and need not be separately considered in this Rule.

No separate treatment of a prevailing plaintiff's right to obtain writs of execution or turnover orders is needed. Under the first portion of Paragraph (a) the revised judgment is the "effective" judgment, and all available post-judgment procedures would apply to that judgment unless it were properly superseded under Rule 47(k). The ten day period after filing and before the revised judgment becomes effective should provide a losing defendant-appellee adequate time to take steps to supersede the revised judgment before any execution would be available under the revised judgment.

Paragraphs (b) and (c). Paragraphs (b) and (c) deal with possible problems caused by the need to abstract a revised judgment in favor of a plaintiff-appellant or to reflect a reduced security interest of a losing plaintiff-appellee. Because the process of obtaining a lien through an abstract of judgment is specifically controlled by Chapter 52 of the Property Code, some specific treatment is required in the Rule.

Normally, the issuance of an abstract of judgment is a ministerial act performed by the district clerk under the authority of Section 52.002 of the Property Code in compliance with the requirements as to form of Section 52.003 of the Property Code. Given that appellate opinions may sometime direct modifications of judgments without expressly providing in capsule form the contents of a revised judgment, it seems unrealistic to expect the district clerk's office to synthesize the terms of the original judgment and the judgment of the Court of Appeals into an abstract of judgment. Accordingly, Paragraph (b) gives the district court the authority on motion to specify the terms of such an abstract based on the revised judgment of the Court of Appeals.

The presumption is that while a clerk may not be able to combine the revised judgment of the Court of Appeals with the original judgment, that is a relatively easy matter for counsel and upon which counsel should almost invariably reach agreement. Thus, although the power is expressly provided to the district court to enter an order dictating the contents of an abstract of the revised judgnment, this should be almost always in the form of an agreed order; even though opposing counsel may not agree with the merits of the judgment of the Court of Appeals, there should be little room for disagreement as to the effect of that judgment. To encourage such agreement, the district court is empowered to impose sanctions for failure to agree in good faith as to the form of the abstract.

Chapter 52 of the Property Code does not provide an express provision for alteration of an abstract of judgment to

reflect a changed judgment on appeal. Section 52.005(2), however, does provide a mechanism for filing a release of an abstract; because that section requires that such a release be signed by the lienholder or his or her attorney, Paragraph (b) permits the trial court to require compliance with the statutory requirements of Section 52.005(2) of the Property Code. Thus, on an appellate judgment vacating a prior judgment for plaintiff in whole or in part, the district court could then provide for a release of any previously filed abstracts and the filing, as needed, of a new abstract reflecting a judgment affirmed or rendered for plaintiff, if any. In order to preserve the rights of the parties, the district court is required to act on such a request within ten days, i.e., the same ten day period that is available before a filed appellate judgment becomes the "effective" judgment.

Paragraph (c) essentially tracks the provisions of Rule 49(b). It permits appellate review of an order specifying the contents of an abstract and for cases of emergency permits the court of appeals to make temporary orders relating to abstracts.

Rule 90. Opinions, Publication and Citation

(a) Decision and Opinion. [No change.]

(b) Signing of Opinions. [No change.]

(c) Standards for Publication. [No change.]

(d) Concurring and Dissenting Opinions. [No change.]

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish." Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after any party has applied to the Supreme Court or Court of Criminal Appeals for writ of error, discretionary review, or any other relief.

(f) Rehearing. [No change.]

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they should be published.

However, the appellate court shall not order any unpublished opinion to be published after any party has applied to the Supreme Court or Court of Criminal Appeals for writ of error, discretionary review, or any other relief.

(h) Order of the Supreme Court. Upon the grant, denial or ~~refusal~~ dismissal of an application for writ of error, ~~whether by outright refusal or by refusal no reversible error,~~ an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. [No change.]

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July 18, 1989

Mr. Russell McMains
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P.O. Drawer 480
Corpus Christi, Texas 78403

Re: TRAP 90, 181

Dear Rusty:

Enclosed please find a copy of proposed changes to TRAP 90 and 181 submitted by Justice Nathan L. Hecht. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan L. Hecht
Honorable David Peeples

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THE SUPREME COURT OF TEXAS

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May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
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175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

OK

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
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February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

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two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

HELD OVER FROM MAY 26-27 Meeting

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

00207

Rule 130. Filing of Application in Court of Appeals

(a) Method of Review. [No change.]

(b) Time and Place of Filing. The application shall be filed with the Clerk of the Court of Appeals within thirty days after the overruling of the last timely motion for rehearing filed by any party. An application filed prior to the filing of a motion for rehearing by a party shall not preclude a party, including the party filing the application, from filing a motion for rehearing, or the court of appeals from ruling on such motion. An application filed prior to the overruling of the last timely filed motion for rehearing filed by any party shall be deemed to have been filed on the date of but subsequent to the overruling of such motion.

(c) Successive Applications. [No change.]

(d) Extension of Time. [No change.]

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June 21, 1989

Mr. Michael A. Hatchell
Ramey, Flock, Hutchins, Jeffus,
Crawford & Harper
P. O. Box 629
Tyler, Texas 75710-0629

Re: Texas Rules of Appellate Procedure 130

Dear Rusty:

Enclosed please find a copy of proposed changes to TRAP 130 submitted by Justice Nathan L. Hecht. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan L. Hecht
Honorable David Peeples

00209

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Rule 181. Judgments in Open Court

In all cases decided by the Supreme Court, its judgments or decrees will be ~~pronounced in open~~ announced through the clerk of the court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. Where the court, after the submission of a case, is of the opinion that the court of appeals has entered a correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or ~~refuse~~ deny the application as though the writ had never been granted, without writing any opinion.

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July 18, 1989

Mr. Russell McMains
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Corpus Christi, Texas 78403

Re: TRAP 90, 181

Dear Rusty:

Enclosed please find a copy of proposed changes to TRAP 90 and 181 submitted by Justice Nathan L. Hecht. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan L. Hecht
Honorable David Peeples

00211

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